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FLEXIBILITY IN CONFLICT OF LAWS MULTISTATE TORT CASES: THE WAY FORWARD IN AUSTRALIA¹

Abstract

The issue of which law to apply to resolve a tort case comprising elements from more than one jurisdiction is not an easy one to decide. Many different approaches have been tried and discarded by the courts. Some approaches provide for a general rule but include a flexible exception. Others provide for a completely flexible test. This article traces the Australian courts' latest attempts to deal with the matter, and documents recent developments in both England and Canada. Reference is made to the vast North American jurisprudence in this area, in particular interest analysis, to suggest the way forward for Australian courts in this area, with a view to maintaining some flexibility in approach, while retaining the law of the place of the wrong as the primary test.

Introduction

The High Court in *Regie National des Usines Renault SA v Zhang*² (Renault) and *John Pfeiffer Pty Limited v Rogerson*³ (Pfeiffer), after alluding to dissatisfaction with its previous approach in this area,⁴ decided upon an apparently simple choice of law rule in tort for both international and interstate Australian choice of law conflicts. The court decided that, generally, the law of the place of the wrong should be applied as the choice of law rule. This was the choice that eventually commended itself to the majority. The court noted this approach reflects community expectations as to the law to be applied,⁵

¹ Thanks to Associate Professor Rosalind Mason, Head of Department of Law, University of Southern Queensland, and two anonymous reviewers, for their helpful comments on an earlier draft.

² (2002) 210 CLR 491

³ (2000) 203 CLR 503

⁴ As to which, refer to Peter Nygh 'The Miraculous Raising of Lazarus: McKain v Miller and Co (South Australia) Pty Ltd' (1992) 22 *University of Western Australia Law Review* 386, 394, Michael Pryles 'Of Limitations and Torts and the Logic of Courts' (1992) 18 *Melbourne University Law Review* 676, Michael Pryles 'The Law Applicable to Interstate Torts: Farewell to Phillips v Eyre?' (1989) 63 *Australian Law Journal* 158,181, Brian Opeskin 'Conflict of Laws and the Quantification of Damages in Tort' (1992) 14 *Sydney Law Review* 340, Australian Law Reform Commission *Choice of Law* (1992) No 58, 10.13, 10.41, Anthony Gray 'Conflict of Laws – Heading in the Wrong Direction?' (1994) 24 *Queensland Law Society Journal* 357. Much of the jurisprudence in this area has been influenced, at least until recently, by the so-called rule in *Phillips v Eyre* (1870) 6 LR QB 1, 28-29 that in order to bring an action in one country for a wrong committed abroad, 'the wrong must be of such a character that it would have been actionable if committed in (the country where the action was brought) ... secondly the act must not have been justifiable by the law of the place where it was done'

⁵ *Pfeiffer* (540). At least one legal philosopher would agree – since Locke thought that citizens agreed to bind themselves to the law of the jurisdiction they lived in by their presence within the jurisdiction, he would logically agree that if a citizen traveled to another jurisdiction, they would be deemed to have agreed to submit themselves to the laws of that jurisdiction by virtue of their presence: John Locke *Second Treatise of Government* (1946) 119

and was in most cases easy to apply. Citizens understood that if they went to another jurisdiction, they would be subject to the rules and regulations of that jurisdiction. Liability would generally be fixed and certain.⁶ Under this approach, liability was fixed by reference to geography, making it easier to promote laws that gave a favourable outcome.⁷ The rule was simple to apply and led to certain results.⁸ The court noted however, that in some cases, it may be difficult to ascertain the ‘place of the wrong’.⁹

The Flexible Exception and Questions of Public Policy

In judgments in other countries, some judgments of the High Court in *Breavington v Godleman*¹⁰ and other cases, adoption of the law of the place of the wrong as the primary rule has been accompanied by what may be termed a ‘flexible exception’, as it was described in *Chaplin v Boys* per Lord Wilberforce. This exception might apply where the place of the wrong is in some sense fortuitous.¹¹

However, in *Pfeiffer* the court rejected a flexible exception, at least in cases involving intra-Australian torts. Their conclusion was that:

‘adopting any flexible rule or exception to a universal rule would require the closest attention to identifying what criteria are to be used to make the choice of law. Describing the flexible rule in terms such as “real and substantial” or “most significant” connection with the jurisdiction will not give sufficient guidance to courts, to parties, or to those like insurers who must order their affairs on the basis of predictions about the future application of the rule. What emerges very clearly from the United States experience in those States where the proper law of the tort theory has been adopted is that it has led to very great uncertainty. That can only increase the cost to parties, insurers and society at large’.¹²

⁶ (539); similar reasoning appears in the decision of the Supreme Court of Canada in *Tolofson v Jensen* [1994] 3 SCR 1022, 1050-1051. However the New York Court of Appeals in *Babcock v Jackson* (1963) 12 NY 2d 473, 191 NE 2d 279, commented that ‘despite the advantages of certainty, ease of application and predictability which it affords, there has in recent years been increasing criticism of the traditional rule (ie law of the place of the wrong) by commentators and a judicial trend towards its abandonment or modification ... (because) the theory ignores the interest which jurisdictions other than that where the tort occurred may have in the resolution of particular issues’ (281)

⁷ (539)

⁸ This decision was confirmed by the High Court in *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575

⁹ (538); a recent example is *Dow Jones*, involving an action for defamation brought by a Victorian resident in a Victorian court in respect of material uploaded in the United States. The High Court found that Victoria, being the place of publication, was the place of the wrong in this case, but that every place in which the material was published and in which the plaintiff’s reputation suffered as a result was also a place of the wrong. As a result, the plaintiff could bring suit in each jurisdiction in which his reputation had been affected by the defamatory statements; cf *Cuccioli v Jekyll and Hyde Neue Metropol Bremen Theater Produktion GMBH and Co* (2001) 150 F Supp 2d 566, involving the unauthorized use of the plaintiff’s likeness to promote a CD advertised on a website created and maintained in Germany, although accessible in the United States. The court found the wrong had occurred in Germany.

¹⁰ (1988) 169 CLR 41

¹¹ *Chaplin* per Lord Wilberforce (389): ‘to fix the liability of two or more persons according to a locality with which they may have no more connection than a temporary accidental and perhaps unintended presence may lead to an unjust result’, accepted in *Breavington* by Mason CJ (76) and Toohey J (162). It has also been applied to justify the exclusive application of the law of the place of the wrong: *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190.

¹² (538)

The court reconsidered the issue of the flexible exception, in relation to international torts, in the *Renault* case. Given the strenuous reasoning above for rejecting any flexibility in respect of intranational torts, one might have expected the court to take the same approach as it took in *Pfeiffer*, rejecting (entirely) the so-called exception for the reasons above. The court did not do so. The court certainly made it clear that the choice of law rule was to be the law of the place of the wrong, without any resort to a flexible exception:

‘The submission ... is that the reasoning and conclusion in *Pfeiffer* that the substantive law for the determination of rights and liabilities in respect of intra-Australian torts is the (law of the place of the wrong) should be extended to foreign torts, despite the absence of the significant factor of federal considerations, and that this should be without the addition of any “flexible exception”. That submission should be accepted’.¹³

However, after considering a Canadian Supreme Court decision taking a similar approach, the court added the following comment: ‘Questions which might be caught up in the application of a “flexible exception” to a choice of law rule fixing upon the (law of the place of the wrong) in practice may often be subsumed in the issues presented on a stay application, including one based on public policy grounds’.¹⁴ Kirby J preferred to reserve the question whether there was a flexible exception in relation to international torts, but held the exception did exist. He referred to the majority’s linking of public policy arguments with the flexible exception, but noted that *Chaplin v Boys*, where the exception was applied by some judges, was not a case where public policy could have been raised as an argument.¹⁵

It is specifically acknowledged here that the approach in the joint judgment suggests that the court sees the role of the flexible exception as relating more to jurisdiction, rather than the choice of law to be applied to resolve the dispute. However, this approach was

¹³ (520)

¹⁴ (519). This approach has been discarded in the United Kingdom. Writing in 1989 (ie pre-legislative reform in the United Kingdom) of a case brought in a United Kingdom court involving elements of a tort committed both in that jurisdiction and New York, Fentiman made the comments: ‘(the decision) ... confirms the suspicion that substantive tortious conflicts will seldom arise in England because such disputes can be disposed of at the jurisdictional stage. First, the case emphasizes how the likely substantive outcome of a dispute can govern questions of jurisdiction, turning as it did on the plaintiffs’ need to establish a good arguable case against the defendants. Second, it confirms the tendency to regard the courts of the place where a tort is (substantially) committed as the *forum conveniens* .. The theoretical importance of this tendency is that it casts further doubt on the scope of the *forum conveniens* doctrine generally’: Richard Fentiman ‘Torts – Jurisdiction or Choice of Law?’ [1989] *Cambridge Law Journal* 191,193.

This approach was abandoned six years later when the United Kingdom Parliament passed the *Private International Law (Miscellaneous Provisions) Act 1995*, which provided for the primary of the law of the place of the wrong (where the most significant elements of the facts constituting the tort occurred or the law of the place of injury in cases of personal injury), subject to a flexible exception where it would be “substantially more appropriate” for the issues to be resolved **by another law** (emphasis added, and note the provision does not state that the exception will apply where it is substantially more appropriate for the issues to be resolved by another court, as the questions are (although related) distinct).

