PRIVATE INTERNATIONAL LAW
IN PURSUIT OF JUSTICE FOR TORT CHOICE OF LAW

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I. INTRODUCTION

The High Court of Australia recently chose to apply the rule of *lex loci delicti* or law of the place of the tort in two cases without a flexible exception. They were *Regie National des Usines Renault SA v Zhang*[1] and *John Pfeiffer Pty Limited v Rogerson*[2] that established Australia's new choice of law rule for international and intra-national torts respectively. The prospect of flexibility in tort choice of law appeared to alarm the court even though it had allowed flexibility in contract choice of law. This article will endeavour to discover why. Various tort choice of law models will be considered and their relative strengths compared in terms of flexibility and certainty. The court's choice and the reasons for it will also be considered including the desirability of both certainty and flexibility.

II. THE MODELS

(a) Lex Loci Delicti

The *lex loci delicti* is the model favoured in many common law countries. Besides Australia, the United Kingdom,[3] Canada,[4] eleven

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[1] [2002] High Court of Australia 10 (14 March 2002) at <www.austlii.edu.au/au/cases/cth/high_ct/2002/10.html> (visited 13 May 2002).

[2] [2000] High Court of Australia 36 (21 June 2000) at <www.austlii.edu.au/au/cases/cth/high_ct/2000/36.html> (visited May 2002).

[3] (UK) Private International Law (Miscellaneous Provisions) Act 1995, Part III, <www.hmso.gov.uk/acts/acts1995/Ukpga_19950042_en_4.htm> (visited June 2002).

[4] Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon [1994] 3 Supreme Court Reports 1022 at <www.canlii.org/ca/cas/scc/1994/1994scc107.html> (visited June 2002).

American states[5] and many European countries have adopted it.[6] This model is relatively easy to apply[7] and provides certainty in a number of ways. For example, wherever the plaintiff chooses to sue, there is a "single governing law"[8] so that the parties know what to expect. This prevents the "not only undesirable, but manifestly absurd" result that the same set of facts could have different results depending on where the plaintiff chooses to sue.[9] Another example is the fulfilment of party expectations on which law applies since parties are likely to act on the basis of those expectations.[10] There is a strong argument that "individual parties should have the law applied to their dispute which they would have expected to apply."[11] As Kincaid notes, this points generally (but not invariably) to a *lex loci delicti* rule:[12]

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[5] Kubes, "'United We Stand': Managing Choice-of-Law Problems in September-11-Based Toxic Torts Through Federal Substantive Mass-Tort Law", (2002) 77 Indiana Law Journal 825 note 40 at <www.lawschool.westlaw.com/anz/> (visited January 2003).

[6] Greene, "Choice of law in tort – the song that never ends" (1998) 26:2 Federal Law Review 349, 362.

[7] Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon [1994] 3 Supreme Court Reports 1022 at <www.canlii.org/ca/cas/scc/1994/1994scc107.html> (visited June 2002).

[8] Jaffey, "Choice of law in tort: a justice-based approach" (March 1982) 2:1 Legal Studies 98, 107.

[9] Breavington v Godleman (1988) 169 Commonwealth Law Reports 41, 88 per Wilson and Gaudron JJ. See also John Pfeiffer Pty Ltd v Rogerson [2000] High Court of Australia 36 (21 March 2000) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2000/36.html> (visited May 2002).

[10] Kincaid, "Justice in Tort Choice of Law" (1996) 18 Adelaide Law Review 191, 198; Jaffey, "Choice of law in tort: a justice-based approach" (March 1982) 2:1 Legal Studies 98, 107; John Pfeiffer Pty Ltd v Rogerson [2000] High Court of Australia 36 (21 March 2000) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2000/36.html> (visited May 2002).

[11] Greene, "Choice of law in tort – the song that never ends" (1998) 26:2 Federal Law Review 349, 364.

[12] Kincaid, "Justice in Tort Choice of Law" (1996) 18 Adelaide Law Review 191, 202. See also Mayss, "Statutory reform of choice of law in tort and delict: a bitter pill or a cure for the ill?" [1996] 2 Web Journal of Current Legal Issues at <http://www.webjcli.ncl.ac.uk/1996/issue2/mayss2.html> (visited June 2002); Jaffey, "Choice of law in tort: a justice-based approach" (March 1982) 2:1 Legal Studies 98, 109; John Pfeiffer Pty Ltd v Rogerson [2000] High Court of Australia 36 (21 March 2000) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2000/36.html> (visited May 2002), for similar conclusions on this point.

> Usually the "when in Rome" rule of thumb will express party expectations...Thus the prima facie rule in tort choice of law should be that the *lex loci* governs.[13]

For all the above reasons, the High Court of Australia[14] and the Supreme Court of Canada in *Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon*[15] have chosen this rule.

However, the *lex loci delicti* rule also experiences uncertainty regarding the place of the tort. For example, Davies has asked where the place of the tort is, if the place of the act is different to the place where injury is sustained?[16] In defamation cases, is the place of the tort where the defamatory material emanated from or the place where it is read?[17]

The High Court in *Zhang* and *Pfeiffer* and the Canadian Supreme Court in *Tolofson* have recognised the difficulty such questions pose. In an even more recent case the High Court in *Dow Jones & Co Inc v Gutnick*[18] dealt with the place of the tort in a defamation suit on materials published outside Australia. The majority in this case (Gleeson CJ, McHugh, Gummow and Hayne JJ, with whom Gaudron J agreed) discussed the desirability of recognising publication as a "bilateral act" that included not only the publisher's act in making the

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[13] See Breavington v Godleman (1988) 169 Commonwealth Law Reports 41, 75 per Mason CJ for a similar idea.

