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Articles

Substance and procedure in multistate tort litigation

Mary Keyes*

Where a tort occurred outside the territory of the forum state, the Australian tort choice of law rule requires that the forum court must apply the law of the place where the tort occurred to resolve the dispute. Several exceptions to this principle are recognised, according to which the forum court may apply forum law instead of the otherwise applicable foreign law. This article considers these exceptions, focusing on the distinction between matters of substance, which may be governed by foreign law, and matters of procedure, which are always governed by forum law. The justifications for the separate treatment of procedural rules are critically examined. This article suggests that most of those justifications are weak and that, when taken together with the other exceptions that permit a forum court to apply its own law, they show that the Australian choice of law rule for multistate torts remains in need of further refinement.

Introduction

In multistate tort litigation,¹ the Australian choice of law rule requires the courts to apply the law of the place of the tort to determine the parties' rights and liabilities. If the tort occurred in a foreign country or a different state, the Australian courts should apply the law of that country or state.² There are a number of exceptions to the requirement that the court apply foreign law, which may result in the application of forum law to resolve some issues. One such exception is that forum law determines all matters of procedure, which are distinguished from matters of substance. Although the courts of the forum may apply foreign substantive law, they never apply foreign procedural law. Procedural laws differ substantially between the Australian states and territories,³ and between different countries. Since procedural rules often

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1 Multistate tort litigation includes intranational and international litigation. For the purposes of this article, there are few relevant points of distinction between intranational and international tort disputes. I will therefore refer generally to multistate tort litigation as encompassing both types of non-local disputes.

2 For the remainder of this article, for simplicity of expression I refer to this other country or state as the foreign state, and to its law as foreign law. This admittedly misdescribes intranational cases.

3 Most prominently, the procedural provisions of the Dust Diseases Tribunal Act 1989 (NSW) have generated much controversy, both in international and in intranational torts disputes, since their enactment. See, eg, *James Hardie Industries Pty Ltd v Grigor* (1998) 45 NSWLR 20 (CA); 16 NSWCCR 434; BC9802459 (an international dispute); *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400; 211 ALR 523; [2004] HCA 61; BC200408297 (an intrastate dispute). The civil liability legislation enacted by the states and territories also creates a

affect the parties' entitlement to relief,⁴ the treatment of procedural issues in multistate cases is often a matter of practical significance.

This article is presented in three parts. In Part I, I explain the relevance of forum law in the resolution of multistate torts. The Australian choice of law rule has changed substantially in the last decade, with the effect of minimising the effect of forum law. In this part, I describe some of the techniques which may lead to the application of forum law even though the Australian choice of law rule indicates that foreign law should be generally applied. Part II focuses on the exclusion of foreign procedural law, one of the more infamous exceptions to the application of foreign law. In this part, I examine the justifications for the distinction between procedural and substantive rules, and also consider how the distinction might be applied in the context of quantification of damages, an area in which its application is presently unsettled in Australia. Part III concludes by suggesting that the courts' continued application of techniques which justify application of forum law, including by the exclusion of foreign procedural rules, indicates that the reformed Australian tort choice of law rule may not be entirely satisfactory and may require further refinement.

I Forum law in multistate torts

The law of the forum has historically had an explicit and primary role in the choice of law rule for multistate torts. This is because of the rule in *Phillips v Eyre*,⁵ which required plaintiffs to establish that their claims were actionable under both the law of the forum and the law of the place of the delict. The rule in *Phillips v Eyre* was central in tort choice of law in England and Australia until recently. In English law, the rule was interpreted to require actionability under the law both of the forum and of the place of the tort.⁶ English law incorporated a flexible exception to the general rule, according to which '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'.⁷ Pursuant to the flexible exception, it was possible that the court might apply only forum law.⁸

There was considerable uncertainty about the precise nature of the rule in

number of differences in the legal regimes of the states and territories, many of which are likely to be characterised as procedural. For discussion and analysis, see M Davies, 'Choice of law after the civil liability legislation' (2008) 16 *TLJ* 104, especially at 109–15.

4 J Lever, 'Why Procedure is More Important than Substantive Law' (1999) 48 *ICLQ* 285.

5 (1870) LR 6 QB 1 at 28–9. For a fascinating discussion of the historical context of this case, see P Handford, 'Edward John Eyre and the Conflict of Laws' (2008) 32 *MULR* 822.

6 *Chaplin v Boys* [1971] AC 356; [1969] 2 All ER 1085; [1969] 3 WLR 322; *Kuwait Airways Corp v Iraqi Airways Co (No 3)* [2002] 2 AC 883; [2002] 3 All ER 209; [2002] 2 WLR 1353; [2002] UKHL 19.

7 *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 at 206; [1994] 3 All ER 749; [1994] 3 WLR 926.

8 *Chaplin v Boys* [1971] AC 356 at 379–80 per Lord Hodson; [1969] 2 All ER 1085; [1969] 3 WLR 322; *Johnson v Coventry Churchill International Ltd* [1992] 3 All ER 14. It was also possible that the flexible exception might lead to the application only of the law of the place of the tort, as occurred in *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 at 206; [1994] 3 All ER 749; [1994] 3 WLR 926.

Phillips v Eyre in Australian law.⁹ The better view is that if the court possessed subject matter jurisdiction according to both the law of the tort and the law of the forum, then the applicable law for a foreign tort was the law of the forum.¹⁰ Under both the English and the Australian interpretations of *Phillips v Eyre*, therefore, forum law was directly applicable.

Both Australian and English tort choice of law rules have been modified in recent years. The broad effect of those changes has been to minimise significantly the role of the law of the forum. The changes to the tort choice of law rules were based on widespread criticism that it was inappropriate to apply the law of the forum.¹¹

The High Court reformed the Australian tort choice of law rule for intranational torts in 2000 and for international torts in 2002. The tort choice of law rule now requires Australian courts to apply only the law of the place of the tort,¹² and does not allow any flexible exception.¹³ In developing the new choice of law rule, members of the High Court emphasised the virtues of the law of the place of the delict relative to the problems inherent in applying the law of the forum. The High Court has particularly stressed the importance of decisional uniformity irrespective of the plaintiff's choice of forum.¹⁴ Other considerations which influenced the court in adopting the law of the place of the tort rather than the law of the forum are that the rule is more certain,

9 M Davies, 'Exactly What is the Australian Choice of Law Rule in Torts Cases?' (1996) 70 ALJ 711; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 (*Pfeiffer v Rogerson*) at [20] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

10 *Gardner v Wallace* (1995) 184 CLR 95; 132 ALR 323; 70 ALJR 113; [1995] HCA 61; *Thompson v Hill* (1995) 38 NSWLR 714; 22 MVR 289; BC9506815; *Zhang v Renault Nationale des Usines Renault SA* [2000] NSWCA 188; BC200004224. Between 1988 and 1991, the law of the place of the tort was the governing law for intra-Australian torts. *Phillips v Eyre* was overruled in Australia by *Breavington v Godleman* (1988) 169 CLR 41; 80 ALR 362; [1988] HCA 40; BC8802620, in which a majority held that the law of the place of the tort was the governing law for intra-Australian torts. *Breavington v Godleman* was in turn overruled by *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1; 104 ALR 257; [1991] HCA 56; BC9102614 (*McKain v Miller*), in which a majority reinstated *Phillips v Eyre*.

11 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [83], [84], [86] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; 187 ALR 1; [2002] HCA 10; BC200200802 (*Renault v Zhang*) at [43]–[60]; *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54; BC200507308 (*Neilson v OPCV*) at [173] per Kirby J; Law Reform Commission, *Choice of Law*, ALRC 58, Commonwealth of Australia, Sydney, 1992, p 44.

12 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [102]; *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1; [2002] HCA 10; BC200200802 at [75].

13 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [79]–[80] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1; [2002] HCA 10; BC200200802 at [75]; *Neilson v OPCV* (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54; BC200507308 at [34] per McHugh J, [64], [91], [93] per Gummow and Hayne JJ.

14 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [17], [44], [83]–[85] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; *Neilson v OPCV* (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54; BC200507308 at [13] per Gleeson CJ, [89]–[91] per Gummow and Hayne JJ, [172], [173], [197], [199] per Kirby J, [271] per Heydon J.

predictable and simple;¹⁵ it gives effect to the reasonable expectations of the parties;¹⁶ and it respects the ability of states effectively to regulate local activities.¹⁷ In intranational torts, the text and structure of the Commonwealth Constitution have been held to require that the place of the tort should be the governing law.¹⁸

The only explicit recent Australian defence of the application of forum law in multistate torts is found in Callinan J's judgment in *Neilson v Overseas Projects Corporation of Victoria*, in which his Honour expressed his preference for applying the law of the forum if it were possible to do so, given the close connections between the controversy and the forum, compared to the weak connections to the place where the tort occurred.¹⁹ His Honour's view as to the desirability of applying forum law in the circumstances was affected by his perception of the difficulties that attend the proof of foreign law;²⁰ a perception that has been influential in the context of excluding foreign procedural rules.

Following these reforms to the Australian tort choice of law rule, the law of the forum now should have a much more limited application than under the rule in *Phillips v Eyre*. Forum law is directly applicable only where the court concludes that the tort occurred within the forum, for the purposes of the claim as the plaintiff has framed it.