¹⁵ (535)

specifically rejected by Toohey J in *Breavington*.¹⁶ Moreover, when it was originally conceived in *Chaplin v Boys*, the ‘flexible exception’ was used as part of the process of deciding which law to be applied ie was a choice of law rule, and not a matter only of jurisdiction. If the parties had a merely incidental connection with the place of the wrong, its law may not be applied on policy grounds. Lord Wilberforce’s double actionability test in *Chaplin*¹⁷ was subject to a flexible exception based on ‘an account of the varying interests and considerations of policy which may arise when one or more foreign elements are present.’¹⁸ The Supreme Court of Canada itself applies the flexible test not merely to questions of jurisdiction, but to the choice of law question.¹⁹

If the High Court continues in future to view public policy arguments as going to jurisdiction only, it is submitted that the Court should clarify in what circumstances it would permit a stay of proceedings based on public policy grounds. The High Court in *Renault* mentioned the inherent jurisdiction of a court to stay proceedings brought before it for various reasons, including that the forum is ‘inappropriate’.²⁰ This has been interpreted narrowly in Australia to mean if continuation of the proceedings in that court 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 or harassment’.²¹ The ends of justice were paramount. One relevant factor was whether the substantive law of the forum was the law of the cause (ie in this context, the law of the place of the wrong). Another was the presence of connecting factors between the plaintiff or the defendant, and the forum jurisdiction.

So, with respect, arguably the precise scope of the flexible exception in relation to conflict of laws in tort is unclear.²² The High Court has said it does not apply to intra-Australian torts. In relation to international torts, the Court says it does not apply to the choice of law decision, but relates to arguments about jurisdiction. Given that this is not how the exception was conceived by Lord Wilberforce in *Chaplin v Boys*, or in the

¹⁶ ‘The argument on behalf of the appellant that if the forum chosen by him is not the natural or appropriate forum, his action may be stayed, is not sufficient. The question is not one of forum non conveniens; it is more deeply rooted than that’ (171)

¹⁷ 391

¹⁸ This is also the sense in which the ‘proper law’ exception is used in the *Private International Law (Miscellaneous Provisions) Act 1995* (UK), as a question going to the choice of law rather than jurisdiction.

¹⁹ *Unifund Assurance Co v Insurance Corp of British Columbia* [2003] 2 SCR 63

²⁰ The High Court’s approach on forum questions has not escaped criticism from the experts. See for example Peter Nygh and Martin Davies (2002) *Conflict of Laws in Australia* 7th edition (129), criticizing the *Voth* decision as out of step with other countries in the Commonwealth, encouraging of forum shopping, and internally inconsistent.

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

²² Others might suggest that the High Court in *Pfeiffer* and *Renault* have unequivocally precluded any exception in relation to the choice of tort law, though acknowledging the flexibility of courts in application of forum non conveniens. The Court did (520) reject application of a flexible exception. This author argues the position remains open because of the High Court’s comment in *Renault* (519) that ‘questions which might be caught up in the application of a ‘flexible exception’ to a choice of law rule fixing upon the lex loci delicti in practice may often be subsumed in the issues presented on a stay application, including one based on public policy grounds’. The author believes this statement is an important one, in that the High Court recognizes its power to invoke public policy considerations as a basis for declining to exercise jurisdiction.

United States where it has been tied into the debate about the proper law of the tort (ie in relation to a decision about choice of law NOT jurisdiction), there is little support for this approach, other than dicta in one Canadian Supreme Court decision. This of itself does not mean it is incorrect, but it is suggested the High Court should elaborate on the reasons for its approach, acknowledge its departure from the United States and English jurisprudence in the area, and explain precisely how 'public policy' is relevant to questions of jurisdiction, as it has suggested.

An Appropriate Borrowing? – Public Policy and Jurisdiction

Kirby J painted Australia's acceptance of the rule in *Phillips v Eyre* as an 'inappropriate borrowing' from the United Kingdom. Time will tell whether the High Court's flirtation with policy arguments in relation to jurisdiction questions, clearly borrowed from a Canadian decision, is eventually viewed the same way.²³

In the leading Canadian case of *Tolofson v Jensen*²⁴ (discussed with approval by the High Court in *Renault*), the Supreme Court of Canada took the opportunity to jettison its previous acceptance of *Phillips v Eyre*, in favour of a general rule favouring the law of the place of the wrong. The case involved a car accident occurring in the Canadian province of Saskatchewan. The accident involved the plaintiff who was resident in and traveling in a car registered in the province of British Columbia, and the defendant who was resident in, and whose car was registered in, Saskatchewan. The action, brought eight years after the accident, was live in British Columbia but statute-barred in Saskatchewan. British Columbian law would decide the matter applying ordinary principles of negligence, but under Saskatchewan law, the defendant would only be liable if found guilty of 'wanton or wilful misconduct'.

In holding that Saskatchewan law was the substantive law to be applied (including its limitation period), the court made some important comments about the relevance of the law of the forum. It stated that:

'The fact that a wrong would not be actionable within the territorial jurisdiction of the forum if committed there might be a factor better weighed in considering the issue of forum non conveniens or whether entertaining the action would violate the public policy of the forum jurisdiction'.²⁵

The parallels with this approach, and the approach of the Australian High Court in *Renault*, are obvious. However, little or no justification for this position is provided by the Canadian judges. No case is referred to in support of it, and no academic writing was used to justify it.²⁶

²³ Carter, P B 'Choice of Law in Tort and Delict' (1991) 107 *Law Quarterly Review* 405, 411 warns against the risk of 'widespread but piecemeal resort to public policy, misuse of characterization, and other 'escape' routes from unacceptably alien foreign laws in individual cases which would be likely to result from total abolition of the (first limb in *Phillips v Eyre*)'.

²⁴ [1994] 3 SCR 1022; see also Janet Walker 'Choice of Law in Tort: The Supreme Court of Canada Enters the Fray' (1995) 111 *Law Quarterly Review* 397

²⁵ per La Forest, Gonthier, Cory, McLachlin and Iacobucci JJ (1026)

²⁶ It is obviously not essential that the Supreme Court of Canada rely on precedent or academic opinion to justify an assertion, but the assertion would surely be stronger if it did. Perhaps not surprisingly, the decision has generally been given a mixed reception by the writers. See negatively eg Swan, J 'Federalism

The Canadian court in *Tolofson* claimed that ‘arguments for an exception based on public policy are simply rooted in the fact that the court does not approve of the law that the legislature chose to adopt’.²⁷ However, with respect (and conceding that policy can be used in different senses by different judges), this somewhat simplistic (and lazy) analysis cannot be supported from even a cursory reading of the United States cases involving public policy arguments and/or weighing up of competing interests. It most certainly would not explain the New York Court of Appeals’ use of policy in the oft-cited *Neumeier* case²⁸ (discussed below) where the court applied the law of the place of the wrong because the forum state ‘had no legitimate interest in ignoring the public policy of a foreign jurisdiction’.²⁹ The place of the wrong there was Ontario, whose law made it very difficult for a passenger injured in a motor vehicle accident to sue the driver of the vehicle they were traveling in. This is evidently not the use of public policy to ignore the law of the place of the wrong because a court does not approve of it.

The point is made even more strongly when in other cases like *Babcock*³⁰ (discussed below) the court had indicated its lack of enthusiasm for the **content** of the anti-recovery law applying in jurisdictions like Ontario in relation to accidents. It is impossible to dismiss the courts’ use of policy in at least some of these cases as nothing more than one court disapproving of the statute law of another jurisdiction. In some of the cases this may have been the case, but certainly not all.

However, the Supreme Court of Canada did make clear some limits of the use of policy, specifically holding that Saskatchewan’s shorter limitation period ‘should not be rejected by a British Columbia court as contrary to public policy. The extent to which limitation statutes should go in protecting individuals against stale claims involves policy considerations unrelated to the manner in which a court must carry out its functions and the particular balance may vary from place to place’.³¹

Major J³² in *Tolofson* gave more guidance as to his understanding of the public policy exception. He was unimpressed with the United States interest analysis as a basis for policy decisions,³³ and agreed with the joint judgment line that public policy arguments meant simply that the court did not approve of the law of the place of the wrong³⁴ (a comment that may be strongly criticized). The judge considered an argument that the

and the Conflict of Laws: The Curious Position of the Supreme Court of Canada’ (1995) 46 *South Carolina L Rev* 923; Jacqueline Castel ‘Back to the Future! Is the “New” Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?’ (1995) 33 *Osgoode Hall Law Journal* 35; cf Peter Kincaid ‘Jensen v Tolofson and the Revolution in Tort Choice of Law’ (1995) 74 *Canadian Bar Review* 538 and Catherine Walsh ‘Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Product Liability Claims’ (1991) 76 *Canadian Bar Review* 91

²⁷ *ibid*

²⁸ *Neumeier v Kuehner* (1972) 286 NE 2d 454 (New York Court of Appeals)

²⁹ (456)

³⁰ *Babcock v Jackson* (1963) 286 NE 2d 454, 456

³¹ joint judgment (1027)

³² with the concurrence of Sopinka J

³³ (1058)

³⁴ *ibid*

law of the forum should apply (at least) when both parties were resident in the forum, so that the place of the accident was in some sense fortuitous. He referred to the *Hague Convention on Traffic* which cited a general rule favouring the law of the place of the accident, but with an exception where all the parties involved in the accident are from the forum. He may be prepared to accept a rule such as this for international torts, but did not reach a final conclusion on the point.³⁵

Subsequent Canadian decisions have continued with policy considerations, but notably in relation to choice of law, rather than merely going to jurisdiction. In *Unifund Assurance Co v Insurance Corp of British Columbia*,³⁶ the Canadian Supreme Court found that in order to apply the law of a province to an out-of-province matter, there needed to be 'sufficient connection' between the province and the out-of-province matter. This sufficient connection could be based on numerous factors, including the relationship between the enacting jurisdiction, subject matter of the legislation and the individual or entity sought to be regulated by it.³⁷ An overriding consideration was stated to be the requirements of order and fairness underlying Canadian federal arrangements.³⁸ This is considered to be a policy decision.³⁹ These factors were stated to be purposive and to be applied flexibly according to the subject matter of the legislation. The Supreme Court of Canada applies the sufficient connection test both as a test for jurisdiction and for choice of law, but recognizes that the test for jurisdiction is applied more liberally.⁴⁰

³⁵ (1062)

³⁶ [2003] 2 SCR 63

³⁷ The concept of sufficient connection would be familiar to an Australian constitutional lawyer as the test for the validity of extra-territorial legislation. Unlike Canadian provinces, Australian state governments have full power to legislate extra-territorially (s2 *Australia Act* 1986 (Cth)), provided there is sufficient connection between the State and the thing being regulated. Sufficient connection can be created through residence, domicile, carrying on business in the State, or even remoter connections. A liberal test is applied: *Pearce v Florenca* (1976) 135 CLR 507, 518. One notices the different use of the test in the two countries. Australian courts use the test to determine whether a law that affects matters physically external to its borders is a valid one. Canadian courts use the test to determine whether it is appropriate for the court of one province to hear a matter in some way related to another province, and also (but applied differently, see below) to determine which law should apply to resolve the dispute. The real and substantial connection test has also been used by the Canadian Supreme Court to determine whether a judgment made by the courts of another country should be recognized and enforced in Canada (*Beals v Saldanha* (2003) Supreme Court Canada 72).