[14] Regie National des Usines Renault SA v Zhang [2002] High Court of Australia 10 (14 March 2002) at <www.austlii.edu.au/au/ cases/cth/high_ct/2002/10.html> (visited 13 May 2002) and John Pfeiffer Pty Ltd v Rogerson [2000] High Court of Australia 36(21 March 2000) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2000/36.html> (visited May 2002).

[15] Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon [1994] 3 Supreme Court Reports 1022 at <www.canlii.org/ca/cas/scc/1994/1994scc107.html> (visited June 2002).

[16] Davies "Choice of Law in Torts" in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8, 416. See also Tolofson and Davis, "Case notes: John Pfeiffer Pty Ltd v Rogerson: choice of law in tort at the dawning of the 21st century" [2000] 24:3 Melbourne University Law Review 982, 1007.

[17] Davies "Choice of Law in Torts" in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) 416 note 13.

[18] [2002] High Court of Australia 56 (10 December 2002) at <www.austlii.edu.au/au/ cases/cth/high_ct/2002/56.html> (visited January 2003).

material available but also the reader's comprehension of the material. Since harm was found to be done to reputation in the latter act the High Court held that defamation should be located where the injurious material was read.

The existence of this uncertainty in the United Kingdom has resulted in legislation that provides for selecting the place of the tort.[19] For actions other than for personal injury or death, or damage to property, they require the "law of the country in which the most significant element or elements of those events occurred"[20] to apply. The majority in *Gutnick* has suggested that ultimately the question is "where in substance did this cause of action arise"?[21] This approach seems to resemble the proper law which has been criticised for lack of certainty. As Davis states:[22]

> [T]hese choices will be based on factors that are clearly arbitrary and fortuitous and may have little to do with the significant connections which the parties have to one law area or another and which more properly ought to guide the resolution of the flexibility in determining applicable law.

The dichotomy between procedural and substantive law raises further uncertainties for the *lex loci delicti* rule which are also visible in the application of the second limb of the *Phillips v Eyre* rule to be discussed below.[23] The forum's procedural laws will apply regardless of the choice of law model chosen[24] but in this respect it is sometimes uncertain which laws are procedural and which are substantive.

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[19] (UK) Private International Law (Miscellaneous Provisions) Act 1995, Part III section 11 at <www.hmso.gov.uk/acts/acts1995/Ukpga_19950042_en_4.htm> (visited June 2002).

[20] Ibid.

[21] [2002] High Court of Australia 56 (10 December 2002) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56.html> (visited January 2003), paragraph 43.

[22] Davis, "Case notes: John Pfeiffer Pty Ltd v Rogerson: choice of law in tort at the dawning of the 21st century" [2000] 24:3 Melbourne University Law Review 982, 1008.

[23] Davies "Choice of Law in Torts" in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8, 461.

[24] Ibid 424, 456; Brilmayer L, Conflict of Laws: Foundations and Future Directions (1991, Little, Brown & Co, Boston) 25.

In 1993, the High Court in *Stevens v Head*[25] stated that laws on the quantification of damages were procedural whereas those on heads of damages were substantive, a confusing distinction in practice. However, the difficulty has been removed from some categories of law and legislation has been passed throughout Australia defining Statutes of Limitation for intra-national torts as substantive law.[26] Further, the High Court in *Pfeiffer* has overruled the awkward distinction in *Stevens* so that laws dealing with both the type and quantum of damages are deemed substantive.

Nonetheless, it seems that difficult areas still exist and may possibly create uncertainty since it is difficult to predict how a judge will categorise each law. The problem of seeking to determine the place of the tort and distinguishing substance from procedure make the *lex loci delicti* rule not as certain as it may seem at first. Nonetheless and speaking relatively, the model does provide a large amount of certainty.

However, this model may be quite inflexible when applied mechanically leaving a potential for unfair consequences. To illustrate this, Davies imagines that the United States has a tort of harassment while Australia does not. This means that if an Australian harasses another while both are temporarily in the United States, United States law will apply. However, as Davies argues:[27]

> If harassment of Australians by Australians does not give rise to civil liability in an Australian court if it takes place in Australia, why should it do so if it happens to take place in the United States of America?

Examples where the place of the tort happens to be merely fortuitous concerns many academics and judges due to the lack of flexibility if the

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[25] (1993) 176 Commonwealth Law Reports 433. See also Davies "Choice of Law in Torts" in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8, 463.

[26] See John Pfeiffer Pty Ltd v Rogerson [2000] High Court of Australia 36 (21 March 2000) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2000/36.html> (visited May 2002) and Davies, "Choice of Law in Torts" in Davies M and ors, Conflict of Laws: Commentary and Materials (1997, Butterworths, Sydney) Chapter 8, 459-460.

[27] Davies "Choice of Law in Torts" in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8, 418.

lex loci delicti rule is applied "mechanically".[28] This caused the House of Lords to reject the *lex loci delicti* rule in *Chaplin v Boys,*[29] despite its certainty in application.

(b) Lex Fori

Another choice of law model is the *lex fori* or the law of the forum, which has certainty in terms of ease of application. However, this may encourage the plaintiff to go "forum shopping" for the seemingly most advantageous applicable law. This is unlike the *lex loci delicti* situation where one law is applied, whichever forum is chosen.[30] The ability to forum shop means the defendant must wait and see which forum the plaintiff chooses before the applicable law is known.[31] It also means that the same set of facts may have different outcomes depending on where the litigation occurs leading to uncertain results.[32] Nonetheless, it may be said that overall and similar to the *lex loci delicti* rule, the *lex fori* rule has a relatively high amount of certainty and, unlike the *lex loci delicti*, determining the place of the tort or characterising laws as procedural or substantive are not issues.

Like the *lex loci delicti* model, the *lex fori* model is also inflexible when applied mechanically. To illustrate this Davies uses an Australian plaintiff suing an American defendant in Australia for negligence. Assuming the negligence occurred in the United States where the suit

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[28] See Jaffey, "Choice of law in tort: a justice-based approach" (March 1982) 2:1 Legal Studies 98, 108; John Pfeiffer Pty Ltd v Rogerson [2000] High Court of Australia 36 (21 March 2000) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2000/36.html> (visited May 2002).