In England, the rule in *Phillips v Eyre* has been largely displaced, first, by UK legislation, and more recently, by a European Community Regulation. The Private International Law (Miscellaneous Provisions) Act 1995 (UK) contained a general rule which stipulated that the law of the place of the tort was the governing law, for most international torts.²¹ This Act preserved a

15 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [44], [83] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1; [2002] HCA 10; BC200200802 at [66]; *Neilson v OPCV* (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54; BC200507308 at [92]–[95], [100] per Gummow and Hayne JJ, [172] per Kirby J.

16 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [75], [87] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; *Neilson v OPCV* (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54; BC200507308 at [172], [179] per Kirby J.

17 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [75], [83]–[86] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1; [2002] HCA 10; BC200200802 at [64] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; *Neilson v OPCV* (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54; BC200507308 at [172] per Kirby J.

18 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [67].

19 *Neilson v OPCV* (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54; BC200507308 at [257]–[258]. Heydon J agreed with Callinan J on this point: at [275]. Other members of the majority also concluded that forum law should be applied. Some of the other members of the majority, like Callinan J, referred to the close connections between the dispute and Australia, relative to the weak connections to the place of the tort: *ibid*, at [17] per Gleeson CJ, [127] per Gummow and Hayne JJ. Unlike Callinan J, none of the other members of the majority explicitly stated a preference for applying the law of the forum *per se*.

20 *Neilson v OPCV* (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54; BC200507308 at [253].

21 Section 11. This legislation does not displace the common law choice of law rule as it applies to international defamation cases: s 13.

flexible exception, which allowed the courts to apply the law of a legal system other than that of the place of the tort, where it was 'substantially more appropriate' to apply the law of that other legal system.²² This exception led to the application of the law of the forum in some cases.²³ In the United Kingdom, choice of law for international torts is now almost exclusively governed by the Rome II Regulation,²⁴ according to which the law of the forum *per se* has no explicit role. The general rule is that the law of the place in which the damage occurs is the applicable law,²⁵ subject to two exceptions. Under the first exception, where the parties are habitually resident in a country other than the place where the damage occurred, the law of the place of their joint residence shall apply.²⁶ Under the second exception, if the tort is 'manifestly more closely connected' with a legal system other than the place of damage, or the place of the parties' joint residence, the law of the place of closest connection is the applicable law.²⁷ Either exception might lead to the application of forum law.

The residual role of forum law: Exceptional cases or escape devices?

Australian courts may still apply forum law to resolve various aspects of multistate tort disputes, even if foreign law is the governing law of the tort. There are a number of circumstances in which forum law may be applied even though it appears that the tort has occurred outside the forum and therefore that foreign law should determine liability. This article is principally concerned with the distinction drawn between substance and procedure, which leads to the exclusion of foreign procedural rules and to the application of forum procedural rules. Before turning to a detailed consideration of that distinction, I outline briefly six other techniques which may lead to the application of forum law, even though the tort has occurred outside the forum and so it appears that foreign law should be applied.

1 Manipulation of the connecting factor in multistate torts

The connecting factors refer to the connections between multistate disputes and legal systems. These connections form the basis of rules in the conflict of laws. In multistate torts, the main connecting factor is the place of the tort. There are significant difficulties associated with identifying the place where a tort is committed.²⁸ The joint judgment in *Pfeiffer v Rogerson* acknowledged that the place of the tort may be both ambiguous and diverse.²⁹ The test for

²² Section 12.

²³ Eg, *Edmunds v Simmonds* [2001] 1 WLR 1003; [2001] RTR 24; [2001] PIQR P21.

²⁴ Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II Regulation). As to the scope of this Regulation, see J Fawcett and J Carruthers, *Cheshire, North and Fawcett: Private International Law*, 14th ed, Oxford University Press, Oxford, 2008, pp 775–88.

²⁵ Rome II Regulation, Art 4(1).

²⁶ Rome II Regulation, Art 4(2). Although expressed in mandatory terms, Art 4(2) is subject to Art 4(3).

²⁷ Rome II Regulation, Art 4(3).

²⁸ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575; 194 ALR 433; [2002] HCA 56; BC200207411 at [43] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

²⁹ *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at

locating the tort is commonly indeterminate: the court is required to locate 'the act on the part of the defendant which gives the plaintiff his cause of complaint'.³⁰ This indeterminacy means the location of the tort is often arguable. Because the place of the tort is often arguable, and because it determines the governing law,³¹ the parties have both scope and incentives to dispute the location of the tort.³² If the court accepts that the tort occurred within the forum, then forum law will apply as the governing law. One simple technique for localising the tort within the forum is for the plaintiff to limit its claim only to the damage allegedly suffered in the forum.³³ This is especially effective where the tort is located by reference to the place where loss or damage is suffered. This occurs in cases of multistate defamation, when the tort is located by the place of publication,³⁴ and of multistate misrepresentation, when the tort is located by the place where the representation is received.³⁵

Where the location of the tort is fortuitous, a court is especially likely to be inclined not to apply the law of that place.³⁶ In legal systems which permit the application of a flexible exception, this is possible. The High Court has repeatedly rejected the flexible exception as being unacceptably uncertain and unpredictable.³⁷ It has, however, applied other techniques to justify the application of forum law, in at least one case in which the flexible exception

[81], [82] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ. The problem of identifying the place of the tort in a complex fact pattern arose in a recent appeal to the High Court, but the court disposed of the appeal without addressing this problem directly: *Puttick v Tenon Ltd* (2008) 238 CLR 265; 250 ALR 582; [2008] HCA 54; BC20080990.

30 *Jackson v Spittall* (1870) LR 5 CP 542 at 552, approved in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 567 per Mason CJ, Deane, Dawson and Gaudron JJ; 97 ALR 124; [1990] HCA 55; BC9002894.

31 It is also significant for establishing jurisdiction in international torts disputes. The place of the tort is one basis on which the Australian courts assert their jurisdiction over foreign defendants on the basis of service out of the jurisdiction: eg, Federal Court Rules 1979 (Cth) O 8 r 2 Item 5; Uniform Civil Procedure Rules 2005 (NSW) r 11.2, Sch 6, para (e). The place of the tort determines the governing law, which is an important factor in the court's decision whether to decline jurisdiction: *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 564–5; 97 ALR 124; [1990] HCA 55; BC9002894.

32 G Davis, 'John Pfeiffer Pty Ltd v Rogerson: Choice of Law at the Dawning of the 21st Century' (2000) 24 MULR 982 at 1007.

33 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575; 194 ALR 433; [2002] HCA 56; BC200207411; *Porter v Bonojero Pty Ltd* [2000] VSC 265; BC200003523.

34 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575; 194 ALR 433; [2002] HCA 56; BC200207411; *Gorton v Australian Broadcasting Corporation* (1973) 22 FLR 181 at 183; 1 ACTR 6. The common law rule is modified for intra-Australian cases by the uniform Defamation Acts in Australia. Under this legislation, the applicable law in cases of intra-Australian multistate defamation is the law of the jurisdiction with which the harm occasioned by the publication has its closest connection: eg, Defamation Act 2005 (NSW) s 11(2).

35 *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd* (1993) 43 FCR 439; 116 ALR 163; (1993) ATPR 41-259; BC9304902; *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd* (1996) 68 FCR 539; 149 ALR 134; (1996) ATPR 41-525; BC9604067.

36 *Chaplin v Boys* [1971] AC 356 at 379–80 per Lord Hodson, 388 per Lord Wilberforce; [1969] 2 All ER 1085; [1969] 3 WLR 322.

37 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [79]–[80]; *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1; [2002] HCA 10; BC200200802 at [75]; *Neilson v OPCV* (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54; BC200507308 at [34], [64], [91], [93], [283].

would have rendered the same result.³⁸

2 Applying foreign choice of law rules to justify application of forum law; or, renvoi

Choice of law rules sometimes require the courts to apply foreign law. This raises the question of whether the reference to foreign law is a reference to foreign domestic law, or to the foreign choice of law rule. Until recently, it was assumed that the reference was almost invariably to foreign domestic law. In *Neilson v Overseas Projects Corporation of Victoria*, an international tort dispute, the High Court held that where foreign law was the governing law, the Australian court should apply all of the foreign law, including its choice of law rules, in the same way that the foreign court would apply it.³⁹ The application of the foreign choice of law rule might then lead the forum court to apply forum law, if that is what the foreign court would do. The conclusion that an Australian court should apply the foreign law in the same way as a foreign court is compatible with what private international lawyers refer to as double or total renvoi, or the foreign court theory.⁴⁰ Critically, the result of treating the reference to Chinese law in *Neilson* as a reference to the Chinese choice of law rule, rather than the Chinese domestic rule, was that the law of the forum was applied to determine the issue in dispute.⁴¹

3 The presumption of similarity between foreign law and forum law

In *Chaplin v Boys*, Lord Wilberforce noted that practical difficulties associated with proving foreign law could be minimised by the rule that forum law applied if the foreign law was not proven.⁴² In *Neilson*, the content of the relevant foreign rule was adequately proven, but the evidence as to its meaning and application was held to be insufficient.⁴³ A majority of the High Court held that in the absence of evidence as to the relevant foreign law, a

38 *Neilson v OPCV* (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54; BC200507308. In concluding that forum law should be applied rather than foreign law, some members of the High Court were influenced by factors that are relevant to determining the application of the flexible exception in English law: M Keyes, 'Foreign Law in Australian Courts' (2007) 15 *TLJ* 9 at 29–30 (Keyes, 'Foreign Law').