³⁸ The Supreme Court of Canada has stated that this concept of order and fairness in terms of tort choice of law fits nicely within the theoretical framework for conflict of law rules in that country, as 'the twin objectives sought by private international law in general and the doctrine of international comity in particular are order and fairness ... The three principles of comity, order and fairness serve to guide the determination of the principal private international law issues: jurisdiction simpliciter, forum non conveniens, choice of law, and recognition of foreign judgments' (*Spar Aerospace Ltd v American Mobile Satellite Corp* [2002] 4 Supreme Court Reports 205, para 20-21)

³⁹ As an example, in *R v Herrer* [1995] 3 Supreme Court Reports 562 the Canadian Supreme Court upheld the conviction of a Canadian resident questioned and tried in the United States. A warning was not given to the accused during questioning by American authorities, although that warning would have been given in Canadian proceedings. The Supreme Court dismissed an appeal against the conviction on this basis, on the rationale that the result was a fair one.

⁴⁰ As it stated in the judgment (58), 'a real and substantial connection sufficient to permit the court of a province to take jurisdiction over a dispute may not be sufficient for the law of that province to regulate the outcome'.

Public Policy in the United States

Given the High Court's brief statement in *Renault* that public policy considerations may be relevant to questions of jurisdiction in the context of international torts (but not interstate torts), it is worthwhile exploring what might be encompassed by 'policy' in this context.⁴¹ Kirby J may also be prepared to consider policy issues in more detail.

There is no Australian case law on policy in this particular context, but the experience of the United States courts in relation to public policy and choice of law torts issues is instructive. Two caveats should be placed on the discussion before commencing: (a) the High Court has indicated tentative support for the approach of the Supreme Court of Canada in *Tolofson* that policy arguments may be relevant to jurisdiction questions, but not (at least according to the majority) choice of law questions. In contrast, the United States courts (as have subsequent Canadian decisions) have discussed policy arguments in relation to choice of law questions; (b) United States courts (but not the Australian High Court) will consider public policy arguments in relation to interstate torts,⁴² and almost all of the cases below are in that context. However, there is no suggestion in the United States cases that factors to consider in a public policy analysis differ according to whether the occasion for their consideration is an interstate or international tort conflict.

A few examples will suffice. The first, *Mills v Quality Supplier Trucking Inc*⁴³ involved a wrongful death action arising from a tort committed in the state of Maryland. Maryland law stated that any contributory negligence on the part of the plaintiff acted as a complete

⁴¹ Upon reflection, the author feels justified in referring to the American jurisprudence on public policy in the area of choice of law for tort. The author considers the High Court's comment in *Renault* (519) that 'questions which might be caught up in the application of a "flexible exception" to a choice of law rule fixing upon the *lex loci delicti* in practice may often be subsumed in the issues presented on a stay application, including one based on public policy grounds' justifies the discussion which follows. The author feels vindicated in resorting to the American experience by the use of public policy arguments in the United Kingdom, where legislation allows the court to discard the law of the place of the wrong where it would be substantially more appropriate for it to be resolved by another law (*Private International Law (Miscellaneous Provisions) Act 1995* (UK), and by the Canadian approach, where the Supreme Court in *Tolofson* made the comment 'the fact that a wrong would not be actionable within the territorial jurisdiction of the forum if committed there might be a factor better weighed in considering the issue of forum non conveniens or whether entertaining the action would violate the public policy of the forum jurisdiction' (per La Forest, Gonthier, Cory, McLachlin and Iacobucci JJ (1026). Refer also to JJ Fawcett 'Policy Considerations in Tort Choice of Law' (1984) *Modern Law Review* 650. These common law jurisdictions clearly relate questions of policy to questions of forum non conveniens, and the High Court has clearly (in the author's view) indicated it will adopt a similar line in its future decisions in this area. This is said to justify a further discussion of how public policy has been used in this area in the United States, though acknowledging there is not one 'American position' on this issue.

⁴² A classic statement of an American court's (original) ability to do so is found in the judgment of Cardozo J in *Loucks v Standard Oil Co of New York* (1918) 120 NE 198, 202 (New York Court of Appeals), asking whether the foreign law 'shocks our sense of justice' or 'menaces the public welfare', or 'violates some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal', although American courts now commonly refuse to apply the law of a state for policy reasons that clearly don't fit the original test: Symeon Symeonides 'Choice of Law in the American Courts in 2001' (2002) 50 *American Journal of Comparative Law* 1, 62

⁴³ (1998) 510 SE 2d 280 (Court of Appeals, West Virginia)

bar to recovery. The law of West Virginia, in which State the action was commenced, had abolished this rule, and had adopted a rule (similar to that in Australian States) allowing for a reduction in damages on the basis of contributory negligence by the plaintiff. The question for the West Virginia court was which law to apply to decide on the question of contributory negligence, that of the law of the place of the wrong (Maryland, in which case the plaintiff would lose), or the law of the forum (West Virginia, in which case the plaintiff would succeed and be awarded damages reduced to take account of the contributory negligence).

The court ruled that it would generally apply the law of the place of the wrong, except in cases where the application of the law of the foreign state contravened the public policy of West Virginia. The court found that Maryland's no-recovery law in this case did contravene the public policy of West Virginia, without providing much justification. They merely stated the obvious, that the plaintiff would 'benefit from application of West Virginia's contributory negligence rule'.⁴⁴

In the workers' compensation context, similar to the situation in *Pfeiffer*, United States courts have dealt with the situation where an injured worker brings legal action in a jurisdiction 'friendly' to their case, in circumstances where the law of the place of the wrong precluded recovery. In the 1998 case of *Powell v Erb*,⁴⁵ the Maryland court applied Maryland's pro-recovery law to award compensation to a worker injured in a work accident in Pennsylvania. Pennsylvania law would not have allowed the worker to recover compensation in that situation. The court applied forum law to allow recovery, on the basis that Pennsylvania's anti-recovery law was contrary to the public policy of the forum. This was the conclusion even though Maryland statute actually explicitly provided that wrongful death actions should be dealt with according to the law of the place of the wrong. The Maryland court conveniently sidestepped this legislation by declaring that the statute did not explicitly deal with wrongful death 'in the workers' compensation context'.⁴⁶

The phrasing changed slightly but the result was the same when the United States Court of Appeals in *Motor Club of America Insurance Co v Hanifi*⁴⁷ heard an action involving a traffic accident occurring in Maryland, the accident being caused by the driver of a car registered to a New York owner. New York and Maryland statute law differed on

⁴⁴ (282)

⁴⁵ (1998) 709 A 2d 1294 (Court of Appeals, Maryland)

⁴⁶ (1999). Another recent example of policy being applied in a workers' compensation context is *Russell v Bush and Burchett Inc* (2001) 559 SE 2d 36, WL 1524554, involving an employee injured on the Kentucky end of a bridge connecting that State with West Virginia. The employee lived in Kentucky, and was hired by a Kentucky employer, in turn hired through public bidding by the West Virginia Division of Highways. West Virginian workers' compensation law would deprive the employer of tort immunity. The West Virginia Supreme Court applied its own laws rather than the law of the place of the wrong, on the basis that the state 'had an affirmative public policy that all workers working on the bridge would have the benefits of West Virginia's workers' compensation law' (40-41). Compare *Stuart v Colorado Interstate Gas Co* (2001) 271 F 3d 1221, where the court applied the workers' compensation statute of the law of the place of the wrong, because that State was also where the employee was hired, the main State in which they worked, and his employer was not based in the forum State.

⁴⁷ (1998) 4th Cir 145 F 3d 170 (United States Court of Appeals)

questions of liability. The Court of Appeals applied the New York statute law, referring to cases where Maryland courts had stated that their public policy is not violated by the application of foreign law rather than Maryland law. The Court of Appeals found in this case that the ‘full faith and credit’ clause of the United States *Constitution* required Maryland courts to recognize and apply New York law. So rather than reject the law of the place of the wrong because of public policy considerations, as previous cases had done, the Court here used statements by the courts of the State in which the wrong occurred as evidence that the State’s public policy would not be harmed by applying another State’s law.

However, perhaps the most famous North American case in this area is the decision by the New York Court of Appeals in *Babcock v Jackson*.⁴⁸ The plaintiff was a passenger in a car the defendant was driving, when the defendant lost control and hit a stone wall. Both parties lived in New York, but the accident occurred in the Canadian province of Ontario, where the parties were on holidays for the weekend. The car was garaged, licensed and insured in New York, as was the place where the journey began and was to end. The only connection with Ontario was the fact that the accident occurred there. The question of which law to apply had important consequences – the Ontario law barred the action completely, while the New York law treated the action like any other negligence action and would allow the court to determine questions of liability.