[29] [1971] Appeal Cases 356.

[30] Goode, "Dancing on the grave of Phillips v Eyre" (September 1984) 3 Adelaide Law Review 345, 348; Australian Law Reform Commission, Report on Choice of Law, Report No 58 (1992), extracted in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8, 443; see also John Pfeiffer Pty Ltd v Rogerson [2000] High Court of Australia 36 (21 March 2000) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2000/36.html> (visited May 2002).

[31] Greene, "Choice of law in tort – the song that never ends" (1998) 26:2 Federal Law Review 349, 361; John Pfeiffer Pty Ltd v Rogerson [2000] High Court of Australia 36(21 March 2000) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2000/36.html> (visited May 2002).

[32] John Pfeiffer Pty Ltd v Rogerson [2000] High Court of Australia 36 (21 March 2000) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2000/36.html> (visited May 2002).

is brought the defendant will be liable but if the suit is in Australia a substantive defence is available. Davies therefore asks:[33]

> If the defendant's conduct would have given rise to civil liability under the law of the United States of America, where it occurred, why should it not do so in Australia, too?

This means that forum law applies however slightly connected the tort is to that forum, subject to the rules of jurisdiction.

(c) The Phillips v Eyre *Rule*

A third choice of law model was initially considered to be a compromise model as it tried to "provide the best of both worlds."[34] It is the much maligned rule in *Phillips v Eyre*[35] used previously in Australia, Canada and England. The oft-quoted formulation of this rule comes from Willes J:[36]

> As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England...Secondly, the act must not have been justifiable by the law of the place where it was done.

On its face, the rule seems quite certain requiring the plaintiff to satisfy both the *lex fori* and *lex loci delicti* rules. However, it has not proven to be so in practice. As Davies states, "the exact nature of the rule still

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[33] Davies "Choice of Law in Torts" in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8, 418. Of course, the plaintiff may sue in the United States but this may not always be possible. For example, the plaintiff may have limited resources. This brings on the next issue, namely, fairness and access to justice: why should such a plaintiff be subjected to this limitation merely because he or she cannot afford to sue in America?

[34] Davies "Choice of Law in Torts" in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8, 418.

[35] [1870] Law Reports 6 Queen's Bench 1.

[36] Ibid 28-9, quoted in Davies "Choice of Law in Torts" in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8, 419.

remains unclear, even after a century and a quarter."[37] Further, the High Court in *Pfeiffer* holds the view that this rule and its adaptations create "considerable confusion and difficulty of application."[38]
It is uncertain precisely which approach this rule dictated. Trying to explain *Phillips v Eyre*, Goode writes:[39]

> This is always a hazardous undertaking, because, once one proceeds beyond the banal, any proposition is bound to be arguable, and therefore possibly incorrect...

One argument is that it is actually a jurisdiction selection rule.[40] Prior to *Breavington v Godleman,*[41] Australian courts generally held the view that this rule required the application of the *lex fori* once both conditions were satisfied.[42] This is also the view that Goode takes of the rule.

In *Breavington* Brennan J reformulates the rule in *Phillips v Eyre* in an attempt to clarify its operation. He states:[43]

> A plaintiff may sue in the forum to enforce a liability in respect of a wrong occurring outside the territory of the forum if – 1. the claim arises out of circumstances of such a character that, if they had occurred within the territory of the forum, a cause of action would have arisen entitling the plaintiff to enforce against the defendant a civil liability of the kind which the plaintiff claims to enforce; and 2. by the law of the place in which the wrong occurred, the circumstances of the occurrence gave rise to a civil liability of the kind which the plaintiff claims to enforce.

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[37] Davies "Choice of Law in Torts" in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8, 419.
[38] John Pfeiffer Pty Ltd v Rogerson [2000] High Court of Australia 36 (21 March 2000) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2000/36.html> (visited May 2002), paragraph 135.
[39] Goode, "Dancing on the grave of Phillips v Eyre" (September 1984) 3 Adelaide Law Review 345, 345.
[40] Davies "Choice of Law in Torts" in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8 , 425.
[41] (1988) 169 Commonwealth Law Reports 41.
[42] See for example McKain v R W Miller & Co (SA) Pty Ltd (1991) 174 Commonwealth Law Reports 1.
[43] (1988) 169 Commonwealth Law Reports 41, 110-111.

Davies believes this formulation requires application of both the *lex fori* and *lex loci delicti* rules.[44] If his view is correct, then this formulation suffers from the problems of both rules such as finding the place of the tort and forum shopping.[45]

Besides being quite uncertain the *Phillips v Eyre* rule is inflexible resulting in the House of Lords and the Privy Council formulating a "flexible exception", as seen in *Chaplin v Boys*[46] and *Red Sea Insurance Co Ltd v Bouygues SA,*[47] and discussed below. It is inflexible because a plaintiff has to be successful according to the law of both the forum and the place of the tort even though there may be only a "slight connection" to either place.[48] As the Australian Law Reform Commission states, the *Phillips v Eyre* rule "manages to be inflexible while retaining considerable uncertainty."[49]

(d) The Proper Law of the Tort

The proper law of the tort is the final tort choice of law model being considered. In the United States several states have adopted it.[50] This model applies the law of the place with the most significant relationship with the parties, taking into account connecting factors such as place of injury, conduct, domicile or residence. Other relevant factors are nationality and place of incorporation.[51]

According to this model, the law of different States may govern different issues in the same case depending on which factors are

