Forum Shopping: A Rejoinder

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I am delighted that my Australian colleague, Brian Opeskin, finds my article "stimulating and provocative" and that we agree on so many points, such as the futility of the traditional quest for "decisional harmony" in the international arena, the need to acknowledge values other than uniformity in the law of conflicts, and the absurdity of disparaging counsel's efforts to advance their clients' interests in cases that transcend state boundaries. I also agree with him that Australia holds few temptations for the forum shopper, although one may well question whether this is a reason for rejoicing or concern. To narrow our area of disagreement even further, let me hasten to say that I have nothing at all against decisional harmony as such — although I would not go as far as to equate it with the rule of law[1] — as long as this goal is not pursued by means of choice-of-law rules that are insensitive to substantive concerns.

I

Our differences are largely limited to intra–Australian realities, about which Opeskin is much better informed than I am.[2] Before addressing them I should, however, say a word about some of the international compacts he mentions. The original Hague conventions adopted shortly after the turn of the century pursued the objective of uniformity with a vengeance. Zealously attempting to prevent "limping" divorces and marriages, they barred couples from divorcing and remarrying, causing untold hardship. These misguided efforts have since been denounced by all signatories. In contrast, the more recent conventions to which he refers are designed to uphold the validity of marriages, divorces and remarriages. In other words, they pursue the twin goals of uniformity and result-selectivity. The same is true of the Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, which contains alternative reference rules that protect wills against invalidation. Yet others, such as the Hague Convention on Jurisdiction and the Law Applicable in the Field of the Protection of Minors and the Hague Convention on Child Maintenance Obligations, openly encourage forum shopping to protect the rights of children.

As these examples show, international practice no longer favours the traditional neutral choice-of-law provisions that seek uniformity at the expense of

1 Few conflicts scholars nowadays would be prepared to take the leap of faith necessary to accord Savigny's postulate a status equal to that of the rule of law. Indeed, the numerous embellishments of multilateralist schemes — such as the public policy exception, renvoi and laws of immediate application — suggest that even dyed-in-the-wool traditionalists view decisional harmony as something desirable, but certainly not as an absolute. Perhaps this is what Opeskin has in mind when he posits what I find difficult to accept, namely that the rule of law is a "matter of degree".

2 For me to urge Australian academics and judges to "embrace the American national pastime" would of course be presumptuous. My article serves the rather more modest purpose to promote the discussion of a much neglected issue.

substantive values.Quite on the contrary, a substantial number of modern conventions is strongly result-oriented.[3] Efforts to unify choice-of-law rules for the sake of uniformity alone, on the other hand, have largely come to naught. As I have tried to show elsewhere, the trend towards teleology and away from the Savignian approach is by no means limited to the United States.[4] Nor, as numerous Conventions demonstrate, is it limited to domestic conflict-of-laws practice.

II

Turning now to the New South Wales *Motor Accidents Act* 1988, the manner in which the legislature of this Australian state curtailed victims' rights for the purpose of lowering insurance premiums is relatively innocuous, at least as compared with some of the rather raw "tort reform" statutes insurance lobbies have foisted upon an unsuspecting American public. So raw, in fact, that some of them have been held unconstitutional by state supreme courts on due process, equal protection and other grounds. (Such constitutional review not being available in Australia, I suppose that nothing could stop the New South Wules legislature from deciding to, say, abolish damages for pain and suffering altogether and to reduce recovery for pecuniary damages by 50 per cent, which would doubtless lower insurance premiums even further.)

Although the New South Wales *Motor Accidents Act* may amount to but a mild encroachment on victims' rights, one might still question the fairness of a balancing act that gives to the "motoring community" while taking from the victims' community. But conflicts cases pose of course quite a different question, namely why foreign victims, who lack "enduring contacts" with the state, should pay for whatever commitments one or the other political party makes to the New South Wales voting public to win an election. Why should the rights of such outsiders be diminished without any corresponding quid pro quo? Does the Australian Constitution require that?[5] The victim in *Stevens v Head*[6] was, after all, an alien, rather than a resident voter. The fact that Sydney has been chosen to host the Olympics in the year 2000 will ensure the presence of visitors from all continents, who, should they be run over by a member of the New South Wales motoring community, will in effect make an involuntary contribution to keep the tortfeasor's insurance premiums down. How this result promotes interstate and international justice eludes me.

Speaking of tort law, Opeskin suggests that I lack objectivity.[7] Far be it

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3 See Juenger, F K, *Choice of Law and Multistate Justice* (1993) at 186-9.

4 See id at 173-85.

5 My point is of course not that Australia's High Court is incapable of exacting uniformity. I merely think that it might be helpful if the Justices were to ponder the fact that the U.S. Supreme Court long ago abandoned its earlier effort to deduce a conflicts code from the US Constitution's Due Process and Equal Protection clauses. I should think that the failure of an experiment by the central court of another common law federal system merits the High Court's consideration.

6 (1993) 176 CLR 433.