39 *Neilson v OPCV* (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54; BC200507308 at [11] per Gleeson CJ, [102] per Gummow and Hayne JJ, [171], [174] per Kirby J, [261] per Callinan J, [271] per Heydon J. For comment, see M Davies, '*Neilson v Overseas Projects Corporation of Victoria Ltd: Renvoi and Presumptions about Foreign Law*' (2006) 30 *MULR* 244; Keyes, 'Foreign Law', above n 38.

40 For a detailed explanation of the doctrine of renvoi, see M Davies, A S Bell and P L G Brereton, *Nygh's Conflict of Laws in Australia*, 8th ed, LexisNexis Butterworths, Sydney, 2010, Ch 15. Members of the majority in *Neilson* preferred not to use the terminology of renvoi: *Neilson v OPCV* (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54; BC200507308 at [99] per Gummow and Hayne JJ, [175] per Kirby J, [277] per Heydon J.

41 The conclusion that forum law should be applied was justified by a bare majority of the court by the application of another exclusionary technique, the presumption of similarity between forum law and foreign law.

42 *Chaplin v Boys* [1971] AC 356 at 388; [1969] 2 All ER 1085; [1969] 3 WLR 322.

43 Four members of the court held that the evidence as to the meaning of the Chinese rule was not sufficient: *Neilson v OPCV* (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54; BC200507308 at [33] per McHugh J, [207] per Kirby J, [248] per Callinan J, [267] per Heydon J. Gleeson CJ held that the evidence was just sufficient (at [17]), and Gummow and Hayne JJ suggested without deciding that the evidence may have been exhaustive (at [124]–[126]).

presumption of similarity between foreign and forum law applied.⁴⁴ Therefore, forum law may be applied if the parties have not fully proven the content or meaning of the foreign law. For example, in *Neilson*, a majority applied Australian principles of statutory interpretation to the applicable Chinese legislation, and concluded that the Chinese legislation as so interpreted required the application of substantive forum law.⁴⁵

The presumption of similarity allows plaintiffs some scope to invoke the application of forum law, because in the absence of proof of foreign law, forum law is applied.⁴⁶ The presumption does not necessarily lead to the application of forum law, but it casts a burden of disproving similarity between forum and foreign law on to the defendant.⁴⁷

4 Characterisation

Some tort disputes give rise to alternative claims, for example, in contract⁴⁸ and under statute.⁴⁹ In adversarial systems, the plaintiff chooses which claims to pursue and, in doing so, has some capacity to determine the applicable law. This is so because the characterisation of the claim, which determines what choice of law rule applies, is usually determined by the way the plaintiff's claim is legally framed. For example, *Pfeiffer v Rogerson* concerned a simple workplace injury. The plaintiff had available to him alternative claims against his employer in contract and tort. He pursued only his claim in tort, but if he had pursued his claim in contract it is likely that the result would have been different.⁵⁰ In *Sweedman v Transport Accident Commission*, an interstate dispute concerning the consequences of a car accident, a majority of the High Court applied the law of the forum rather than the law of the place of the tort,

44 Ibid, at [125] per Gummow and Hayne JJ, [249] per Callinan J, [267] per Heydon J.

45 Ibid, at [125], [127] per Gummow and Hayne JJ, [249], [251] per Callinan J, [275] per Heydon J.

46 The parties may also informally agree to the application of forum law, if neither party pleads or proves the relevant foreign law: *Tolofsen v Jensen* [1994] 3 SCR 1022; (1994) 120 DLR (4th) 289 at 307 per La Forest J, 326 per Major J (with whom Sopinka J agreed). There are some limits to the effectiveness of this strategy. In *Damberg v Damberg*, Heydon JA held that the court is not bound to accept admissions of fact, and that it will be reluctant to act on admissions of fact 'where there is reason to question the correctness of the facts admitted or agreed': (2001) 52 NSWLR 492 at 519-22; [2001] NSWCA 87; BC200102714.

47 Davies, above n 39, at 264. See, eg, *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 1900 (Comm); [2006] 2 Lloyd's Rep 629 at [431].

48 Eg, *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351; *Busst v Lotsirb Nominees Pty Ltd* [2003] 1 Qd R 477; [2002] QCA 296; BC200204643; *O'Driscoll v J Ray McDermott* [2006] WASCA 25; BC200600796.

49 There are a number of situations in which statutes may provide alternative bases of liability to a common law claim in tort. These include where the claim is for misrepresentation, in which case the plaintiff is likely also to have a viable claim for breach of the Trade Practices Act 1974 (Cth) s 52(1).

50 He unsuccessfully attempted on appeal to the High Court to include in the alternative a claim under contract. This attempt was unsuccessful: *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [5].

essentially because the plaintiff claimed under forum legislation.⁵¹ The nature of the claim under that legislation effectively dictated its characterisation.⁵²

In this case, the Suttons, residents of Victoria, were injured when their car, registered in Victoria, was involved in an accident in New South Wales with a car driven by Mrs Sweedman, a NSW resident. The car Mrs Sweedman was driving was registered in New South Wales. Mr and Mrs Sutton made claims for compensation for their injuries from the Transport Accident Commission (the TAC), the Victorian statutory authority responsible for administering the Victorian legislation regulating transport accidents.⁵³ The TAC paid the Suttons' claims, and brought proceedings in the Victorian courts seeking to recover a statutory indemnity from Mrs Sweedman. That claim was created under the Victorian legislation.⁵⁴ New South Wales law had no equivalent statutory scheme.

The majority of the High Court decided this appeal by focusing on the nature of the TAC's claim.⁵⁵ The majority characterised the TAC's claim for an indemnity as equivalent to a claim in quasi-contract;⁵⁶ and held that the obligation to indemnify was 'distinct from any underlying claim in tort'.⁵⁷ The majority held that the governing law for such claims is the law of the place with which the obligation to indemnify is most closely connected,⁵⁸ and concluded that the obligation was most closely connected to Victoria.⁵⁹ In dissent, Callinan J strongly objected, referring to authority that 'substance rather than form may be determinative of a question of choice of law, that the true, real, or substantial issues in dispute, of law and fact, govern the choice, and not the nomenclature of the cause of action'.⁶⁰ His Honour held that the claim should be characterised by reference to the facts on which the claim was based, rather than on the form of the claim. Callinan J concluded that the facts which constituted the claim were tortious and that the governing law should be the law of the place of the tort.⁶¹

One may sympathise with the majority in *Sweedman*. What else *can* a court in an adversarial system do, other than determine the claim which is actually brought by the claimant? This case draws attention to a difficult problem which commonly arises in multistate cases, perhaps more commonly in

51 (2006) 226 CLR 362; 224 ALR 625; [2006] HCA 8; BC200601021 (*Sweedman*). The plaintiff, the Transport Accident Commission, claimed against the defendant under the Transport Accident Act 1986 (Vic) s 104(1), seeking a statutory indemnity (a claim created by that legislation).

52 For discussion and criticism, see M Keyes, 'Statutes, Choice of Law and the Role of Forum Choice' (2008) 4 *J Private Int L* 1 at 23–4 (Keyes, 'Statutes').

53 Transport Accident Act 1986 (Vic).

54 *Ibid*, s 104(1).

55 *Sweedman* (2006) 226 CLR 362; 224 ALR 625; [2006] HCA 8; BC200601021 at [9].

56 *Ibid*, at [29].

57 *Ibid*, at [27].

58 *Ibid*, at [29].

59 This was because the obligation was created by Victorian legislation, any amount recovered would be returned to the Victorian fund, and the obligation arose after the commission had made a payment under the Victorian legislation to Victorian residents: *ibid*, at [30], [32].

60 *Ibid*, at [116], citing *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387 at 407, 418; [1996] 1 All ER 585 at 604, 614.

61 *Sweedman* (2006) 226 CLR 362; 224 ALR 625; [2006] HCA 8; BC200601021 at [114]–[115].

multistate torts than in other areas of private international law: the status that should be given to peculiar statutory claims, defences, or remedies, which do not have exact or even rough equivalents in forum or in foreign law, as the case may be. Relatedly, the creation of specialist tribunals and courts which dispense idiosyncratic types of relief following idiosyncratic processes, has caused a problem for private international law which largely assumes that rights, remedies, and processes for achieving those remedies are roughly comparable between legal systems. The courts' options in such cases are to identify analogous even if not equivalent claims, remedies or processes which are known to forum law, or to refuse altogether to consider the foreign claim, remedy or process.⁶² The latter option is one that appears to be especially attractive in the context of excluding foreign procedural law, as is further explored below.