[44] Davies "Choice of Law in Torts" in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8, 425.
[45] Goode, "Dancing on the grave of Phillips v Eyre" (September 1984) 3 Adelaide Law Review 345, 345.
[46] [1971] Appeal Cases 356.
[47] [1995] 1 Appeal Cases 190.
[48] Mayss, "Statutory reform of choice of law in tort and delict: a bitter pill or a cure for the ill?" [1996] 2 Web Journal of Current Legal Issues at <http://www.webjcli.ncl.ac.uk/1996/issue2/mayss2.html> (visited June 2002).
[49] Australian Law Reform Commission, Report on Choice of Law, Report No 58 (1992), extracted in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8, 442.
[50] See extract from Red Sea Insurance Co Ltd v Bouygues SA [1995] 1 Appeal Cases 190 in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8, 440.
[51] Ibid 440.

deemed most relevant to an issue.[52] As such, it is a very flexible model allowing judges to weigh different connecting factors to find the most applicable law. It "recognises that the concerns of the substantive tort law, while relevant, may not always point to an obvious choice of law".[53] Greene refers to this as a "great strength" of this model[54] and many critics agree with this. However, as a model it is too uncertain. La Forest J, presenting the majority view in *Tolofson,* states:[55]

> The criticism is easy to make that, more even than the doctrine of proper law of the contract...where the search is often one of great perplexity, the task of tracing the relevant contacts, and of weighing them, qualitatively, against each other, complicates the task of the courts and leads to uncertainty and dissent...

His Honour uses *Dym v Gordon*[56] as an example. In this case, four judges believed Colorado law should be applied while three others believed New York law should be applied.[57] The problem arose because the weighing-up of competing connecting factors is quite a subjective process and it is sometimes difficult for the parties to know in advance which law will apply. As Kahn-Freund explains:[58]

> There is no ultimate distinction between a connecting factor which is 'significant' and one which is 'accidental'. This is a matter of impression, of feelings, one might almost say an aesthetic matter which defies rational argument for or against.

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[52] Ibid.

[53] Greene, "Choice of law in tort – the song that never ends" (1998) 26:2 Federal Law Review 349, 354.

[54] Ibid 354.

[55] Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon [1994] 3 Supreme Court Reports 1022 at <www.canlii.org/ca/cas/scc/1994/1994scc107.html> (visited June 2002). See also Greene, "Choice of law in tort – the song that never ends" (1998) 26:2 Federal Law Review 349, 354.

[56] (1965) 209 NE 2d 792.

[57] Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon [1994] 3 Supreme Court Reports 1022 at <www.canlii.org/ca/cas/scc/1994/1994scc107.html> (visited June 2002).

[58] Kahn-Freund, "Delictual liability and the conflict of laws" (1968) II Recueil des Cours 5, 36, quoted in John Pfeiffer Pty Ltd v Rogerson [2000] High Court of Australia 36 (21 March 2000) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2000/36.html> (visited May 2002), paragraph 78.

Thus, in contrast with the other models, the proper law of the tort model is extremely flexible but this is at the expense of certainty, a necessity in practice.

III. THE FLEXIBLE EXCEPTION

A flexible exception may apply to the first three models discussed above. Regarding the *lex loci delicti* rule, a flexible exception is thought to be desirable when the disputing parties have "no substantial connection" with the place of the tort.[59] The Australian Law Reform Commission prefers this method and argues for a general *lex loci delicti* rule that may be displaced by the law of another place with a "substantially greater connection" to the circumstances of the case.[60] This has been incorporated into legislation in the United Kingdom that requires the *lex loci's* displacement if:[61]

> ...it appears that the law of some other place is 'substantially more appropriate' given the significance of the factors which connect the tort to the law of the place of the tort and the significance of those which connect it to another country.

The House of Lords in *Chaplin* formulated a flexible exception to the *Phillips v Eyre* rule that Davies describes as follows:[62]

> As originally stated, the flexible exception would have allowed the court to depart in exceptional cases from applying the *lex loci delicti* in the second limb of *Phillips v Eyre* if the place of the tort ...was purely fortuitous, and if the *lex fori* had the most significant relationship with the occurrence and the parties.

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[59] See McKain v R W Miller & Co (SA) Pty Ltd (1991) 174 Commonwealth Law Reports 1.

[60] Australian Law Reform Commission, Report on Choice of Law, Report No 58 (1992), extracted in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8, 443.

[61] (UK) Private International Law (Miscellaneous Provisions) Act 1995, Part III at <www.hmso.gov.uk/acts/acts1995/Ukpga_19950042_en_4.htm> (visited June 2002).

[62] Davies "Choice of Law in Torts" in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8, 432.

Further, the Privy Council in *Red Sea Insurance* extended the exception by: [63]

> ...permitting departure in exceptional cases from an application of the *lex fori* in the first limb of *Phillips v Eyre* if the *lex loci delicti* has the most significant relationship with the occurrence and the parties.

The public policy exception is another exception devised for the *lex loci delicti* and *Phillips v Eyre* rules. This requires the *lex fori* to apply "where to apply the law of the place of the tort would violate the public policy of the forum".[64] The exception gives the court flexibility to displace otherwise rigid rules for a possible fairer outcome.

However, this flexibility seems to come at the expense of certainty. When exceptions are expressed in terms such as "substantially greater connection"[65] and "substantially more appropriate",[66] judges have "unfettered discretion" to apply these vague concepts making it difficult to predict when and how they will be applied.[67] Jaffey and Mayss complain, in context of the flexible exception to the *Phillips v Eyre* rule that it is difficult to know exactly what these concepts entail.[68] Even those who support a flexible exception, such as Toohey J in *Breavington*, have emphasised that the exceptions may only be used in "special circumstances" to avoid uncertainty as much as possible.[69]

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[63] Ibid 436.

[64] Greene, "Choice of law in tort – the song that never ends" (1998) 26:2 Federal Law Review 349, 362.