7 Opeskin, who ascribes to me a plaintiff-favouring bias, is not entirely objective himself. His emphasis on planning suggests that he views the problem of substandard tort legislation from the insurer's point of view. Obviously, neither victims nor tortfeasors plan accidents; the planning is done by the real parties in interest, those who sell policies and pay

from me to believe that whatever helps plaintiffs is good law; I certainly do not equate maximum recovery with justice. But, having taught the subject for a number of years, I do not feel uncomfortable about making some value judgments.[8] I harbour serious doubts, for instance, about awarding punitive damages especially in design defect cases as courts in the United States occasionally do. But the American "tort reform" legislation has shown that legislatures are more likely to listen to powerful, well-organised lobbies than to the ordinary citizen. This is, of course, the reason why American state courts have questioned the constitutionality, not to mention the wisdom, of such legislation. But even if such redistributive schemes pass constitutional muster, one may well question the propriety of applying them in interstate[9] and international cases.[10]

III

As far as the interests of tort defendants are concerned, it seems to me that Australian law does not unduly favour forum shoppers.[11] There is, of course, no need for *forum non conviens* and anti-suit injunctions within Australia: crossvesting legislation permits the quick and easy (perhaps too quick and easy) transfer from one court to another. Thus, procedural devices exist to shelter defendants from unfair attacks; if anything, the defendant's reverse foreign shopping possibilities may well be too broad.[12] If further remedial steps should be necessary, legislators ought to consider toning down overly permissive jurisdictional statutes and abolishing the old English practice of tag jurisdiction.

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off claims. Essentially, then, he takes the position that insurers' interests deserve priority over those of injured parties.

8 The phrase "drags on the coat-tails of civilisation" is, however, not my own; I am quoting the words of Judge Kenison (of the New Hampshire Supreme Court) in *Clark v Clark*, 222 A2d 205 at 209 (NH 1966). See Juenger, above n3 at 203 for similarly telling observations by other American judges.

9 Considering that — as Opeskin points out — Australian law is already quite uniform, one wonders why total conformity should be a pressing issue and whether the game would be worth the candle. Also, the danger that choice-of-law approaches that are designed to resolve what amounts to a marginal Australian problem could be uncritically applied to international transactions cannot be gainsaid. Rules adopted solely for domestic consumption may play havoc on the international scene, where the policies behind competing rules diverge much more than within Australia.

10 Fears about Australia becoming a "good place for forum shopping" are of course overblown. As Lord Denning's remarks suggest, at least in tort cases — which constitute the bulk of the problem — Australia (unlike the United States) has little to offer to forum shoppers.

11 No doubt, there exists a certain disparity between the parties in tort cases, which in Australia — as in the United States — constitute the bulk of litigation that poses the problem of forum shopping. That disequilibrium, however, does not favour the plaintiff. To be sure, the victim has the advantage of selecting the place where the case is tried. But this advantage is far outweighed by the fact that insurers, the real parties to interest, are knowledgeable experts with vast resources, who can readily shoulder costs and fees that daunt ordinary tort plaintiffs and their counsel.

12 To put Opeskin's complaint about the lack of liberality Australian courts evince when applying the *forum non conveniens* doctrine in perspective, it is important to note that civil law countries do not recognise that doctrine at all, and that even in the United Kingdom courts no longer have discretion to dismiss cases if the plaintiff resides within the European Union.

And now a final word about Mrs Stevens. She was from New Zealand, pursuant to whose law she would have collected even less than the meagre recompense allowed by the New South Wales statute. How is that possible? Well, it is possible because Australia's High Court so decided. And, to my mind, its decision was correct. There is no rule to the effect that interstate and international cases should be treated alike. In fact, I am pleased to see that a better measure of justice was meted out in a transnational litigation than Mrs Stevens could have received had the case been entirely local to either New South Wales or New Zealand.

All this should make it obvious that I have but little sympathy with the Australian Law Reform Commission's proposal on tort choice of law, which was copied from the one adopted by the English and Scottish Law Commissions that likewise has failed to attract enough support to be enacted into positive law. On the whole, having received a good many conflicts cases, I have more confidence in the judiciary's instinct for what is fair in conflicts cases than in scholarly writing.[13] The judges' reasoning may not always be cogent, but their common sense and penchant for fairness are apt to produce sound results as they did in *Stevens v Head*.

13 The propensity of mechanical conflicts rules to cause mischief, and the failure of the drafters to anticipate such mischief, is vividly demonstrated by an example to which Opeskin refers, namely legislation that requires the courts to characterise statutes of limitations as substantive rather than procedural. To call for application of the *lex causae*, rather than the *lex fori*, is bound to increase the incidence of malpractice actions: since the internal controls of most law offices are geared to domestic limitation periods, some shorter foreign ones are likely to be missed. Moreover, legislation of this nature presupposes that everyone concerned can readily discern which substantive law applies. Given the notorious vagueness and obscurity of conflicts rules — not to mention such intractable issues as renvoi, characterisation and public policy — it will quite frequently be doubtful which state's law applies. Such legislation therefore diminishes, rather than enhances, certainty and predictability.