5 Exclusion of foreign laws that infringe forum public policy

The courts have a general discretion to decline to apply particular foreign laws which infringe the forum's public policy. This discretion should be 'exercised exceptionally and with the greatest circumspection'.⁶³ Carter suggested that, compared to some of the other techniques by which foreign law may be excluded, 'public policy may be seen as having the disadvantageous merit of being blatantly frank and obvious'.⁶⁴ The Australian courts have applied this exception very rarely.⁶⁵ It is not applicable at all in intra-Australian torts cases⁶⁶ and it seems unlikely to arise in international torts cases.⁶⁷ If foreign law is excluded on the basis that it infringes forum public policy, the result is usually that forum law applies in default.⁶⁸

In *Renault v Zhang*, the joint judgment of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ suggested that ensuring compliance with the forum's public policy in the regulation of multistate torts was the basis of the justiciability requirement imposed by *Phillips v Eyre*, but expressed the view that this was no longer a valid justification for retaining explicit reference to

62 In *Pfeiffer v Rogerson*, the joint judgment stated that 'in some cases, if the forum does not provide curial relief of the kind provided by the law of the state or territory in which the events occurred, that forum would be a clearly inappropriate forum': (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [95]. See also at [94].

63 *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883; [2002] 3 All ER 209; [2002] 2 WLR 1353; [2002] UKHL 19 at [18] per Lord Nicholls.

64 P B Carter, 'The Role of Public Policy in English Private International Law' (1993) 42 *ICLQ* 1 at 2.

65 R Mortensen, *Private International Law in Australia*, LexisNexis, Sydney, 2006 (Mortensen, *Private International Law*), p 218.

66 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [63].

67 *Puttick v Fletcher Challenge Forests Ltd* [2006] VSC 370; BC200608206 at [31]. However, the public policy exclusion was applied by the House of Lords in *Kuwait Airways Corporation v Iraqi Airways Co (No 3)* [2002] 2 AC 883; [2002] 3 All ER 209; [2002] 2 WLR 1353; [2002] UKHL 19 (a claim in conversion).

68 Mortensen, *Private International Law*, above n 65, p 218. In *Kuwait Airways Corporation v Iraqi Airways Co (No 3)* the House of Lords did not apply forum law in default, but rather applied the foreign law excluding the aspect of foreign law which was held to be offensive to forum policy: [2002] 2 AC 883; [2002] 3 All ER 209; [2002] 2 WLR 1353; [2002] UKHL 19 at [111], [168]. For criticism, see J M Carruthers and E B Crawford, '*Kuwait Airways Corporation v Iraqi Airways Company*' (2003) 52 *ICLQ* 761 at 772.

forum law at the choice of law stage.⁶⁹ Their Honours suggested that any concern the forum court may have about whether the content of the relevant foreign law infringes forum public policy should be addressed at the jurisdictional stage.⁷⁰ It is difficult to see how this concern could be accommodated within the framework of the existing Australian jurisdictional principles, but it might be encompassed within the technique discussed next, concerning the exclusion of laws that enforce foreign governmental interests.

6 Exclusion of foreign laws that enforce foreign governmental interests

The courts will not enforce a law which involves the enforcement of foreign governmental interests; namely, interests ‘which arise from certain powers peculiar to government’.⁷¹ It is unlikely that such interests would be directly implicated in transnational tort disputes. There is some confusion as to the true nature of the rule excluding foreign laws that enact foreign governmental interests, and in particular as to whether it is a technique of choice of law or a limitation on the courts’ subject-matter jurisdiction.⁷² It seems likely that this concern will be addressed in future at the jurisdictional, rather than at the choice of law, stage. In some multistate tort cases, Australian courts have held that they should not adjudicate disputes involving the application of foreign legislation which enacts specific policy objectives, and have denied jurisdiction accordingly.⁷³

The continuing significance of forum law in multistate tort litigation

There remains in Australia little explicit support for the application of the law of the forum *per se* to determine multistate tort disputes. That is wholly appropriate: the application of forum law is chauvinistic and incompatible with the internationalist objectives of private international law.⁷⁴ The Australian choice of law rule for multistate torts now contains no direct reference to the law of the forum; because the flexible exception has not been accepted as part of Australian law, forum law cannot be applied on the basis that it is the legal system with the closest connection to the parties and the

69 *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1; [2002] HCA 10; BC200200802 at [59]–[60].

70 *Ibid.*, at [60].

71 *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 42; 78 ALR 449; [1988] HCA 25; BC8802610.

72 L Collins (Ed), *Dicey, Morris & Collins on the Conflict of Laws*, 14th ed, Sweet & Maxwell, London, 2006, pp 101–2.

73 *Amwano v Parbery* (2005) 148 FCR 126; 226 ALR 767; [2005] FCA 1804; BC200510770 at [18]. See similarly *Puttick v Fletcher Challenge Forests Ltd* [2006] VSC 370; BC200608206 at [17], [32], [35]–[36], affirmed *Puttick v Fletcher Challenge Forests Ltd* (2007) 18 VR 70; [2007] VSCA 264; BC200710253 at [42], [100]. On further appeal, the High Court took a different view, emphasising that ‘considerations of geographical proximity and essential similarities between legal systems, as well as the legislative provisions now made for the determination of some trans-Tasman litigation, all point against treating the identification of New Zealand law as the *lex causae* as a sufficient basis on which to conclude that an Australian court is a clearly inappropriate forum to try a dispute’: (2008) 238 CLR 265; 250 ALR 582; [2008] HCA 54; BC20080990 at [31]. That statement was *obiter*, because the majority concluded that the defendant had not established that foreign law was the governing law.

74 H Yntema, ‘The Objectives of Private International Law’ (1957) 35 *Can Bar Rev* 721 at 735.

dispute. The effectiveness of the reform to the choice of law rule has been somewhat eroded in recent cases in which the High Court has applied forum law to resolve multistate tort disputes, by resort to several of the techniques outlined above.

The most serious objection to the application of forum law in multistate disputes is that the principal control on doing so is supplied by the jurisdictional rules. The Australian jurisdictional principles are unequal to this task, especially in the context of tort litigation.⁷⁵ Consequently, forum law might be applied in circumstances where that is inappropriate. Until the jurisdictional principles for multistate torts are reformed, the courts should be especially careful in applying any of the techniques which lead to the application of forum law.

Critics of the jurisdiction-selecting method of choice of law derided the use of the techniques described above to exclude the application of foreign law as 'escape devices', which inappropriately expanded the application of forum law.⁷⁶ The escape devices were criticised for detracting attention from fundamental defects in the general jurisdiction-selecting choice of law method, as well as in specific choice of law rules.⁷⁷ They were also criticised for creating uncertainty and unpredictability.⁷⁸ These criticisms are now generally accepted,⁷⁹ sometimes pragmatically.⁸⁰ Following reform to the choice of law rule in tort, which was explicitly justified on the basis that forum

⁷⁵ The principles of establishing jurisdiction in international disputes require only weak connections to the forum. In most of the superior courts, it suffices that the defendant has suffered damage or loss within the forum as a consequence of the tort, wherever the tort occurred: eg, Federal Court Rules 1979 (Cth) O 8 r 2 Item 5; Uniform Civil Procedure Rules 2005 (NSW) r 11.2, Sch 6, para (e); Uniform Civil Procedure Rules 1999 (Qld) r 124(1)(l); Supreme Court (General Civil Procedure) Rules 2005 (Vic) r 7.01(1)(j). The Australian courts have a discretion to decline jurisdiction according to the principle of *forum non conveniens*, but they rarely exercise that discretion, especially in international tort cases; in personal injuries litigation, they are especially unlikely to decline jurisdiction: M Keyes, *Jurisdiction in International Litigation*, Federation Press, Sydney, 2005 (Keyes, *Jurisdiction*), pp 168, 173. In intranational tort litigation, the Service and Execution of Process Act 1992 (Cth) s 15(1) facilitates service of the process of any of the Australian courts within Australia, with no nexus requirement. It should be easier for a defendant in intranational litigation to succeed in achieving a transfer of proceedings to another court within Australia than for a defendant to secure a stay in international litigation: Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth) s 5 and equivalent legislation of the same name enacted by the states and territories.

⁷⁶ B Currie, 'Notes on Methods and Objectives in the Conflict of Laws' in *Selected Essays on the Conflict of Laws*, Duke UP, Durham, NC, 1963, p 181. Other writers have also noted that the exceptions can be used in a way that undermines choice of law rules: eg, Fawcett and Carruthers, above n 24, p 121 (referring to the public policy doctrine). For a detailed analysis of the use of escape devices in order to justify the application of the law of the forum in torts cases, see R Mortensen, 'Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches' (2006) 55 *ICLQ* 839 (Mortensen, 'Homing Devices').

⁷⁷ D Cavers, 'A Critique of the Choice-of-Law Problem' (1933) 47 *Harvard L Rev* 173 at 182-7. See similarly Carter, above n 64, at 1, 10 (arguing that the public policy doctrine 'denotes shortcomings in choice of law rules').

⁷⁸ Currie, above n 76, p 181.

⁷⁹ P B Carter, 'Rejection of Foreign Law: Some Private International Law Inhibitions' (1984) 55 *British Yearbook of Int L* 111 at 125 (referring to public policy as 'the easy escape to the familiar comforts of the *lex fori*'); ALRC, above n 11, p 6.