[65] See Australian Law Reform Commission, Report on Choice of Law, Report No 58 (1992), extracted in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8; Kincaid, "Justice in Tort Choice of Law" (1996) 18 Adelaide Law Review 191, 203.

[66] (UK) Private International Law (Miscellaneous Provisions) Act 1995, Part III, <www.hmso.gov.uk/acts/acts1995/Ukpga_19950042_en_4.htm> (visited June 2002).

[67] Kincaid, "Justice in Tort Choice of Law" (1996) 18 Adelaide Law Review 191, 203; Mayss, "Statutory reform of choice of law in tort and delict: a bitter pill or a cure for the ill?" [1996] 2 Web Journal of Current Legal Issues at <http://www.webjcli.ncl.ac.uk/1996/issue2/mayss2.html> (visited June 2002).

[68] Jaffey, "Choice of law in tort: a justice-based approach" (March 1982) 2:1 Legal Studies 98, 98; Mayss, "Statutory reform of choice of law in tort and delict: a bitter pill or a cure for the ill?" [1996] 2 Web Journal of Current Legal Issues at <http://www.webjcli.ncl.ac.uk/1996/issue2/mayss2.html> (visited June 2002).

[69] Breavington v Godleman (1988) 169 Commonwealth Law Reports 41, 163.

This is demonstrated in *Tolofsen* where the court decided to allow a flexible exception but only in very few cases, and not for intra-national torts. In addition, any such exception needs to be carefully defined.[70] Thus, it is seen that even the flexible exceptions have been designed to minimise uncertainty wherever possible.

IV. CERTAINTY AND FLEXIBILITY

How desirable is certainty and flexibility in tort choice of law? Different members of the High Court hold different opinions on this issue. Deane, Wilson and Gaudron JJ believed that the Constitution of Australia[71] impacts on the choice of law rule thereby restricting flexibility.[72] Both Mason CJ and Toohey J expressed the need for a "flexible exception" to the different rules but Dawson J disagreed with them.[73] Toohey J states that the flexible exception may apply to "give appropriate significance to the *lex loci delicti* and the *lex fori* in all the circumstances."[74] Presumably this will facilitate justice for the parties subject to the circumstances of each particular case. In *McKain v R W Miller & Co (SA) Pty Ltd*[75] the majority in the High Court decided against adopting the flexible exception to the *Phillips v Eyre* rule and more recently settled on *a lex loci delicti* rule minus the flexible exception in *Zhang* and *Pfeiffer*.

The High Court has been influenced in intra-national tort cases by Australia's federal nature. For example, Brennan, Dawson, Toohey and McHugh JJ in *McKain* have stated:[76]

> [M]indful of the freedom of intercourse throughout this country and the general similarity of the laws in force in the various parts of Australia, the overwhelming desideratum in a rule for intra-national

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[70] Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon [1994] 3 Supreme Court Reports 1022 at <www.canlii.org/ca/cas/scc/1994/1994scc107.html> (visited June 2002).

[71] 1900 Commonwealth of Australia Constitution Act (Imp) 63 & 64 Victoria c 12.

[72] See the judgments of Deane J and Wilson and Gaudron JJ in Breavington v Godleman (1988) 169 Commonwealth Law Reports 41.

[73] See Davies "Choice of Law in Torts" in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8, 419.

[74] Breavington v Godleman (1988) 169 Commonwealth Law Reports 41, 162.

[75] (1991) 174 Commonwealth Law Reports 1.

[76] (1991) 174 Commonwealth Law Reports 1, 38.

> torts is certainly of application or, more accurately, as much certainty as the subject-matter admits.

The majority in *Pfeiffer* has agreed, stating:[77]

> [I]deally, the choice of law rules should provide certainty and uniformity of outcome no matter where in the Australian federation a matter is litigated...

The cases also found it desirable that one set of facts should produce the same result wherever the plaintiff sued in Australia.[78] Any other result within a federation would seem "odd".[79]

The majority in *McKain* added that a flexible exception as devised in *Chaplin* is unnecessary in a federal context because it only applies when the *lex loci* has "no real connection to the proceedings." They held that such a circumstance would be too rare in a federal context to warrant having the flexible exception.[80] Neither is a public policy exception seen as necessary in the intra-national context. This is because it is unlikely that the law of an Australian state or territory will "violate some fundamental principle of justice, some prevalent conception of good morals, [or] some deep-rooted tradition of the commonwealth" in another state or territory.[81] In Canada, the same ideas have been seen as important in formulating the rule.[82]

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[77] John Pfeiffer Pty Ltd v Rogerson [2000] High Court of Australia 36 (21 March 2000) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2000/36.html> (visited May 2002).

[78] See, for example, Breavington v Godleman (1988) 169 Commonwealth Law Reports 41; John Pfeiffer Pty Ltd v Rogerson [2000] High Court of Australia 36 (21 March 2000) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2000/36.html> (visited May 2002).

[79] See John Pfeiffer Pty Ltd v Rogerson [2000] High Court of Australia 36 (21 March 2000) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2000/36.html> (visited May 2002).

[80] Greene, "Choice of law in tort – the song that never ends" (1998) 26:2 Federal Law Review 349, 360.

[81] Loucks v Standard Oil Co of New York 120 NE 198, 202, quoted in John Pfeiffer Pty Ltd v Rogerson [2000] High Court of Australia 36 (21 March 2000) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2000/36.html> (visited May 2002), paragraph 91.

[82] Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon [1994] 3 Supreme Court Reports 1022 at <www.canlii.org/ca/cas/scc/1994/1994scc107.html> (visited

With respect to both intra-national and international torts the High Court fears that any exception may be too vague and undermine certainty entirely and Kincaid shares the same view.[83] The majority in *Pfeiffer* has stated:[84]

> 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 a 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.