The court applied the test in the *Restatement* that the law of the jurisdiction with the closer connection to the specific issue raised should be used. The court engaged in interest analysis (combined with proper law) in weighing up the respective interests of the two jurisdictions in regulating the matter.⁴⁹ Relevant here was the court’s determination that New York law should apply, as that State had a far closer connection to the parties and the incident. There was ‘neither reason nor warrant for departing’ from the New York policy ‘of requiring a tortfeasor to compensate his (passenger) for injuries caused by his negligence’.⁵⁰

Admittedly, only a very small number of United States cases have been considered in this article. However, it is possible to draw some conclusions from the jurisprudence in that country. Others have pointed to the uncertainty the application of public policy can create.⁵¹ The lesson from the United States in relation to public policy arguments is surely that, at the very least, one needs to exercise extreme caution before adopting public policy arguments in this area. One surely needs to be clear on how public policy is to be used in these cases. Even the four cases discussed above show a different view of the courts as to the use of policy arguments, by some courts to displace the general rule that the law of the place of the wrong is to be applied, by others to justify the law of the forum

⁴⁸ (1963) 12 NY 2d 473

⁴⁹ a topic to which the article shall return later but not dwell on here

⁵⁰ (284)

⁵¹ per Carter, P B ‘Torts in English Private International Law’ (1981) 52 *British Year Book of International Law* 9, Otto Kahn-Freund (1979) 50 *British Year Book of International Law* 201 (review of Christopher Morse *Torts in Private International Law* (1978))

being applied, and by others in the weighing up of the interest that each jurisdiction has in regulating the matter.

Where the Place of the Wrong is Fortuitous or Incidental

Adapting the facts of *Chaplin v Boys*, assume that two Australian soldiers were involved in a collision while driving in Malta. Both soldiers had been stationed there temporarily. Assume the law in Malta regarding personal injuries remains materially different from the law in Australia. If an action were brought in an Australian court in respect of the accident, what is the Australian court to do? Should it:

- (a) hear the action and apply the now-accepted general rule that the law of the place of the wrong (here Malta) should apply
- (b) decline to hear the action because an Australian court is a ‘clearly inappropriate forum’ (as we have seen, the Court has said one relevant factor here is which substantive law is to be applied – here it would be Maltese. If the parties are Australian citizens, it is difficult to say that an Australian court is ‘clearly inappropriate’)
- (c) hear the action, but discard the now-accepted general rule that the law of the place of the wrong should apply, on the basis of public policy arguments that Australia has a closer connection with the parties, so Australian law should apply.⁵²

Based on what the High Court said in *Renault*, the third possibility could be discarded. The Court did not see the flexible exception as relating to the question of choice of law. Given that the ‘clearly inappropriate forum’ test is such a difficult one to satisfy, one would think it likely that the first possibility would be the most likely outcome.

How does the High Court’s public-policy-in-the-context-of-jurisdiction test apply here, if at all? Is this the kind of case where an Australian court might, on the grounds of public policy, refuse to hear the action because an Australian court is a clearly inappropriate forum?⁵³ It has been noted that this is a very difficult test to satisfy, so arguably not, at least according to participants in the joint judgment in *Renault*. The position of Kirby J is more equivocal. He considered the arguments in favour of and against a flexible exception, concluding that he would rather leave the question whether to recognize a flexible exception “**where the law of the foreign jurisdiction is such as to justify an**

⁵² This approach would apparently be supported by the decisions of Lord Wilberforce in *Chaplin*, Mason CJ in *Breavington*, and the United States decision of *Babcock v Jackson*

⁵³ Canadian scholars are skeptical. In “Back to the Future! Is the New Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?” (1995) 33 *Osgoode Hall Law Journal* 35, Jacqueline Castel asks (69): ‘Can the doctrine of forum non conveniens really play a significant role as a substitute for actionability by the law of the forum or public policy if the forum is the most appropriate forum or the natural forum? Consider the case where the cause of action created by the law of the place of the wrong is not known to the forum but both parties are resident or domiciled in the forum. In such a case the court cannot declare itself forum non conveniens. It must take jurisdiction and apply the law of the place of the wrong to the exclusion of the law of the forum ... Only where the forum is not connected with the action, that is, not the appropriate jurisdiction based on all relevant factors, could it declare itself forum non conveniens’

Australian court's declining to recognize or enforce the law of that place' (emphasis added). He reiterated:

'The general rule is that stated in Pfeiffer. In international torts, there is an exception to the application of that general rule. That exception may be invoked by reference to public policy considerations that would make the enforcement by the forum of the law of the place of the wrong contrary to the public policy of the forum'.⁵⁴

In commenting on the majority's opinion that questions of public policy would often in practice be subsumed on questions of forum non conveniens, he said this 'need not be so'. He referred to the situation in *Chaplin v Boys* as one case, where the flexible exception applied and the law of the place of the wrong did not apply. This was not because application of Maltese law was contrary to public policy. These comments by Kirby J suggest that his Honour would consider arguments about public policy as going to the choice of law (as Lord Wilberforce did in *Chaplin*), rather than a question of jurisdiction only. It is acknowledged, however, that Kirby J expressly reserves the question for a future time.

The question of the use of policy then is debatable, and it is submitted, with respect, that the court needs to clarify its use of 'public policy'.⁵⁵ Again, it is acknowledged that the majority of the High Court in *Renault* indicated support of the then Canadian line that public policy is relevant only to questions of jurisdiction. However, given the Canadian courts' since-expanded use of policy considerations to include choice of law, given policy as used in the United Kingdom has been somewhat broader, the view of some High Court judges (at different times, Toohey, Mason and Kirby JJ) that policy is relevant to choice of law questions, and the turbulent history of this area of the law, it is considered possible that a future High Court may consider policy arguments in relation to the choice of law question, rather than merely jurisdiction. Of the current members, at least Kirby J would apparently support this expansion.⁵⁶

⁵⁴ (535). Another discussion of policy issues occurs in J J Fawcett 'Policy Considerations in Tort Choice of Law' (1984) *Modern Law Review* 650

⁵⁵ For the High Court's difficulties with policy issues recently in the context of recovery for personal injury, see for example *Gala v Preston* (1991) 172 CLR 243, *Perre v Apand Pty Ltd* (1999) 198 CLR 180 and *Cattanach v Melchior* (2003) 199 ALR 131. A detailed study of this jurisprudence is beyond the scope of this paper, but they are included as an example of differences among the Court as to the use of policy in deciding negligence cases. Most recently, Callinan J in *Cattanach* called for judges to be explicit if they were deciding negligence claims based on policy, rather than explain decisions on other grounds (209).

⁵⁶ Discussion of the distinction between substance and procedure is considered to be beyond the scope of this paper. However, one should note that policy considerations have also been considered relevant in making this distinction. For example, New York courts have classified statutes prohibiting recovery for wrongful death as procedural, and refused to apply them to suits brought in New York based on an accident occurring in a state with legislation barring suits for wrongful death. This was because 'for our courts to be limited by the Massachusetts damage ceiling (at least to our own (residents)) is so completely contrary to our public policy that we should refuse to apply that part of the Massachusetts law': *Kilberg v Northeast Airlines Inc* (1961) 9 NY 2d 34, 172 NE 2d 526, *Miller v Miller* (1968) 22 NY 2d 12 and *Tooker v Lopez* (1969) 24 NY 2d 569. Based on its comments in *Renault*, it seems the High Court might agree with this reasoning and apply it in an appropriate case. On the other hand, if it continues to follow the Canadian line in this area, the Canadian court in *Tolofson* held that the limitation period of the law of the place of the

Conclusion on Policy

Given the uncertainty associated with the use of policy in multistate tort conflicts cases, evidenced by the results of decisions in many common law jurisdictions, the author feels justified in considering other possible solutions to the problem of determining which law to apply to resolve this kind of dispute. The author remains sceptical that a judicially crafted public policy exception is appropriate to achieve the desired flexibility, without leading to possible undesirable results, or 'too much' flexibility (while accepting this is a delicate balance). It is not recommended that the Canadian approach, relying on the overriding principle of 'order and fairness', be adopted either, with its inherent uncertainty.⁵⁷

OTHER APPROACHES

At the outset one should note that a variety of other approaches have been taken to resolve these difficult issues. There is not as much consistency in the the use of terms, including the use of the terms 'policy', 'proper law', 'interest analysis', as one would like. Policy is used in different ways, sometimes as an exception to the general choice of law rule, sometimes in determining what the governing law should be in the first place. Sometimes interest analysis is seen as a distinct approach in itself, sometimes it is said to have been combined with a proper law approach.⁵⁸ Though there may be some relation and overlap between the two, for the purposes of this article (and for the purposes of conceptualizing the law in this area) the author thinks it better to discuss them separately.

A. Proper Law of the Tort⁵⁹

It is worth bearing in mind two points in this context:

- (a) that the original *Restatement* in the area of conflict of laws called for the strict application of the law of the place of the wrong, only to be later replaced by the revised *Restatement* which calls for an interest-weighting approach; and
- (b) the weighing of different interests accords with the accepted approach (including in Australia) of dealing with conflict issues in relation to contracts,⁶⁰ thus

wrong should not be rejected by the forum court on the basis of differing policy approaches to limitation questions.

⁵⁷ The author views the Canadian approach of considering order and fairness as being a type of policy argument, though this use of policy may differ from other uses of policy. It is acknowledged that the Canadian court does not label the approach a policy one.

⁵⁸ An example of the latter is contained in the Australian Law Reform Commission's *Choice of Law Report* (1992). It recommended that 'in interstate torts, the court take into account the purpose and object of laws in deciding whether to replace the *lex loci* with the place of greater connection' (para 6.65). Nygh also conflates interest analysis with proper law thus: 'The proper law of the tort approach employed in the United States depends upon interest analysis, rather than jurisdiction selecting choice of law rules' (428-429); Peter Nygh and Martin Davies *Conflict of Laws in Australia* (2002) 7th ed. Lord Wilberforce in *Chaplin v Boys* also related the two, as did Mason CJ in *Breavington v Godleman*.