⁸⁰ Eg, *Dicey, Morris & Collins* states that the doctrine of *renvoi* 'may be a useful means of arriving at a result that is desired for its own sake': above n 72, p 82.

law ought not to be applied to resolve multistate torts, it is unfortunate that these techniques are being applied with some regularity.

The techniques discussed in this part are not specific to multistate tort problems. They can be applied in any area of private international law. Little attention has been paid in the commentary to whether different factors should be taken into account in determining the application of these techniques in different areas of law. The answer should probably be that, while similar factors are generally relevant, specific factors should be taken into account depending on the relevant objectives for choice of law in that particular area of law.⁸¹ Prior to the reform of the tort choice of law rule, these exceptions had a relatively limited application in multistate torts, because of the prominence of forum law as the governing law.⁸² Following that reform, the exceptions have a potentially greater scope. This raises the issue of the implications of the reform to the choice of law rule for the way the exceptions are applied in multistate tort litigation.⁸³ The next part considers this issue in the context of the rule distinguishing foreign rules of substance from those of procedure and excluding the application of foreign procedural rules.

II Substance and procedure

It is fundamental in private international law that matters of procedure are differentiated from matters of substance.⁸⁴ The courts of the forum always apply their own procedural law. They do not apply foreign procedural law, even if foreign law is the law of the cause.⁸⁵ As can be seen, the distinction has two related but separate aspects, each of which emphasises a different facet of the principle. The first aspect emphasises that forum law determines issues of procedure.⁸⁶ Local procedural law thus has an effectively mandatory status; logically, there is no scope for the application of foreign law. The second aspect emphasises that rules of the foreign governing law which are procedural are inapplicable.⁸⁷ This aspect requires that the court should

81 For example, the exceptions should have a very limited operation in international contract disputes where there is an effective express choice of law, because of the strong emphasis given to bilateral party choice of law in that area: *Helmsing Schiffarts GmbH & Co KG v Malta Drydocks Corporation* [1977] 2 Lloyd's Rep 444 at 450.

82 See, eg, *Mutual Mercantile Insurance v Neilson* (2004) 28 WAR 206; [2004] WASCA 60; BC200401664 at [34], discussed in M Keyes, 'The Doctrine of Renvoi in International Tort' (2005) 13 *TLJ* 1 at 9–10 (referring to the renvoi exception); Mortensen, 'Homing Devices', above n 76, at 868 (referring to the public policy exception). In Australian law, prior to the reform of the rule in *Phillips v Eyre*, foreign law had to be consulted to ascertain whether the claim was justiciable, and therefore the exceptions had some relevance.

83 Mortensen defended the application of some of the exceptions, following reform to the tort choice of law rule, as being consistent with precedents established prior to that reform: 'Homing Devices', above n 76, at 851 (referring to characterisation), at 855 (referring to location of the tort).

84 *Dicey, Morris & Collins*, above n 72, p 177; Fawcett and Carruthers, above n 24, p 75; Davies et al, above n 40, p 333.

85 *Phillips v Eyre* (1870) LR 6 QB 1 at 29.

86 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [131] per Kirby J; *Dicey, Morris & Collins*, above n 72, p 177.

87 *Dicey, Morris & Collins*, above n 72, p 177. The characterisation of the foreign law to determine whether it is a matter of procedure should be done according to the foreign law: *ibid.* This point is not settled, though. Sykes and Pryles suggested that English courts had in

consider whether the foreign rule is procedural and, if so, not apply it. One significant, though unrecognised, cause of confusion in this area is that these two aspects are insufficiently differentiated. While they are clearly related,⁸⁸ the tension between them is seldom acknowledged, much less debated. Consequently, it is often unclear whether the distinction depends upon rationalising the application of forum procedural law or justifying the exclusion of foreign law. As will be seen, these involve separate considerations.

In practice, the focus is on whether foreign law should be excluded,⁸⁹ not on whether forum law covers the field and therefore leaves no place for the application of foreign law.⁹⁰ The issue arises because the defendant argues that some aspect of the governing foreign law is either applicable as a matter of substance⁹¹ or inapplicable as a matter of procedure,⁹² as the case may be. The court then characterises the relevant rule of foreign law to determine whether it is substantive or procedural.

In common law jurisdictions, procedure was historically defined very broadly.⁹³ This broad definition was regarded as one of the less subtle techniques by which the courts extended the application of forum law.⁹⁴ Until 2000, the broad definition of procedure prevailed in Australia.⁹⁵ In keeping

practice applied English law to the question of characterisation: E I Sykes and M C Pryles, *Australian Private International Law*, 3rd ed, Law Book Co, Sydney, 1991, p 256. Recent Australian authority suggests that the *lex fori* applies to determine whether the foreign law is procedural: *Garsec Pty Ltd v His Majesty the Sultan of Brunei* (2008) 250 ALR 682; [2008] NSWCA 211; BC200807985 at [151]; *Hamilton v Merck and Co Inc* (2006) 66 NSWLR 48; 230 ALR 156; [2006] NSWCA 55; BC200602118 at [43]–[52] per Spigelman CJ, [126] per Handley JA. A majority of Australian commentators now take the view that characterisation is a matter for forum law: Davies et al, above n 40, p 334; M Tilbury, G Davis and B Opeskin, *Conflict of Laws in Australia*, Oxford University Press, Melbourne, 2002, p 348.

88 The two aspects are usually discussed as though there were no inconsistency between them. There has been little recognition of the difference in these two aspects, and consequently little consideration of the relationship. It may be that the foreign procedural rule must not be applied and *therefore* forum law applies (even if only by default). On the other hand, it may be that the foreign procedural rule must not be applied, because forum law applies. The latter proposition is consistent with some statements in *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [48].

89 Eg, *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [35]; *McKain v Miller* (1991) 174 CLR 1 at 40; 104 ALR 257; [1991] HCA 56; BC9102614.

90 Mortensen urges that this focus on the foreign law is incorrect, because according to his analysis the purpose of the distinction is to exclude from consideration any procedural law other than that of the forum: *Private International Law*, above n 65, p 178.

91 As in *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351; *McKain v Miller* (1991) 174 CLR 1; 104 ALR 257; [1991] HCA 56; BC9102614; and *Stevens v Head* (1992) 176 CLR 433; 112 ALR 7; [1993] HCA 19; BC9303608.

92 As in *Harding v Wealands* [2007] 2 AC 1; [2006] 4 All ER 1; [2006] 3 WLR 83; [2006] UKHL 32.

93 *Dicey, Morris & Collins*, above n 72, p 177, citing the first edition of Dicey (*A V Dicey, A Digest of the Law of England with Reference to the Conflict of Laws*, Stevens and Sons, London, 1896, p 712). The traditional distinction was between matters of right and remedy: *Huber v Steiner* (1835) 2 Bing NC 202 at 210; 132 ER 80; [1835–42] All ER Rep 159.

94 ALRC, above n 11, p 122.

95 In *McKain v Miller*, a majority applied a traditional analysis to conclude that the interstate

with developments in other common law jurisdictions, in Australian law procedure is now defined narrowly. The narrow definition was endorsed by the High Court in the same cases that reformed the tort choice of law rule.⁹⁶ Procedural rules are now defined as only those rules which are ‘directed to governing or regulating the mode or conduct of court proceedings’.⁹⁷ Unfortunately, the court defined substantive rules in two, not perfectly compatible, ways: first, as anything that is not procedural, and second, as ‘laws that bear upon the existence, extent or enforceability of remedies, rights and obligations’.⁹⁸ The second of these definitions seems particularly likely to give rise to problems of interpretation and application.

A popular variant of the second definition of substantive laws proposes that if the rule in question is outcome-determinative, it must be substantive.⁹⁹ The outcome-determinative test is obviously flawed because many issues that are conventionally treated as procedural have a significant impact on outcomes. Indeed, in every case in which the parties dispute the character of a foreign rule, this is precisely because it will be outcome-determinative.

Justifications for treating substance and procedure differently

The literature reveals four main justifications which motivate the two aspects of the distinction between substance and procedure.¹⁰⁰ The first three justify the application of forum law: first, as a matter of the convenient and efficient conduct of proceedings in the forum; second, as an incident of the parties’ choice of forum; third, as an application of the presumption that legislation has a territorially confined application. The fourth justification rationalises

limitation period was procedural and therefore inapplicable: (1991) 174 CLR 1; 104 ALR 257; [1991] HCA 56; BC9102614. In *Stevens v Head* a majority held that interstate legislation on quantum of damages was procedural: (1992) 176 CLR 433; 112 ALR 7; [1993] HCA 19; BC9303608.

96 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [99]–[100] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ, [133], [161] per Kirby J, [192] per Callinan J; *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1; [2002] HCA 10; BC200200802. This narrow definition had been proposed by minorities in earlier decisions, particularly, *McKain v Miller* (1991) 174 CLR 1 at 26–7 per Mason CJ, 46, 52 per Deane J, 56 per Gaudron J; 104 ALR 257; [1991] HCA 56; BC9102614; *Stevens v Head* (1992) 176 CLR 433 at 445, 451 per Mason CJ, 462 per Deane J, 469 per Gaudron J; 112 ALR 7; [1993] HCA 19; BC9303608.