Zhang shares this view.[85] It means more costs "to parties, insurers and society at large"[86] and the fear of a result such as that which Kahn-Freund has described in the American states applying the proper law as "hopelessly confused, chaotic, unpredictable, and – despite all laudable efforts to explain it – incomprehensible."[87]

Another reason for the emphasis on certainty is the belief that parties generally expect the law of the place that they are in to govern their actions and as such it is important to protect their expectations.[88] On

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June 2002).

[83] Kincaid, "Justice in Tort Choice of Law" (1996) 18 Adelaide Law Review 191, 192.

[84] John Pfeiffer Pty Ltd v Rogerson [2000] High Court of Australia 36 (21 March 2000) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2000/36.html> (visited May 2002), para 79.

[85] Regie National des Usines Renault SA v Zhang [2002] High Court of Australia 10 (14 March 2002) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2002/10.html> (visited May 2002).

[86] See Regie National des Usines Renault SA v Zhang [2002] High Court of Australia 10 (14 March 2002) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2002/10.html> (visited May 2002). See also John Pfeiffer Pty Ltd v Rogerson [2000] High Court of Australia 36 (21 March 2000) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2000/36.html> (visited May 2002).

[87] Kahn-Freund, reviewing Morse, "Torts in private international law" (1979) 50 British Year Book of International Law 200, 201, quoted in Regie National des Usines Renault SA v Zhang [2002] High Court of Australia 10 (14 March 2002) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2002/10.html> (visited May 2002), paragraph 127.

[88] See John Pfeiffer Pty Ltd v Rogerson [2000] High Court of Australia 36 (21 March 2000) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2000/36.html> (visited May

the other hand, as Greene argues, this idea is more applicable to an international traveller than an intra-state one despite Mason CJ's ideas to the contrary in *Breavington*.[89] This position is similar to the High Court's approach in contract choice of law, which *prima facie* allows the parties to *choose* the law that will govern their contract, namely, the law they will *expect* to govern. However, in its aim to accord with the parties' expectations, the court has leant towards greater certainty for tort choice of law. In doing so, it has assumed that parties expect the law of the place they are in to govern their actions. In contrast, it has accorded greater flexibility for contract by looking for the parties' choice of the place they wish to govern their contract. This is a main reason why greater flexibility in contract has occurred.

Although the High Court has conceded occasionally that the place of the tort may be fortuitous, it has the following view:[90]

> But for every hard case that can be postulated if one form of universal rule is adopted, another equally hard case can be postulated if the opposite universal rule is applied.

In short, the High Court has settled for what it considers the best option, namely, applying the *lex loci delicti* rule with no flexible exception. It has decided that neither a flexible rule nor a flexible exception is desirable because the practical disadvantages outweigh the advantages. Kirby J sums up the High Court's view nicely stating that "[t]he goals that should apply to a 'choice of law' rule are clear. It should offer results that are certain and predictable."[91] The Supreme Court of Canada shares this view and in *Tolofson* held that "[o]ne of the main goals of any conflicts rule is to create certainty in the law."[92]

2002).

[89] Greene, "Choice of law in tort – the song that never ends" (1998) 26:2 Federal Law Review 349, 357.

[90] John Pfeiffer Pty Ltd v Rogerson [2000] High Court of Australia 36 (21 March 2000) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2000/36.html> (visited May 2002), para 82.

[91] Ibid para 136.

[92] Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon [1994] 3 Supreme Court Reports 1022 at <www.canlii.org/ca/cas/scc/1994/1994scc107.html> (visited June 2002).

Despite the opinion of the High Court, there is a need for some flexibility in tort choice of law, as demonstrated in the above discussion on the various choice of law models. For example, consider a case where both parties come from the same place but the tort occurs fortuitously in another, and the applicable rule is an inflexible *lex loci delicti* rule. Is it fair to the parties that, when all the other circumstances point to applying their own law, it is the fortuitous place of the tort that is determinative?[93] The same is true of an inflexible *lex fori* rule especially where the plaintiff chooses the forum because of its plaintiff-friendly laws but that forum has only a slight connection with the circumstances of the tort.[94] Perhaps these may be a rare occurrence, but even so, common sense and a sense of justice indicate a need for some flexibility to accommodate such circumstances.

Generally speaking, it seems that flexibility is associated with justice for the parties in cases where flexibility is necessary. The flexible exceptions to the *Phillips v Eyre* rule formulated in *Chaplin* and *Red Sea Insurance* were deemed necessary to create a just result in precisely the kind of scenarios discussed immediately above. In fact, Lord Wilberforce in *Chaplin* referred to "the conflict between the desire for certainty and simplicity in the law on the one hand and the need for '*flexibility in the interests of individual justice*' on the other" (emphasis added).[95]

It is broadly recognised that the purpose of flexibility is to allow the court some freedom from the general rule in "difficult cases".[96] A

[93] See Davies "Choice of Law in Torts" in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8, 418; Jaffey, "Choice of law in tort: a justice-based approach" (March 1982) 2:1 Legal Studies 98, 108; Brilmayer L, Conflict of Laws: Foundations and Future Directions (1991, Little, Brown & Co, Boston) 32; Davis, "Case notes: John Pfeiffer Pty Ltd v Rogerson: choice of law in tort at the dawning of the 21st century" [2000] 24:3 Melbourne University Law Review 982, 1004.

[94] Of course, this may be dealt with in many cases by the forum's jurisdiction rules. However, some rules are more lenient on a plaintiff than others, and it is not inconceivable that such fact situations may arise.

[95] [1971] Appeal Cases 356, 389.