⁵⁹ Morris, J H C 'The Proper Law of the Tort' (1951) 64 *Harvard Law Review* 881

⁶⁰ *Merwin Pastoral Co Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565, *Rothwells Ltd (In Liq) v Connell* (1993) 119 ALR 538. See Lawrence Collins 'Interaction Between Contract and Tort in the Conflict of Laws' (1967) 16 *International and Comparative Law Quarterly* 103. Brainerd Currie used

providing a harmonized approach in the two areas of law. As James noted in relation to the *Pfeiffer* case, 'it is unfortunate that the outcome of his case may have been different had it been framed in contract'.⁶¹

The *American Restatement 2d, Conflict of Laws*,⁶² embraces the theory of the 'proper law of the tort', or the tort law of the place with the closest connection with the parties (s145). Section 145(2) of the *Restatement* specifies that the following are relevant in relation to tort choice of law questions:

- (i) the place where the injury occurred;
- (ii) the place where the conduct causing the injury occurred;
- (iii) the domicile, residence, nationality, place of incorporation and place of business of the parties; and
- (iv) the place where the relationship, if any, between the parties is centered.

The Restatement provides that the above 'contacts' are to be evaluated according to their relative importance with respect to the particular case.⁶³

The court in *Pfeiffer* in rejecting the proper law approach, noted that usually, when applying the test, the law of the forum had been adopted.⁶⁴ There is some analogy with the concept of the proper law of the tort, and the application of the so-called flexible exception, in that some judges who apply the flexible exception approach apply the law of the place of the wrong as the primary rule, subject to an exception where another place is more closely connected with the parties and the events.⁶⁵

some contracts examples to demonstrate interest analysis eg the classic case of *Milliken v Pratt* (1878) 125 Mass 374, involving a conflict between a Massachusetts law denying contractual capacity to married women, and the contrary Maine law, in an action by a Maine creditor against a Massachusetts married woman. Currie saw this as involving a conflict between the policy of Maine law to protect the security of transactions and its intended beneficiaries to be resident Maine creditors, and the policy of Massachusetts, involving subordinating the policy of protecting the security of transactions to that of protecting married women against economic exploitation: Currie *Selected Essays on the Conflict of Laws* (1963) 85

⁶¹ Elizabeth James 'John Pfeiffer Pty Ltd v Rogerson: The Certainty of Federal Choice of Law Rules for Intranational Torts: Limitations, Implications and a Few Complications' [2001] 23 *Sydney Law Review* 145,163. The development of interest analysis has also been connected with legal realism theory: see Michael Green 'Legal Realism, Lex Fori and the Choice of Law Revolution' (1995) 104 *Yale Law Journal* 967; per Catherine Walsh 'Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Product Liability Claims' (1997) 76 *Canadian Bar Review* 91, 99 'Legal realism is widely acknowledged to be the impetus behind ... a result-oriented jurisprudence under which the advancement of local policies and local concepts of justice guides choice of law adjudication in the same way as it does other categories of domestic adjudication'.

⁶² American Law Institute, *Restatement (Second) of Conflict of Laws* (1971), an approach referred to with approval by Lord Wilberforce in *Chaplin v Boys* [1971] AC 356, 391-392

⁶³ The first version of the *Restatement* favoured the law of the place of the wrong as the sole rule to be applied. The court noted in *Pfeiffer* that the proper law approach had recently been criticized in the literature, and referred to suggestions the approach was inherently subjective rather than logical. A critique of the approach is found in Adrian Briggs 'Choice of Law in Tort and Delict' (1995) *Lloyd's Maritime and Commercial Law Quarterly* 519

⁶⁴ *Pfeiffer* (538)

⁶⁵ Lord Wilberforce in *Chaplin*, Mason CJ in *Breavington v Godleman* (1988) 169 CLR 41, and the United States Supreme Court decision in *Babcock v Jackson* (1963) 240 NYS 2d 742; this issue will be considered in more detail later in the article. Lord Wilberforce pointed out in *Chaplin* that the Second American

However, issue may be taken with the High Court's (very brief) review of the state of the United States authorities, and the conclusion drawn in the joint judgment in *Pfeiffer* that there is some trend back towards the application of the place of the wrong rather than the proper law. The proper law of the tort remains the predominant rule used in the United States.⁶⁶ The New York Court of Appeals decision of *Babcock v Jackson*, in which a balancing of interests proper law approach was taken, has never been overruled in that State.⁶⁷ A recent (1998) survey named only 11 of the United States as those applying a strict rule of the law of the place of the wrong. United States commentators have viewed the position in the United States as follows:

'As the century draws to a close, the traditional theory in tort (favouring the place of the wrong) ... finds itself in a very precarious state. This assessment is based not simply on the relatively low number of states that still adhere to that theory, but also on the shallowness of their commitment to it. Although the degree of commitment varies from state to state, it is fair to say that very few of these states are philosophically committed to the traditional theory ... in some of these states, the (law of the place of the wrong) rules remain in place only because the highest court of the particular state has yet to encounter the "right case" for seriously considering their abandonment'.⁶⁸

One Australian author has concluded that 'clearly, the High Court has misconceived any revival of support for the *lex loci* in the United States'.⁶⁹

The United Kingdom's torts choice of law legislation, the *Private International Law (Miscellaneous Provisions) Act 1995*, also may require an evaluation of connecting

Restatement formulation 'has what is very necessary under a system of judge made law, the benefit of hard testing in concrete applications' (391).

⁶⁶ Kirby J in *Renault* conceded this point, referring to States of the United States: 'Some jurisdictions that previously adhered to applying the law of the place of the wrong have tended more recently towards introducing greater flexibility in the rules ... a judicial revolution (has) resulted in the widespread abandonment of the rule of the place of the wrong' (536)(often after legislation had been introduced, and not without its own difficulties). The United Kingdom's *Private International Law (Miscellaneous Provisions) Act 1995* allows for a proper law exception to be invoked, whenever it would be 'substantially more appropriate' for the issue/s to be resolved by another law.

⁶⁷ The approach commended itself to Mason CJ in *Breavington* (76)

⁶⁸ Symeon Symeonides 'Choice of Law in the American Courts in 1998' [1999] 47 *American Journal of Comparative Law* 328, 345; see to like effect Symeon Symeonides 'Choice of Law in the American Courts in 2001' (2002) 50 *American Journal of Comparative Law* 1, 61 (ten states continue to apply the law of the place of the wrong approach, with two of these applying a policy exception to avoid it in 2001), Symeon Symeonides 'Choice of Law in the American Courts in 1996: Tenth Annual Survey' (1997) 45 *American Journal of Comparative Law* 447. A leading authority on American choice of law, Weintraub, confirmed swift acceptance of the influential role of policy and interest analysis since cases in the 1950s and 60s: Russell Weintraub *Commentary on the Conflict of Laws* (3rd ed, 1986) 315-316. The 1991 *Supplement* (66) confirms 'The courts of thirty-five states .. have displaced the place of wrong rule as the sole choice of law rule for torts'. One Australian author has concluded that 'clearly, the High Court has misconceived any revival of support for the *lex loci* in the United States': Elizabeth James 'John Pfeiffer Pty Ltd v Rogerson: The Certainty of Federal Choice of Law Rules for Intranational Torts: Limitations, Implications and a Few Complications' [2001] 23 *Sydney Law Review* 145, 158

⁶⁹ Elizabeth James 'John Pfeiffer Pty Ltd v Rogerson: The Certainty of Federal Choice of Law Rules for Intranational Torts: Limitations, Implications and a Few Complications' [2001] 23 *Sydney Law Review* 145, 158

factors. However, this is in a different way – where a primary rule is subject to displacement based on connecting factors, rather than in the *Restatement*, where the connecting factors comprise the general rule. Its primary rule, that the law of the place of the wrong governs substantive issues, is subject to the application of another country’s law instead if, having considered the significance of the factors that connect a tort with the country in which it was committed, and the country factors that connect a tort with the other country, ‘it is substantially more appropriate for the applicable law to be the law of that other country’ for the purposes of determining the issues.⁷⁰ The Australian Law Reform Commission proposed a similar approach be adopted in Australia, and specifically rejected a proper law approach as the general choice of law rule.⁷¹

B. Interest Analysis⁷²

Some in the United States have suggested that interest analysis may assist in the resolution of conflict of law issues in tort.⁷³ Though not immune from criticism,⁷⁴

⁷⁰ s12(2); the Privy Council had concluded in *Red Sea Insurance Co v Bouygues SA* [1995] 1 AC 190, 206 that ‘the law of England recognizes that a particular issue between the parties to litigation may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and with the parties’.

⁷¹ Australian Law Reform Commission *Choice of Law* (1992) No 58, *Choice of Law Bill*, clause 6(8)

⁷² A leading American authority on choice of law rules, Russell Weintraub, wrote in his *Commentary on the Conflict of Laws* (3rd ed, 1986)(315-316) that there had been a swift acceptance of the influential role of policy and interest analysis since the landmark decision in *Schmidt v Driscoll Hotel* (1957) 82 NW 2d 365. In that case, the court applied Minnesota law to an accident that took place in the State of Wisconsin. Minnesota law allowed a person injured as a result of the intoxication of another to sue for compensation the person who caused the intoxication, in this case the owners of a hotel in Minnesota. Wisconsin law did not recognize such an action. The parties involved were both residents of Minnesota, the defendant was licensed there, and was served alcohol there. The court found that Minnesota law applied, with Minnesota having an interest in admonishing a liquor dealer whose violation of its statutes was the cause of injuries to a local resident, and in providing for a remedy for the injured person. Refer also to Robert Leflar *American Conflicts Law* 195 (3rd ed, 1977) who sets out a number of choice-influencing factors, including predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum’s governmental interests, and application of the ‘better rule of law’ as factors influencing choice of law.