97 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [99] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ. See similarly [133], [161] per Kirby J and [192] per Callinan J; *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1; [2002] HCA 10; BC200200802 at [75], but see also [76], suggesting a possible reservation in relation to quantification of damages in international problems (discussed further below at text accompanying nn 150–77).

98 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [102] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ, and see also [99]. See similarly [161] per Kirby J.

99 W W Cook, ‘“Substance” and “Procedure” in the Conflict of Laws’ (1933) 42 *Yale LJ* 333 at 346; *Stevens v Head* (1992) 176 CLR 433 at 469 per Gaudron J; 112 ALR 7; [1993] HCA 19; BC9303608.

100 These are the justifications which are most frequently identified in the commentary and case law, and which have been most influential in Australia. For an extensive consideration of justifications, see S Szászy, ‘The Basic Connecting Factor in International Cases in the Domain of Civil Procedure’ (1966) 15 *ICLQ* 436.

giving a wide scope to the foreign law, in order to uphold the objectives of the choice of law rule. These justifications are discussed in turn below.

1 *The forum court's convenience and efficiency*

The most frequently expressed justification for applying forum rather than foreign rules of procedure is that it promotes the convenience and efficiency of the forum court;¹⁰¹ especially, that it reduces the complexity of the judicial task by allowing the court to do that with which it is familiar and to avoid the burden of having to do that with which it is unfamiliar.¹⁰² Concerns with the perceived difficulty of applying foreign law are commonly expressed in the context of the exclusion of foreign laws held to be procedural.¹⁰³ In *Harding v Wealands*, Lord Woolf observed that the foreign legislation was a 'detailed statutory code' which he thought it would be 'very difficult, if not impossible' for an English court to apply.¹⁰⁴ In *Pfeiffer v Rogerson* the High Court stated that although the forum court's reluctance to apply foreign law did not justify the exclusion of foreign law by reference to the double actionability rule, it justified the exclusion of foreign law by reference to the exclusion of foreign procedural rules.¹⁰⁵

This justification has dominated the case law and commentary on the distinction between substance and procedure,¹⁰⁶ which seems largely due to the deference given to Cook's leading work.¹⁰⁷ Carruthers suggested that this dominance 'may be said to have blocked or stifled critical analysis or

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- 101 Cook, above n 99, at 343–4; *Dacey, Morris & Collins*, above n 72, p 178; G Panagopoulos, 'Substance and Procedure in Private International Law' (2005) 1 *J of Private Int L* 69 at 71; J Carruthers, 'Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages' (2004) 53 *ICLQ* 691 at 692–3; P Beaumont and Z Tang, 'Classification of Delictual Damages: *Harding v Wealands* and the Rome II Regulation' (2008) 12 *Edinburgh Law Rev* 131 at 133–4; *Harding v Wealands* [2005] 1 All ER 415; [2005] 1 WLR 1539; [2004] EWCA Civ 1735 at [55], [58] per Arden LJ; *McKain v Miller* (1991) 174 CLR 1 at 22, 26–7 per Mason CJ, 49 per Deane J, 56 per Gaudron J; 104 ALR 257; [1991] HCA 56; BC9102614; *Stevens v Head* (1992) 176 CLR 433 at 469 per Gaudron J; 112 ALR 7; [1993] HCA 19; BC9303608; *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [192] per Callinan J; *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400; 211 ALR 523; [2004] HCA 61; BC200408297 at [148] per Kirby J.
- 102 *McKain v Miller* (1991) 174 CLR 1 at 22 per Mason CJ; 104 ALR 257; [1991] HCA 56; BC9102614; *Stevens v Head* (1992) 176 CLR 433 at 451 per Mason CJ; 112 ALR 7; [1993] HCA 19; BC9303608; *Harding v Wealands* [2007] 2 AC 1; [2006] 4 All ER 1; [2006] 3 WLR 83; [2006] UKHL 32 at [9], [11] per Lord Woolf. See also Davis, above n 32, at 1008; Fawcett and Carruthers, above n 24, p 76 (because rules of procedure are highly technical, many of which 'would be unintelligible to a foreign judge and certainly unworkable by a machinery designed on different lines').
- 103 T O Main, 'The Procedural Foundation of Substantive Law' (2009) 87 *Washington U Law Rev* 1 at 37.
- 104 *Harding v Wealands* [2007] 2 AC 1; [2006] 4 All ER 1; [2006] 3 WLR 83; [2006] UKHL 32 at [11].
- 105 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [94] ('a litigant who invokes the jurisdiction of the court must take the procedures and remedies of that court as they are').
- 106 However, the joint judgment in the leading Australian case, *Pfeiffer v Rogerson*, does not mention it.
- 107 Cook, above n 99, at 344. Beale also regarded convenience as the justification for applying forum procedural law: J H Beale, *A Treatise on the Conflict of Laws*, 1935, vol 3, pp 1599–600, cited in S C Symeonides, W C Purdue and A T von Mehren, *Conflict of Laws: American, Comparative, International*, 2nd ed, Thomson West, St Paul, 2003, p 56.

argument'.¹⁰⁸ This justification is flawed, because it is incompatible with two fundamental aspects of multistate litigation. First, it is unusual for the administration of justice to be given any explicit consideration in private international law, much less a decisive weight. English and Australian courts have rejected it as an inappropriate consideration when it has been raised in the context of jurisdiction in international cases.¹⁰⁹ It seems even less legitimate that it should be used to justify the exclusion of foreign law. Second, this justification has an overtly parochial tendency, which is inconsistent with the responsibility of courts to apply foreign law where it is indicated as the governing law¹¹⁰ and with the internationalist nature of private international law more generally. The joint judgment in *Renault v Zhang* accepted that the proof of foreign law was sometimes onerous, but observed that 'proof of foreign law is concomitant of reliance upon any choice of law rule which selects a non-Australian *lex causae*'.¹¹¹ Perceived difficulties of proof are often referred to as a reason for excluding the application of foreign procedural rules.¹¹² These difficulties are not unique to foreign procedural rules. It seems unlikely that proof of foreign procedural law would be generally more inefficient or inconvenient than the proof of foreign substantive law¹¹³ or foreign choice of law rules and attitude to renvoi.¹¹⁴ If foreign procedural law can be proven by expert evidence, the courts of the forum should apply it, subject to the public policy exception.¹¹⁵

2 The consequence of the parties' choice of forum

The application of forum procedural law is often justified on the basis that it is an incident of the plaintiff's, or, as it is sometimes expressed, the parties', choice of forum.¹¹⁶ The courts regularly state that 'litigants must take the

¹⁰⁸ Carruthers, above n 101, at 692.

¹⁰⁹ *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 253–5 per Deane J; 79 ALR 9; [1988] HCA 32; BC8802600; *Lubbe v Cape plc* [2000] 1 WLR 1545 at 1566–7 per Lord Hope, 1561 per Lord Bingham; [2000] 4 All ER 268; [2000] UKHL 41. They are relevant considerations according to the US principles of jurisdiction: *Piper Aircraft Co v Reyno* 454 US 235 at 241 (1981); 102 S Ct 252; 70 L Ed 2d 419.

¹¹⁰ *McKain v Miller* (1991) 174 CLR 1 at 22–3 per Mason CJ; 104 ALR 257; [1991] HCA 56; BC9102614 (suggesting that one of the explanations for the historically broad definition of procedure might be that 'the importance of international judicial comity may not have been given the same recognition it nowadays commands').

¹¹¹ *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1; [2002] HCA 10; BC200200802 at [66].

¹¹² *Harding v Wealands* [2005] 1 All ER 415; [2005] 1 WLR 1539; [2004] EWCA Civ 1735 at [58] per Arden LJ (suggesting that difficulties in proving foreign rules about damages may account for their traditional classification as procedural).

¹¹³ Szászy, above n 100, at 447; Beaumont and Tang, above n 101, at 134.

¹¹⁴ In *Neilson*, a majority of the High Court regarded itself as capable of both dealing with foreign choice of law rules and the foreign court's attitude to renvoi, even where the foreign legal system was very different from the forum's and even where evidence as to the application of that foreign law was insufficient: *Neilson v OPCV* (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54; BC200507308.

¹¹⁵ A Briggs, *The Conflict of Laws*, 2nd ed, Clarendon, Oxford, 2008, p 40. This suggestion was made in the context of quantification of damages, but is of general relevance.

¹¹⁶ *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [94], [99] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ, [160] per Kirby J; *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400; 211 ALR 523; [2004] HCA 61; BC200408297 at [169] per Kirby J (accepting that a plaintiff can invoke 'purely procedural' advantages by choice of forum).

forum as they find it', including the procedural law applicable in that forum.¹¹⁷ This justification illustrates two common, though problematic, features of the way party autonomy is employed in multistate litigation. These are, first, the uncritical priority given to party autonomy; and second, a conflation of the situation and interests of plaintiffs and defendants.¹¹⁸ These features are examined in turn below.