[96] Mayss, "Statutory reform of choice of law in tort and delict: a bitter pill or a cure for the ill?" [1996] 2 Web Journal of Current Legal Issues at <http://www.webjcli.ncl.ac.uk/1996/issue2/mayss2.html> (visited June 2002); Red Sea Insurance Co Ltd v Bouygues SA [1995] 1 Appeal Cases 190, per Lord Slynn of Hadley, extracted in Davies "Choice of Law in Torts" in Davies M and ors, Conflict

certain rule with no flexibility is bound not to result always in a just outcome as the examples show. As Lord Wilberforce has recognised in *Chaplin*, "[n]o purely mechanical rule can properly do justice to the great variety of cases where persons come together."[97]

However, one should not forget that certainty is another facet of justice for the parties. According to Greene:[98]

> Of course 'justice to the parties' is going to mean different things to different people. At one extreme it can mean an ad hoc decision based on the merits of each individual conflict. At the other it can mean formulating rules which do the most justice to the most parties most of the time.

Since the former extreme accords with flexibility and the latter with certainty, this is a good explanation for the High Court's view. A certain rule may be just, in that, it allows parties to know exactly which law will govern their actions. This is evident in *Gutnick* where the High Court was concerned that:[99]

> ...those who would seek to order their affairs in a way that will minimise the chance of being sued for defamation must be able to be confident in predicting what law will govern their conduct.

This is also evident when one considers the injustices of forum shopping giving the defendant little idea which law will apply until the plaintiff chooses the forum. This suggests that justice should be a balance between certainty and flexibility.

It has been seen above that party expectations are an important aspect of certainty. Although they point generally to the *lex loci,* this is not

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of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8, 440; Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon [1994] 3 Supreme Court Reports 1022 at <www.canlii.org/ca/cas/scc/1994/1994scc107.html> (visited June 2002) per Major J.

[97] [1971] Appeal Cases 356, 391.

[98] Greene, "Choice of law in tort – the song that never ends" (1998) 26:2 Federal Law Review 349, 364.

[99] Dow Jones & Co Inc v Gutnick [2002] High Court of Australia 56 (10 December 2002) at <http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56.html> (visited January 2003) paragraph 24.

always the case. Kincaid uses an example of an Australian dinner party in an Islamic country. The guests at the party, assuming they are not Muslims, "would not expect to conform amongst themselves to an

Islamic code of blasphemy" despite being in that country.[100] Therefore, even though party expectations is an element of certainty, some flexibility is necessary to account for those times "where party expectations clearly indicate another law."[101] Kincaid admits that it may be difficult to determine what those expectations are or if they differ between the parties.[102] Nonetheless, the difficulties are not so great as to require that the flexible exception should be abandoned altogether.

Another problem with mechanically applied rules is this: where they may create an undesirable result a judge may be tempted to use one of various escape devices to avoid their application.[103] Some examples, such as defining the place of the tort and characterising laws as either substantive or procedural, have been identified above. Another example is the non-characterisation of the dispute as a tort case.[104] Such escape devices are wholly undesirable because they completely undermine certainty[105] and the "justice" in each case does not come from a flexibility built in to the rule and known to the parties beforehand. On the other hand, the "justice" comes from the judge's own manipulation of the rules to suit his or her own view of what the outcome should be.

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[100] Kincaid, "Justice in Tort Choice of Law" (1996) 18 Adelaide Law Review 191, 202.

[101] Ibid 202-3; also recognised by Major J in Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon [1994] 3 Supreme Court Reports 1022 at <www.canlii.org/ca/cas/scc/1994/1994scc107.html> (visited June 2002).

[102] Kincaid, "Justice in Tort Choice of Law" (1996) 18 Adelaide Law Review 191, 205. See also Greene, "Choice of law in tort – the song that never ends" (1998) 26:2 Federal Law Review 349, 364.

[103] Greene, "Choice of law in tort – the song that never ends" (1998) 26:2 Federal Law Review 349, 369; Brilmayer L, Conflict of Laws: Foundations and Future Directions (1991, Little, Brown & Co, Boston) 24-5.

[104] Brilmayer L, Conflict of Laws: Foundations and Future Directions (1991, Little, Brown & Co, Boston) 25.

[105] Ibid 24.

On the other hand, irrespective of how desirable flexibility may be, it should not be achieved at the expense of sufficient certainty. Kincaid believes that even when some flexibility is allowed and the judges may use their discretion in a particular case, the discretion should be guided in order to result in as much certainty as possible in that flexibility.[106] In this sense, exceptions providing for the case where something is "substantially more appropriate"[107] are not desirable because they leave too much to the uncertain discretion of individual judges.[108] Following this vein, Lord Hodson became reluctant to allow a flexible exception in *Chaplin,* stating:[109]

> [R]ules of law should be defined and adhered to as closely as possible lest they lose themselves in a field of judicial discretion where no secure foothold is to be found by litigants or their advisers.

The need for certainty is recognised generally as allowing lawyers to advise their clients and prepare their cases with some predictability and so that the people may organise their affairs according to certain and established rules.[110] Additionally, certainty allows for the simpler application of laws[111] and avoids protracted litigation with difficult issues.

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[106] Kincaid, "Justice in Tort Choice of Law" (1996) 18 Adelaide Law Review 191, 194.

[107] As in (UK) Private International Law (Miscellaneous Provisions) Act 1995, Part III, <www.hmso.gov.uk/acts/acts1995/Ukpga_19950042_en_4.htm> (visited June 2002).

[108] Kincaid, "Justice in Tort Choice of Law" (1996) 18 Adelaide Law Review 191, 194.

[109] [1971] Appeal Cases 356, 378.

[110] Kincaid, "Justice in Tort Choice of Law" (1996) 18 Adelaide Law Review 191, 194; Red Sea Insurance Co Ltd v Bouygues SA [1995] 1 Appeal Cases 190; Australian Law Reform Commission, Report on Choice of Law, Report No 58 (1992), extracted in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8, 443; Greene, "Choice of law in tort – the song that never ends" (1998) 26:2 Federal Law Review 349, 368; Mayss, "Statutory reform of choice of law in tort and delict: a bitter pill or a cure for the ill?" [1996] 2 Web Journal of Current Legal Issues at <http://www.webjcli.ncl.ac.uk/1996/issue2/mayss2.html> (visited June 2002); Davis, "Case notes: John Pfeiffer Pty Ltd v Rogerson: choice of law in tort at the dawning of the 21st century" [2000] 24:3 Melbourne University Law Review 982, 1004.