⁷³ Pioneering work on interest analysis is found in Brainerd Currie *Selected Essays on the Conflict of Laws* (1963) and Currie, B ‘Survival of Actions: Adjudication Versus Automation in the Conflict of Laws’ (1957-58) 10 *Stanford Law Review* 205. For more recent writing on interest analysis, see Harold Korn ‘The Choice of Law Revolution: A Critique’ (1983) 83 *Columbia Law Review* 772, Russell Weintraub ‘An Approach to Choice of Law That Focuses on Consequences’ (1993) 56 *Alberta Law Review* 701; Lawrence Kramer, L ‘Rethinking Choice of Law’ (1980) 80 *Columbia Law Review* 277 and Russell Weintraub ‘A Proposed Choice of Law Standard for International Products Liability’ (1990) 16 *Brooking Journal of International Law* 225

⁷⁴ eg Carter, P B n50 at 21 argues that interest analysis proceeds upon a ‘fundamental misconception concerning the ultimate purpose of civil litigation. That purpose is to do justice between the parties before the court’. (It may be arguable in response that a fundamental purpose of tort law, including choice of law rules in tort, is efficient loss distribution eg Fleming, J in *Law of Torts* (9th ed)(1998) refers to a variety of purposes tort law serves, including deterrence, compensation and loss distribution. At (12) the learned author refers to a ‘growing trend towards loss distribution’. See also Richard Posner *The Economic Analysis of Law* (1986 3rd ed), William Landes and Richard Posner *The Economic Structure of Tort Law* (1987)), and Australian Law Reform Commission *Choice of Law* (1992) para 6.13 ‘The rule (double actionability) is out of touch with modern trends in tort law which are more concerned with the distribution of loss and risk than the allocation of responsibility’. Some commentators suggest a stronger limit be placed on the application of forum law than interest analysis would allow eg Simson, G J ‘State Autonomy

including in particular Brilmayer,⁷⁵ it is submitted that Australian courts may find interest analysis to be of assistance in this area in future years.⁷⁶ There is no support for interest analysis in Australian case law, although the Australian Law Reform Commission supported considering the purpose or object of laws in applying the choice of law rules, which is considered to be similar to interest analysis.⁷⁷ The Australian High Court made a cursory and arguably misleading reference to interest analysis in its *Pfeiffer* decision.⁷⁸

A clear example of interest analysis occurred in the New York Court of Appeals decision in *Babcock v Jackson*⁷⁹, to which reference has already been made. The case involved two New York residents, one driving the other to Canada for the weekend. While in Canada, the driver of the vehicle lost control and the car crashed. The vehicle was registered and insured in New York, and was garaged there. Both parties resided in New York, and their journey commenced, and would have ended, there. In other words, the location of the accident was merely fortuitous, similar to the situation before the House of Lords in *Chaplin v Boys*, and before the High Court in *Pfeiffer*. Ontario law would bar the action, New York law would allow it to be heard.

The court noted the general rule that the question would be governed by the law of the place of the wrong, and outlined the chief advantages of the rule as they saw them, namely certainty, predictability, and ease of application, as the High Court did in *Pfeiffer*. However, they noted the rule would sometimes lead to unfair results.

The court cited the *Kilberg* case, involving a New York resident being killed in a plane crash in Massachusetts. Massachusetts law contained a ceiling on the damages claimable by the deceased's family. In refusing to apply the Massachusetts ceiling, the New York court explained that the random chance that the event occurred in Massachusetts did not give that State a controlling interest or concern in the amount of tort recovery, due to New York's competing interest in providing full compensation for its residents or users of transportation facilities originating in New York. The deceased had bought her ticket from the defendant in New York, and the trip originated there.⁸⁰

in Choice of Law: A Suggested Approach' (1978) 52 *Southern California Law Review* 61; Silberman, L. 'Can the State of Minnesota Bind the Nation?: Federal Choice of Law Constraints After Allstate Insurance Co v Hague' (1981) 10 *Hofstra Law Review* 103

⁷⁵ Lea Brilmayer 'Interest Analysis and the Myth of Legislative Intent' (1980) 78 *Michigan Law Review* 392, criticizing interest analysis (at least by Currie) as pro-resident, pro-forum and pro-recovery (398) and leading to unpredictable results (407). She implies interest analysis does not genuinely seek to reflect the wishes or interests of legislatures.

⁷⁶ Mason CJ referred to the debate in *Breavington* (82)

⁷⁷ *Choice of Law* (1992) 'It is recommended that in interstate torts, the court take into account the purpose and object of laws in deciding whether to replace the lex loci with the place of greater connection' (para 6.65).

⁷⁸ The Court stated only that 'interest analysis has been doubted' (537), citing curiously as support for the proposition a case commonly referred to as an example of an interest analysis approach (*Alaska Packers*) and then the work of Brainerd Currie, also an advocate of the approach.

⁷⁹ (1963) 12 NY 2d 473, 191 NE 2d 279

⁸⁰ *Kilberg v Northeast Airlines Inc* (1961) 172 NE 2d 526, 527-528

Turning its mind to this case, the court adopted a similar interest-weighting approach, in deciding whether to apply New York or Ontario law.⁸¹ It found New York's concern in the matter was unquestionably the greater and more direct, and the interest of Ontario at best minimal. New York was the home of the driver and passenger, the place where the car was kept and insured, and where the journey began and was designed to end. Ontario's only connection was the 'purely adventitious circumstance' that the accident occurred there. Ontario had no conceivable interest in denying such a remedy in a suit between New York litigants for injuries suffered in Ontario because of conduct tortious under Ontario law. Their law was designed to prevent fraudulent insurance claims. There was no reason to depart from the New York policy of requiring a tortfeasor to compensate a person they have injured by their negligence.⁸²

Another example of interest analysis is the majority judgment of the United States Supreme Court in *Allstate Insurance Co v Hague*.⁸³ The plaintiff was suing as personal representative of her dead husband in relation to an insurance policy on his cars. He had been killed in a car accident, involving an unlicensed driver. The policy covered the dead man's three cars and provided for uninsured motorist coverage at the rate of \$15 000 per car. The plaintiff wanted to 'stack' the coverage to provide for a total of \$45 000 insurance. This was possible under the law of Minnesota, but not the law of Wisconsin. The accident occurred in Wisconsin, the plaintiff and her husband were living there at the time, and the uninsured defendant also lived there. The case was connected with Minnesota in that the dead man had been employed there and commuted there daily for 15 years, and that the plaintiff had since moved to Minnesota and been appointed executor of the will by a Minnesota registrar.

The majority confirmed that a State's law could be applied to a dispute if the State 'has a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of its law is neither arbitrary nor fundamentally unfair'.

⁸¹ The approach taken is similar to that of the *Second Restatement*, which was in draft form at the time of the decision. For an excellent account of the important impact the *Babcock* decision has had on American jurisprudence, see Harold Korn 'The Choice of Law Revolution – A Critique' (1983) 83 *Columbia Law Review* 772

⁸² However, the result would be different if one of the parties resided in the law of the place of the wrong. This was confirmed in *Neumeier v Kuehner* (1972) 286 NE 2d 454, where the wife of a Canadian resident sued after her husband was killed while a passenger in a car driven by a New York resident in Canada. The court applied Canadian law to the issue, noting that although New York has a deep interest in protecting its own residents, even when they are traveling interstate, it has no legitimate interest in ignoring the public policy of a foreign jurisdiction, Ontario in this case, and in protecting the plaintiff passenger living and injured there from legislation obviously addressed to a resident travelling in a vehicle within its borders (at 456).

⁸³ (1981) 449 US 302. Other examples include *Phillips Petroleum Co v Shutts* (1995) 472 US 797, *Alaska Packers Association v Industrial Ace Commission* (1934) 294 US 532, *Bowles v Zimmer Manufacturing Co* (1960) 277 F 2d 868, *Herzog v Stern* (1934) 264 NY 379, 191 NE 23 and *Auten v Auten* (1954) 308 NY 155, 124 NE 2d 99, *Russell v Bush and Burchett Inc* (2001) 559 SE 2d 36, WL 1524554, in relation to an international conflict case, *Tucci v Club Mediterranee SA* (2001) 107 Cal Rptr 2d 401, and in relation to maritime torts (relevant because the High Court left their determination as an open question in *Renault: Lauritzen v Larsen* (1953) 345 US 571 and *Romero v International Terminal Operating Co* (1959) 358 US 354. See also Brainerd Curri 'Comments on Babcock v Jackson, A Recent Development in Conflict of Laws; (1963) 63 *Columbia Law Review* 1212

Here Minnesota law could be applied, as the dead man had worked there for many years, the insurance company operated a business in that jurisdiction (presumably was aware of Minnesota law), and Minnesota had an interest in regulating its insurance obligations because 'they affected a long-standing member of Minnesota's workforce', a Minnesota resident and court-appointed representative. Minnesota had an interest in securing full compensation for 'resident accident victims to keep them off welfare rolls and able to meet financial obligations'.⁸⁴

Another example where the above dicta might be tested occurred in the United States case of *Rosenthal v Warren*.⁸⁵ The case involved a New York resident who died in the course of an operation performed by a Massachusetts doctor. The deceased had travelled from New York to Massachusetts for the surgery. The deceased's estate sued the doctor. Massachusetts law contained a damages limitation in respect of malpractice of a maximum of \$50 000. New York law contained no such limitation. Which law should apply?⁸⁶

A majority of the Court found that New York law, the law of the forum, was applicable. The court applied the rule that generally, the law of the place of the wrong was applicable, subject to an exception where another jurisdiction had a stronger interest in the matter, and/or policy reasons justified resort to another law. After reviewing the authorities, the court noted that generally 'the strong New York public policy against damage limitations has triumphed over the contrary policies of the sister states in every case where a New York (resident) has brought suit'.⁸⁷ The majority noted it was not unfair to apply New York's compensatory policy here, because the conduct of a Massachusetts hospital or doctor was not 'patterned upon' the existence of the statute.⁸⁸ The defendant's insurance policy did not differentiate according to where the plaintiff launched legal proceedings.