In this justification, the plaintiff's ability to choose the forum, and thereby to invoke the application of forum procedural law, is unquestioned. This is consistent with the generally permissive nature of transnational civil litigation in common law systems.¹¹⁹ This justification is implicitly premised on an assumption that jurisdictional principles control forum choice, to guard against forum shopping and to protect the defendant's interests.¹²⁰ This justification loses much of its legitimacy if jurisdictional principles do not properly control forum choice, as is the case in Australia, especially in international tort disputes.¹²¹

The conflation of the situation of plaintiffs and defendants that is regularly made in this justification to rationalise the application of forum procedural rules is inappropriate.¹²² In multistate litigation, the parties' interests diverge; the plaintiff's choice of forum is often made not only because of the procedural advantages available in that forum, but also deliberately to disadvantage the defendant. Given the ease with which jurisdiction is established in multistate cases, and the difficulty in securing a stay of proceedings in international cases, a defendant's inability to secure a stay of proceedings should not generally be characterised as a submission to the jurisdiction.¹²³

It is not controversial to propose that plaintiffs should be burdened by the consequences of their choice of forum. Plaintiffs should not be heard to object to the application of forum procedural law, especially if that would deprive them of an entitlement available under foreign procedural law.¹²⁴ Given the unsatisfactory state of the Australian jurisdictional principles, it should be controversial to assert that by choosing the forum the plaintiff is entitled to invoke favourable procedural rules. In *De La Vega v Vianna* Lord Tenterden CJ stated that a person suing in England should not 'be deprived of any superior advantage which the law of this country may confer. He is to have the

117 *Chaplin v Boys* [1971] AC 356 at 379 per Lord Hodson; [1969] 2 All ER 1085; [1969] 3 WLR 322; *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [99] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

118 Eg, Fawcett and Carruthers, above n 24, p 75.

119 R Fentiman, *Foreign Law in English Courts*, Oxford University Press, Oxford, 1998, especially Ch III; Keyes, *Jurisdiction*, above n 75, pp 18–20.

120 Carruthers, above n 101, at 693.

121 See above n 75.

122 Keyes, 'Foreign Law', above n 38, at 28–9.

123 Cf *McKain v Miller* (1991) 174 CLR 1 at 22 per Mason CJ; 104 ALR 257; [1991] HCA 56; BC9102614.

124 *Robinson v Bland* (1760) 2 Burr 1077 at 1084; 97 ER 717 at 721; *De La Vega v Vianna* (1830) 1 B & Ad 284 at 288; 109 ER 792 at 793; *M'Elroy v M'Allister* 1949 SC 110 at 139; *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [94], [99] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; Fawcett and Carruthers, above n 24, p 76.

same rights which all the subjects of this kingdom are entitled to.’¹²⁵ The suggestion that it would be inequitable to treat plaintiffs in transnational cases differently from plaintiffs in domestic cases ignores the many accepted, entirely legitimate, distinctions in the treatment of domestic and international litigation.¹²⁶

It should also be controversial to assert, or to imply,¹²⁷ that defendants ought to be subject to the forum’s procedural rules on the basis of their submission to the jurisdiction.¹²⁸ The defendant does not choose the forum, unless there is a contractual selection of forum, which is unlikely in tort disputes. A defendant’s inability to obtain a stay of proceedings should not be treated as a submission to the jurisdiction. The application of forum procedural law should therefore not be justified as an incident of the defendant’s choice of forum. This justification should certainly not be used to legitimise the application of unfavourable procedural rules against the defendant.

It has been suggested that the application of forum law to procedural issues can be justified on the basis of the parties’ legitimate expectations, which are derived from the plaintiff’s choice of forum and the defendant’s submission to the jurisdiction.¹²⁹ This argument is really just another way of expressing the autonomy justification, because the parties’ presumed reasonable expectations are generated by their selection of forum. In the Australian context, such an argument suffers from the problems identified above.

3 *The limited territorial application of procedural legislation*

Several Australian and English judges have suggested that procedural legislation has a limited territorial application and therefore, as a matter of statutory interpretation, applies only in the forum in which it was enacted.¹³⁰ It has also been suggested that courts of the forum in which procedural rules

125 *De La Vega v Vianna* (1830) 1 B & Ad 284 at 288; 109 ER 792 at 793.

126 Szászy, above n 100, at 446–7.

127 Often, defendants are simply not distinguished from plaintiffs: eg, *McKain v Miller* (1991) 174 CLR 1 at 22 per Mason CJ; 104 ALR 257; [1991] HCA 56; BC9102614.

128 Mason CJ suggested that the defendant’s submission to the jurisdiction ‘indicates a willingness’ to litigate ‘according to the ordinary way in which litigation in that forum is conducted’ and regarded this as equivalent to the plaintiff’s willingness, which was demonstrated by the plaintiff’s choice of forum: *McKain v Miller* (1991) 174 CLR 1 at 22; 104 ALR 257; [1991] HCA 56; BC9102614.

129 Carruthers, above n 101, at 693. See similarly *Harding v Wealands* [2007] 2 AC 1; [2006] 4 All ER 1; [2006] 3 WLR 83; [2006] UKHL 32 at [9]; Mortensen, ‘Homing Devices’, above n 76, at 857.

130 *Pedersen v Young* (1964) 110 CLR 162 at 166 per Menzies J; [1964] ALR 798; (1964) 38 ALJR 58; BC6400110; *Breavington v Godleman* (1988) 169 CLR 41 at 136 per Deane J; 80 ALR 362; [1988] HCA 40; BC8802620; *Stevens v Head* (1993) 176 CLR 433 at 469 per Gaudron J; 112 ALR 7; [1993] HCA 19; BC9303608; *Harding v Wealands* [2007] 2 AC 1; [2006] 4 All ER 1; [2006] 3 WLR 83; [2006] UKHL 32 at [73], [75] per Lord Rodger. Cf *McKain v Miller* (1991) 174 CLR 1 at 61 per Gaudron J; 104 ALR 257; [1991] HCA 56; BC9102614.

are enacted are *required* as a matter of statutory interpretation to apply them.¹³¹ This suggestion is consistent with forum procedural rules being treated as a type of mandatory rule.

This justification is flawed. Permitting multistate problems to be determined effectively by reference to whether one party claims that forum legislation applies is unsatisfactory.¹³² The courts tend to decide in such cases that they should apply forum statutes without reference to the usual multilateral considerations that inform the principles of private international law. In the absence of an express statement in forum legislation that the legislation must be applied with mandatory effect in multistate cases, courts should not give legislation such an effect.

This justification is unhappily reminiscent of governmental interest analysis, according to which forum courts are obliged to apply forum law in preference to foreign law, if the forum has an interest in the application of its law. Sykes and Pryles correctly observed that it ‘seems virtually undeniable that the forum would always have an interest in its own procedure’ and therefore that, according to governmental interest analysis, the forum would inevitably apply forum law ‘on any issue which could arguably be presented as procedural’.¹³³

4 Conformity with the objectives of the choice of law rule

This justification alone focuses on the importance of applying foreign law. It requires that the distinction between procedure and substance should operate conformably with the choice of law rule. In the context of tort choice of law, this means that procedure should be narrowly defined in order to uphold the objectives of the choice of law rules¹³⁴ and, in particular, effectively to control forum shopping.¹³⁵

This justification is closely related to the proposition that it is artificial and arbitrary to exclude parts only of the foreign law.¹³⁶ It is often artificial to sever issues of procedure from related issues of substance.¹³⁷ The distinction between foreign substantive and procedural law resembles the distinction

131 *Roerig v Valiant Trawlers Ltd* [2002] 1 All ER 961; [2002] EWCA Civ 21; [2002] 1 WLR 2304 at [28]–[29] per Waller LJ, with whom Sedley and Simon Brown LJ agreed generally (at [48] and [49]).

132 For discussion and criticism of this tendency, see Keyes, ‘Statutes’, above n 52, at 16–26.

133 Sykes and Pryles, above n 87, p 267.

134 Cook, above n 99, at 344; *Dacey, Morris & Collins*, above n 72, p 177; Fawcett and Carruthers, above n 24, pp 75–6; *McKain v Miller* (1991) 174 CLR 1 at 23 per Mason CJ; 104 ALR 257; [1991] HCA 56; BC9102614; ALRC, above n 11, p 126.

135 *McKain v Miller* (1991) 174 CLR 1 at 23, 25 per Mason CJ, 50 per Deane J; 104 ALR 257; [1991] HCA 56; BC9102614; *Stevens v Head* (1992) 176 CLR 433 at 452 per Mason CJ, 469 per Gaudron J; 112 ALR 7; [1993] HCA 19; BC9303608; *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [133] per Kirby J; *Harding v Wealands* [2005] 1 All ER 415; [2005] 1 WLR 1539; [2004] EWCA Civ 1735 at [69] per Arden LJ, [86] per Sir William Aldous; The Hon Justice W M C Gummow, ‘Form or Substance?’ (2008) 30 *Aust Bar Rev* 229 at 235; Davis, above n 32, at 1009.

136 *Chase Manhattan Bank v Israel-British Bank (London) Ltd* [1981] Ch 105 at 124; [1979] 3 All ER 1025; [1980] 2 WLR 202 (‘Within the confines of a single legal system, right and remedy are indissolubly connected and co-related’); Main, above n 103, at 2; Mortensen, ‘Homing Devices’, above n 76, at 859.