[111] Mayss, "Statutory reform of choice of law in tort and delict: a bitter pill or a cure for the ill?" [1996] 2 Web Journal of Current Legal Issues at <http://www.webjcli.ncl.ac.uk/1996/issue2/mayss2.html> (visited June 2002).

Although there may be no perfect tort choice of law model it is still generally agreed that certainty is most important. As Kincaid states, a "*prima facie* rule" should exist that provides the "important element of certainty and predictability."[112] However, if this certain rule should create an unfair result in a particular case, some flexibility is required to prevent such a result.[113] This could apply, for example, where the *lex loci* is merely fortuitous[114] or on any other occasion where "justice to the parties so demands".[115] This balance is recognised in the Australian Law Reform Commission's recommendations[116] and United Kingdom legislation.[117] They agree that to maintain certainty, flexible exceptions should only apply in "special circumstances".[118] Commenting on the United Kingdom legislation, Mayss states:[119]

> [T]he new rules embrace certainty, simplicity and ease of application and limited flexibility, which are vital qualities in the underlying jurisprudential policy considerations in any desirable choice of law.

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[112] Kincaid, "Justice in Tort Choice of Law" (1996) 18 Adelaide Law Review 191, 202. See also Mayss, "Statutory reform of choice of law in tort and delict: a bitter pill or a cure for the ill?" [1996] 2 Web Journal of Current Legal Issues at <http://www.webjcli.ncl.ac.uk/1996/issue2/mayss2.html> (visited June 2002); Greene, "Choice of law in tort – the song that never ends" (1998) 26:2 Federal Law Review 349, 368.

[113] Kincaid, "Justice in Tort Choice of Law" (1996) 18 Adelaide Law Review 191, 204.

[114] Jaffey, "Choice of law in tort: a justice-based approach" (March 1982) 2:1 Legal Studies 98, 116; Davis, "Case notes: John Pfeiffer Pty Ltd v Rogerson: choice of law in tort at the dawning of the 21st century" [2000] 24:3 Melbourne University Law Review 982, 1004.

[115] Greene, "Choice of law in tort – the song that never ends" (1998) 26:2 Federal Law Review 349, 368.

[116] Australian Law Reform Commission, Report on Choice of Law, Report No 58 (1992), extracted in Davies M and ors, Conflict of Laws: Commentary and Materials (Sydney: Butterworths, 1997) Chapter 8, 443.

[117] (UK) Private International Law (Miscellaneous Provisions) Act 1995, Part III, <www.hmso.gov.uk/acts/acts1995/Ukpga_19950042_en_4.htm> (visited June 2002).

[118] Breavington v Godleman (1988) 169 Commonwealth Law Reports 41, 163 per Toohey J.

[119] Mayss, "Statutory reform of choice of law in tort and delict: a bitter pill or a cure for the ill?" [1996] 2 Web Journal of Current Legal Issues at <http://www.webjcli.ncl.ac.uk/1996/issue2/mayss2.html> (visited June 2002).

Rejecting the above views, the High Court believes that the need for certainty outweighs considerations favouring flexibility. Notwithstanding their conclusion, total certainty may be impossible to achieve as Greene indicates:[120]

> Too many other variables exist even if any given Australian court would apply the same substantive tort law. These include differing procedures, differing interpretations of the law in question and even as obvious a factor as the differing personalities and philosophies of judges.

If this is so, it is arguable that the High Court should incorporate some flexibility into the rule. However, given the court's position, presumably a reaction against the vagaries of the *Phillips v Eyre* rule, this is not likely. In practice however, this is difficult to reconcile considering the court's willingness to accept flexibility in contract choice of law.

This is especially so considering the suggestion that certainty "is not such an important factor in the law of torts as it is in the law of contract."[121] The proper law of the contract, which involves consideration of the parties' choice of place to govern their contract, determines contract choice of law. Nonetheless, Dicey and Morris in their celebrated work, *Conflict of Laws,* have observed:[122]

> [E]ven where the parties have themselves taken the opportunity afforded to them to express an intention as to what law should govern the contract, the supposed certainty intended to be achieved by that is subject to a measure of flexibility. The court can, indeed must, depart from the selected law where the parties' selection is

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[120] Greene, "Choice of law in tort – the song that never ends" (1998) 26:2 Federal Law Review 349, 358.

[121] Lawrence Collins and ors (eds), Dicey and Morris on the Conflict of Laws (1993, 12th edition), volume 2, 1501-2, quoted in Davis, "Case notes: John Pfeiffer Pty Ltd v Rogerson: choice of law in tort at the dawning of the 21st century" [2000] 24:3 Melbourne University Law Review 982, 1004.

[122] Davis, "Case notes: John Pfeiffer Pty Ltd v Rogerson: choice of law in tort at the dawning of the 21st century" [2000] 24:3 Melbourne University Law Review 982, 1005.

not bona fide or is contrary to forum policy or infringes a mandatory rule of the forum.

This flexibility is not allowed in tort choice of law.

V. CONCLUSION

This article has canvassed the various choice of law models and analysed their relative strengths in terms of flexibility and certainty. It has considered the views of various stakeholders who have concluded that although certainty in tort choice of law is unquestionably desirable, justice to the parties necessitates some flexibility in application and approach. It is difficult to explain exactly why the High Court has not followed this consensus particularly in light of the flexibility allowed in contract choice of law. For many, especially the litigants, the court's position seems to dampen its ability to provide justice in a fair manner for all.