Rejecting arguments that there was an expectation that the law of Massachusetts would apply to the issues as they concerned actions in that State, the court mentioned the doctor had a world wide following, and the hospital solicited patients from outside that State, including New York. The majority noted that the Massachusetts limitation was so 'absurd and unjust' that the New York policy of fully compensating the harm from wrongful death would outweigh any interest Massachusetts has in keeping down the size of verdicts in malpractice claims.⁸⁹

⁸⁴ (313-319), the court finding no suggestion that the plaintiff had moved to Minnesota in anticipation of the litigation or because of the more favourable legal environment. Some writers viewed the decision as the 'high point' of the right of local courts to prefer their own laws: 'Symposium, Choice of Law Theory After Allstate Insurance Co v Hague' (1981) 10 *Hofstra Law Review* 1; Sheve, G R 'Choice of Law and the Forgiving Constitution' (1996) 71 *Indiana Law Journal* 271

⁸⁵ (1973) 475 Fed 2d 438 (United States Court of Appeals, 2nd circuit)

⁸⁶ This is a clear case of what the High Court specifically left open, regarding international torts, in the *Renault* case – whether the law regulating the amount of damages recoverable should be determined by the law of the cause or the law of the forum

⁸⁷ (443)

⁸⁸ (444)

⁸⁹ (445). Compare the recent case of *Tucci v Club Mediterranee SA* (2001) 107 Cal Rptr 2d 401, where the plaintiff, a California resident, was hired in California to work at the defendant's premises in the Dominican Republic. He was injured in that Republic while engaged in employment activity. The law of

Conduct Regulation and Loss Distribution

United States courts have recognized that different choice of law rules can apply to different issues put before the court for consideration. Specifically, they have recognized a distinction between what is known as ‘conduct regulation’ and ‘loss distribution’. Different rules apply to these categories. Conduct regulation tends to be governed by the law of the place of the wrong, either with or without resort to interest analysis. Nevertheless, interest analysis would be readily applied to conduct regulation. A jurisdiction has a clear and strong interest in regulating conduct within its territory. It would be very difficult for another jurisdiction to claim it has a stronger interest in regulating conduct within another jurisdiction, than the jurisdiction itself would have. As the court in *Babcock v Jackson* said, ‘where the defendant’s exercise of due care in the operation of his vehicle is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern ... (because of) that jurisdiction’s interest in regulating conduct within its borders ... it would be almost unthinkable to seek the applicable rule in the law of some other place’.⁹⁰

So recently in *Matson by Kehoe v Anctil*,⁹¹ the issue was whether the parents of a child injured in a Vermont car accident were guilty of contributory negligence. At the time of the accident, the plaintiff’s mother was holding the child in her lap in the front passenger seat. The question of contributory negligence would be answered differently according to which law applied, the defendant being from Quebec. The court applied the law of the place of the wrong, Vermont, to the issue. The conclusion was that ‘because both the conduct and the injury occurred in Vermont ... (that state) ... had a strong and obvious interest in regulating the conduct of persons within its territory and in providing redress for injuries that occurred there’.⁹²

Loss distribution is seen as something to which interest analysis (together, in some cases, with a proper law approach) is applied. Given that conduct regulation and loss distribution are decided by different rules, different law can apply to them. This is why in the 1997 *Matson* case the law of Vermont applied to the question of contributory

the Republic gave the plaintiff less entitlement to damages than the law of California. The court weighed up the interests, noting that the Dominican Republic had an interest in making sure that its employers faced limited and predictable financial liability for work-related injuries, while California had an interest in ensuring that workers hired in that State were adequately insured. The court concluded that Dominican law should apply, because that country’s interests would be more impaired if its law were not applied than California’s interest would be, if its law were not applied.

⁹⁰ (483), 191 NE 2d 284

⁹¹ (1997) 979 F Supp 1031

⁹² (1035). Similarly in *Pittman v Maldania Inc* (2001) WL 1221704, the defendant operated a water ski rental office on the Delaware side of that State’s border with Maryland. The law of both states provided it was unlawful to rent skis to a person under 16, but the law of Delaware (only) also required that the person renting to produce a valid driver’s licence. The plaintiff, aged 14, obtained skis after misrepresenting his age. He was injured while riding the skis in Maryland. The court found the law of the place of the wrong (in this case Delaware, where the skis were hired) should apply. The Delaware law reflected a ‘clear policy against renting skis to people who are unable to produce a valid driver’s licence ... (as) part of a comprehensive statute on boating safety ... (and) a state statute regulating conduct should be enforced throughout the State’

negligence, but in the 1998 *Matson* case when the issue arose as to whether the defendant truck driver was an independent contractor or the agent of another defendant, the court viewed this as a loss distribution issue and applied Quebec law to the question. Quebec law had the greater interest in and closer connection with the issue because the truck driver and the corporation were both from that jurisdiction.⁹³

So for example in *Babcock v Jackson* itself, the court found that the law of the forum should apply to the questions of liability because that jurisdiction had a closer interest in the issue than the alternative place of the wrong. The policy underlying the law of the place of the wrong would not be disturbed, the court found, if the law of the forum governed liability compensation issues.

While *Babcock v Jackson* dealt with a situation where the court applied interest analysis to find that the law of the forum governed compensation issues, the court can also apply interest analysis to find that the law of the place of the wrong governs these issues. A good example of this situation is *Myers v Langlois*.⁹⁴ There both of the relevant parties lived in a jurisdiction (Quebec) barring the plaintiff's action. The accident occurred in a state (Vermont) allowing the plaintiff's action. The action was brought in a Vermont court. That court concluded that the law of Quebec should apply, based on interest analysis. As the judges said: 'Since the choice of law issue presented relates to allocation of post-event losses, not regulation of conduct, the goals of Vermont's system would not be realized by permitting the actions to go forward here. Quebec has demonstrated strong policy concerns by enacting a comprehensive automobile insurance act that provides no-fault compensation and allocates loss between Quebec residents. We therefore conclude that Quebec's significant interest in maintaining its no-fault insurance scheme outweigh the parties' contacts with Vermont'.⁹⁵

It should be pointed out the writer is not aware of any reference to the distinction between conduct regulation and loss distribution in any of the Australian conflicts jurisprudence. However, the joint judgment in *Renault* contains the interesting aspect that the judges expressly reserved the question whether questions on kind, and quantification of, damage should be governed by the law of the place of the wrong.⁹⁶ This is interesting because the High Court has confirmed in cases such as *Stevens v Head*⁹⁷ that it views questions as to the heads of damage that may be recoverable as a matter of substance that should, according to the general rule adopted by the High Court in *Pfeiffer* and *Renault*, be resolved according to the law of the place of the wrong. Yet the High Court in *Renault* leaves open the question of which law to apply. This leaves open the possibility that in future cases, the High Court might adopt the distinction, in applying its conflict of law rules in torts cases, between issues of conduct regulation and loss distribution. In particular, it might confirm that the law of the place of the wrong should apply to

⁹³ *Matson v Anctil* (1998) 7 F Supp 2d 423

⁹⁴ (1998) 721 A 2d 129

⁹⁵ (132)

⁹⁶ (520)

⁹⁷ (1992) 176 CLR 433

questions of conduct regulation, but the issue of loss distribution might need a more flexible approach.

This distinction between conduct regulation and loss distribution makes strong analytical sense to the writer. There is no warrant for departing from the law of the place of the wrong regarding issues of conduct regulation. That jurisdiction has a right to regulate conduct that occurs within its boundaries. The rule meets the reasonable expectation of the parties that if they enter another jurisdiction, their conduct is subject to regulation by the government of that jurisdiction. The rule is simple to apply, certain, and unlikely to lead to anomalies.

Compared with the issue of conduct regulation, loss distribution is more difficult. No general answer can be provided as to the correct approach, given the multitude of possibilities that may present themselves. However, in the simplest case where both parties are resident in one country/jurisdiction (A) and are involved in an accident in country B, it is surely true to say that country B has no real interest in determining the issue of the respective liabilities of the parties. The policy of that country's liability laws will not be thwarted if A's laws are applied to resolve the liability issues, in the case where both parties to the litigation are from that country. This situation is common in conflicts cases, including the facts raised in *Chaplin*, *Pfeiffer* and *Babcock*.

As James suggested, in reference to the *Pfeiffer* decision, the court should have considered whether 'the New South Wales legislature had any real interest in the application of its workplace scheme to an ACT employer's liability'.⁹⁸ Similarly, one could ask whether Malta had any interest in the application of its compensation laws to decide liability between British residents (the *Chaplin* situation), or whether the province of Ontario had any interest in the application of its compensation laws to decide liability between New York residents (the *Babcock* situation).

One might make the same comment in relation to the recent decision in *Union Shipping New Zealand Ltd v Morgan*.⁹⁹ There the plaintiff, a New Zealand resident working for a shipping company incorporated in New Zealand, was injured while the ship was unloading coal in a New South Wales port. He sued his employer at common law. New Zealand had a no-fault compensation scheme that would have prevented him bringing a common law action in that country. The New South Wales Court of Appeal found that New South Wales law applied to the action. Again, one might ask the question whether New South Wales had any interest in applying its tort law (allowing a common law action) to the claim, based as it was against a New Zealand employer, who had contributed to a compensation scheme for employees in that country.¹⁰⁰ Is it anomalous

⁹⁸ Elizabeth James 'John Pfeiffer Pty Ltd v Rogerson: The Certainty of Federal Choice of Law Rules for Intranational Torts: Limitations, Implications and a Few Complications' [2001] 23 *Sydney Law Review* 145,159

⁹⁹ [2002] 54 NSWLR 690

¹⁰⁰ It is submitted a correct application of interest analysis to this factual scenario would find New South Wales had no interest in the litigation. With respect, it is not to the point to conclude, as Heydon JA did in *Union Shipping*, that 'it cannot be said that New South Wales, whose citizens were receiving the coal, had no concern with the presence of the vessel' (731). If this was a purported application of interest analysis, it

that had the plaintiff been unloading the coal in New Zealand, or in non-Australian territorial waters, his claim may not have been able to be brought?

It is submitted that the rule decided upon by the High Court in *Pfeiffer* (confirmed in *Renault*), while having the advantage of simplicity and certainty, cannot address this situation in an acceptable way – where the law of the place of the wrong is in a sense fortuitous, and the parties have no other connection with this place other than that fact. This problem applies both in relation to international torts, and in torts involving more than one Australian jurisdiction.

Other possibilities may present themselves. It may be that one of the parties may live in the jurisdiction where the accident occurred, with the other living in the forum jurisdiction. Some United States courts would solve this problem by applying an interest analysis to the question of loss distribution. The High Court would apparently apply the law of the place of the wrong, inflexibly if dealing with an interstate conflict. The result would be more interesting if it were dealing with an international conflict. It outlined in *Renault* that in such cases the law of the place of the wrong would continue to apply. It may adopt an exception based on public policy considerations. But what of the High Court's reservations in *Renault* on the distinction it agreed to in *Pfeiffer* between matters of substance and matters of procedure, and particularly its comments that it reserves the question whether issues regarding quantification of damages is in fact a matter for the place of the wrong, in relation to international cases?¹⁰¹

Is this far from the approach of the United States which reserves the issue of loss distribution to the place with the closer connection with the parties, involving questions of policy? It was suggested earlier that the High Court in *Renault* may have been indicating it would apply questions of policy in its classification of issues, including quantification of damages, as either substantive or procedural.

The matter must remain for the moment one of conjecture only, but it is quite conceivable given the Court's comments in *Renault* that one day, it may (as a matter of policy) determine issues of quantification of damages, in relation to an action brought in Australia based on a tort committed overseas, according to the law of the forum (Australia). The policy reason for this may be that the foreign jurisdiction does not recognize heads of damage that Australian law does (the situation in *Chaplin*), together with (or as an alternative) the argument that deciding issues of loss distribution by the law of the forum (Australian law) does not, as a matter of international comity, interfere with the sovereignty, public policy or interest of the foreign jurisdiction in the matter at hand. If the Court were to take this step, it would be justified in doing so by referring to the United States distinction between conduct regulation and loss distribution.

is submitted with respect not to be an accurate one. His Honour went on to say that 'it is difficult to see how anything in the nature of an onerous or disruptive burden would be created by applying New South Wales law' (731). With respect, this is not an accepted test for deciding on questions of *choice of law*.

¹⁰¹ of the approach of the Supreme Court of California in *Tucci v Club Mediterranee SA* (2001) 107 Cal Rptr 2d 401, where the court applied the law of the place of the wrong, the Dominican Republic, to determine what remedies were available to the plaintiff, rather than the law of the forum

Applying an Interest Analysis Approach to Australian Decisions

It is an interesting exercise to briefly review the leading Australian decisions in relation to conflict of laws in the area of tort, to see whether the result would be different if an interests analysis were adopted.

Koop v Bebb (1951)

The accident occurred in New South Wales, with the action being brought by the plaintiffs in Victoria. They were Victorian residents, with the defendant living in New South Wales. The High Court applied the law of the forum, given their adoption of *Phillips v Eyre*. Under an interest analysis, the issues of conduct regulation and loss distribution would be separated. The question whether the defendant's driving was negligent or not should be governed by the place of the wrong, in this case New South Wales. The question of loss distribution would be based on what damages the plaintiff should recover, based on respective State interests. Victoria has a strong interest in ensuring its residents obtain proper compensation for injury, and arguably the law of that State should apply to questions of loss recovery, in the absence of New South Wales limiting provisions.

Breavington v Godleman (1988)

The accident occurred in the Northern Territory. Territory law limited damages available to a Territory resident suing for personal injury. The plaintiff lived in the Territory, but brought the action in Victoria, where no statutory limit applied. A majority of the court (for different reasons) applied the law of the place of the wrong, with a minority applying a double choice of law rule. Under interest analysis, conduct regulation ie the question whether the driving was negligent, should be governed by the law of the place of the wrong. Loss distribution should be resolved by an interest analysis – the Territory law restricting liability reflects a concern within that jurisdiction at excessive damages payouts to residents. Victoria has no interest in the litigation or the outcome. Territory law should apply to all substantive issues.

McKain v Miller (1992)

The accident occurred in South Australia. The employer was incorporated in and carrying on business in that State. That State's limitation period barred this action. The plaintiff sued in New South Wales, where the action was not statute-barred. A majority of the court accepted a double choice of law rule, and considered a limitation period was substantive, governed by the law of the forum, here New South Wales. The action could proceed. Under interest analysis, conduct regulation and questions of negligence would be regulated by the law of South Australia as the place of the wrong. Regarding loss distribution, South Australian law reflects a policy of protecting residents of that State from liability beyond a limited time frame. New South Wales had some interest in the matter as the plaintiff was resident in that State, though the defendant was not. The accident did not occur there. South Australia is considered to have a stronger interest in the outcome of the litigation. Applying South Australian law, the action should not proceed.

Pfeiffer v Rogerson (2000)

The accident occurred in New South Wales. The defendant carried on business in the Australian Capital Territory, and employed the plaintiff there. New South Wales workers' compensation law limited liability; Territory law did not. A unanimous High Court applied the law of the place of the wrong, New South Wales. Applying interest analysis, New South Wales law should apply to conduct regulation – the question of negligence. Regarding loss distribution, one starts with the law of the place of the wrong as the primary option, but subject to interest analysis. New South Wales has no interest in applying its workers' compensation regime to the situation – the defendant employer did not contribute to the fund of that State. Arguably, the Territory has a stronger interest in the matter, as the employer carries on business there, and is paying premiums in that jurisdiction. The plaintiff lives and is employed within the Territory.

Renault v Zhang (2002)

The accident occurred in New Caledonia, injuring the plaintiff, an Australian resident. The defendant manufacturer was a French company. A majority of the court applied the law of the place of the wrong, New Caledonia. If interest analysis were applied, the law of New Caledonia would apply to conduct regulation – the question of negligence. Regarding loss distribution, the prima facie rule is that the law of the place of the wrong should apply. Both Australia and France have some interest in the litigation, with the plaintiff and defendant respectively resident there. New Caledonia has an interest in ensuring that a business that rents out cars in that country to tourists or Caledonian residents deals only in mechanically sound vehicles. It would be likely New Caledonian law would apply to the case.

Union Shipping New Zealand Ltd v Morgan (2002)

The relevant facts are very similar to Pfeiffer, with the plaintiff and defendant both resident in New Zealand, and the plaintiff employed there. A New Zealand workers' compensation to which the defendant contributed applied to the accident. New Zealand law would not allow a common law claim, while the law of New South Wales, where the accident occurred, would. Applying an interest analysis approach, the law of New South Wales would apply to conduct regulation, but the law of New Zealand would apply to loss distribution – New South Wales has no interest in the decision whether the defendant should have to compensate the plaintiff through a common law claim. New Zealand has a regulatory system for its employers regarding work-related accidents, and has an expectation that the system will be enforced.

We see that in some cases, the result is the same, albeit after the application of very different reasoning. However, it is submitted the issues regarding statutes of limitation can be more easily resolved through interests analysis than the fine distinctions the court resorted to in cases such as *McKain*, and the different approaches are likely to lead to different results when considering workers' compensation issues (and it is submitted motor vehicle accident issues).

Summary and Conclusion

It is submitted that the High Court has generally taken a very positive step recently in stating the law of the place of the wrong as the only law to be applied in relation to torts involving more than one state, and as the primary law to be applied in relation to international torts. However, in future the High Court may need to consider increasing flexibility in the application of its choice of law rules, as at least Kirby J on the current bench has conceded.

There is a rich North American jurisprudence in relation to questions of policy (albeit in a different context), including the possibility of answering different questions that may arise in a conflicts case by applying different laws, and interest analysis to weigh up competing interests in particular cases. Such an approach also commended itself to the British legislators.

The author has concluded against creating any exception to choice of law rules based only on 'policy'. As has been seen, the concept is fraught with uncertainty. It has been used in different ways by different courts. The record of the High Court in various fields in applying the concept of 'policy' has not been an envious one, creating uncertainty, and perhaps masking views and considerations that are not always expressed clearly. The author would prefer a more explicit and transparent solution.

The conclusion reached by the writer is that matters of conduct regulation should be regulated by the law of the place of the wrong, without exception. This rule should apply both in interstate and international torts cases. This result is generally consistent with the High Court's stated preference in *Pfeiffer* for rules in this area to be as simple as possible, consistent, and certain. It meets legitimate expectations that a person who is present within a jurisdiction submits to that jurisdiction's conduct regulation rules. That jurisdiction has a strong interest in developing and enforcing conduct standards that apply to all within its borders.

However, it is concluded that the question of loss distribution is a more vexed one. There is much to be said for the argument that the law of the place of the wrong should not apply to this issue in the case where that country's government (and/or law) has no interest in the allocation of responsibility between the parties. This may be because the parties do not reside in that jurisdiction, have no interest in it, and where the policy intent of that country's relevant laws would not be thwarted by their non-application to the loss allocation decision in the case at hand.¹⁰² It is conceded here that it may be a difficult matter of evidence to determine in all cases the policy intent of the relevant legislatures. However, this should at least be a genuine exercise, and not a sham to justify applying the law of the forum, to take into account Brilmayer's forum-bias concerns with interest analysis.

As a result, it is suggested that where the issue is one of loss distribution, the court should not automatically apply the law of the place of the wrong to resolve the issue. Perhaps this could be the starting point, or initial presumption. The question should be answered

¹⁰² This is acknowledged as a hybrid of interest analysis and proper law approach, an approach certainly not without support in the literature (above n58).

by considering interest analysis, and whether the policy intent of each of the relevant legislatures in the tort field would be thwarted if their law did not apply to resolve the issue. This change to the current position could be achieved through development by the High Court, but perhaps the preferable approach is to legislate the exception to clarify the issue, as the United Kingdom did. The legislation could clarify the general rule subject to displacement, precisely which considerations were relevant in applying the interest analysis approach to loss distribution, and what kind of evidence might be appropriate to determine the issue. This is seen as preferable to a vague judicially crafted exception based on 'policy'.