137 Carruthers, above n 101, at 699; C Dougherty and L Wyles, ‘*Harding v Wealands*’ (2007) 56 ICLQ 443 at 452.

between foreign choice of law rules and internal rules, which is the concern of the doctrine of renvoi.¹³⁸ Addressing the latter problem, and having noted the resemblance, Gummow and Hayne JJ asked why choice of law should 'be premised upon the results of imposing on a foreign legal system a division which that foreign legal system may not make?'¹³⁹ In *Neilson* the High Court insisted that the forum should apply foreign choice of law rules because of its concern to ensure that the outcome of a dispute which is governed by foreign law is coherent with the total solution supplied by the relevant foreign law,¹⁴⁰ which was based on the concern to prevent plaintiffs from securing a result that would not be obtained if they litigated in the place where the tort occurred.¹⁴¹ By analogy, the forum should apply foreign rules which are an integral aspect of the foreign law's solution to the issues in dispute, even if they might be characterised as procedural according to forum law.

The relation between the justifications

While the justifications are often referred to by the courts and in the commentary, they have not been much scrutinised. The first three justifications, which relate to the application of forum procedural law, are all seriously flawed. Those justifications are also incompatible with the objectives of the tort choice of law rule.¹⁴² These flaws and this incompatibility are symptomatic of the confusion between the two aspects of the distinction, identified above. The priority which is usually given to convenience and the consequences of the parties' choice of forum suggests that legitimising the application of forum procedural law has precedence, in an abstract sense, even if in practice the main issue is whether the foreign rule should be excluded.

For this distinction to operate harmoniously with the choice of law rule, the final justification must dominate. In *Harding v Wealands*, Arden LJ stated that a reference to forum law 'must be justified by some imperative which, relative to the imperative of applying the proper law, has priority'.¹⁴³ It is often

138 *Neilson v OPCV* (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54; BC200507308 at [98] per Gummow and Hayne JJ.

139 *Ibid.* See similarly at [111] per Gummow and Hayne JJ, [171], [174] per Kirby J, [271] per Heydon J.

140 *Ibid.*, at [111] per Gummow and Hayne JJ ('to refer to the *whole* of the law of the place of commission of a tort runs less risk of incoherence'), [171], [174] per Kirby J, [271] per Heydon J. Cf *Harding v Wealands* [2007] 2 AC 1; [2006] 4 All ER 1; [2006] 3 WLR 83; [2006] UKHL 32 at [77], where Lord Rodger accepted that applying the forum's law to questions of quantum of damages would 'conflict with certain of the objects' of the foreign law, but then dismissed that concern because 'the impact on the [foreign legislative] scheme of applying a different scale of damages in claims litigated in this country is unlikely to be anything other than marginal'.

141 *Neilson v OPCV* (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54; BC200507308 at [13] per Gleeson CJ, [89]–[91] per Gummow and Hayne JJ, [172], [173], [197], [199] per Kirby J, [271] per Heydon J.

142 *Garsec Pty Ltd v His Majesty the Sultan of Brunei* (2008) 250 ALR 682; [2008] NSWCA 211; BC200807985 at [121]; *Tolofsen v Jensen* [1994] 3 SCR 1022; (1994) 120 DLR (4th) 289 at 320. Tilbury et al suggest that the convenience argument 'leads to the view that the concept of "procedure" in the conflict of laws should be narrowly confined': Tilbury, Davis and Opeskin, above n 87, p 333. With respect, this does not necessarily follow; the convenience argument is compatible with any definition of procedure.

143 *Harding v Wealands* [2005] 1 All ER 415; [2005] 1 WLR 1539; [2004] EWCA Civ 1735 at [52].

assumed that convenience is such an imperative: that when the inconvenience or difficulty entailed in applying foreign law is too great, the court ought to apply forum law.¹⁴⁴ As explained above, the argument for convenience is questionable. In addition, this is an especially uncertain and unpredictable test.¹⁴⁵ Inconvenience is not an imperative that justifies the exclusion of foreign law.

Party choice is of course a very significant characteristic of adversarial systems,¹⁴⁶ but a unilateral choice of forum should not justify excluding foreign law. In *Pfeiffer v Rogerson*, Kirby J observed that:

It may be reasonable to recognise the right of a litigant to choose different courts in the one nation by reason of their advantageous procedures, better facilities or greater expedition. However, it is not reasonable that such a choice, made unilaterally by the initiating party, should materially alter that party's substantive legal entitlements to the disadvantage of its opponents.¹⁴⁷

Upholding the consequences of the plaintiff's unilateral choice of forum should not outweigh the achievement of the objectives of the choice of law rule in multistate torts, which do not include party autonomy. It should only be used to justify the application of forum procedural law which is unfavourable to the plaintiff. What effect then should be given to a bilateral choice of forum? While an ex ante bilateral choice of forum is unlikely in multistate tort cases, it is conceivable that the parties might agree to the forum, or at least that the defendant might not object to the forum.¹⁴⁸ In such a case, it is less objectionable for forum law to be applied to matters of procedure.¹⁴⁹

The courts' perceived responsibility to enforce local legislation which is not expressed to have a mandatory application in multistate cases should not be regarded as an imperative that outweighs upholding the objectives of the tort choice of law rule, for the reasons outlined above. Upon analysis, then, although the distinction between matters of procedure and substance may be perceived to be inveterate and unassailable, its foundations are far less stable than is usually assumed.

144 R Weintraub, 'Choice of Law for Quantification of Damages: A Judgment of the House of Lords Makes a Bad Rule Worse' (2007) 42 *Texas Int LJ* 311 at 322.

145 *McKain v Miller* (1991) 174 CLR 1 at 26 per Mason CJ; 104 ALR 257; [1991] HCA 56; BC9102614.

146 The plaintiff also has scope to enliven the application of forum law using several of the other techniques discussed above. For example, this may be achieved by the manner in which the claim is pleaded (by reference to the characterisation of the claim, which is usually determined by the claim asserted by the plaintiff) and the manner in which the relief sought is particularised (the type of relief claimed can affect the location of the tort, which in turn is used to identify the governing law).

147 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [129].

148 As occurred in *Neilson v OPCV* (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54; BC200507308.

149 *Tolofsen v Jensen* [1994] 3 SCR 1022; (1994) 120 DLR (4th) 289 at 307 per La Forest J (noting that 'the parties may either tacitly or by agreement choose to be governed by the *lex fori* if they find it advisable to do so'), 326 per Major J (with whom Sopinka J agreed).

Applying the distinction: quantification of damages

A consideration of the treatment of particular issues of law in terms of their treatment as procedural or substantive is beyond the scope of this article.¹⁵⁰ Two issues which have been the focus of attention in Australia are the treatment of limitation periods and the treatment of quantum of damages. Limitation periods are now regarded as substantive at common law¹⁵¹ and under legislation.¹⁵² In intra-Australian cases, ‘all questions about the kinds of damage, or amount of damages that may be recovered, would be treated as substantive issues’.¹⁵³ This is because ‘all questions about damages can affect how much a plaintiff recovers and thus alter the rights of plaintiffs and, also, the obligations of defendants’.¹⁵⁴ In *Renault v Zhang*, the High Court left open the question of whether quantum of damages should be determined according to the governing law or forum law in international cases.¹⁵⁵ Briggs observed that while ‘the long and disreputable tradition of recourse to a broad category of procedure had finally been seen off in *Pfeiffer* it was summoned back to half-life [in *Renault v Zhang*] even before the funeral oration’.¹⁵⁶ This issue remains open in Australia.¹⁵⁷

In a detailed survey of the decisions of Australian, UK and Canadian courts in multistate torts, Mortensen found that the courts of those countries had not in general resorted to the escape devices in order to justify the application of forum law.¹⁵⁸ However, he reported that the characterisation of quantum of damages as procedural was still used as a homing device in the United Kingdom and in Canada.¹⁵⁹ This tendency is demonstrated in *Harding v Wealands*, in which the House of Lords applied a broad definition of

150 For detailed discussion, see Davies et al, above n 40, pp 335–50; *Dacey, Morris & Collins*, above n 72, pp 179–203.

151 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [100] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ, [161] per Kirby J, [193] per Callinan J; *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1; [2002] HCA 10; BC200200802 at [76] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

152 Choice of Law (Limitation Periods) Act 1993 (NSW) and equivalent legislation in the other states and territories. See, similarly Foreign Limitation Periods Act 1984 (UK) s 1(1)(a) (where foreign law is the governing law in proceedings in the UK courts, the foreign law’s limitation periods are also applicable).

153 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [100] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ (emphasis in original), [193]–[194], [199] per Callinan J. See also *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400; 211 ALR 523; [2004] HCA 61; BC200408297 at [147] per Kirby J.

154 *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [98].

155 *Renault v Zhang* (2002) 210 CLR 491; 187 ALR 1; [2002] HCA 10; BC200200802 at [76] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

156 A Briggs, ‘The Legal Significance of the Place of a Tort (*Regie National des Usines Renault SA v Zhang*)’ (2002) 2 *Oxford University Commonwealth LJ* 133 at 136. See also Mortensen, ‘Homing Devices’, above n 76, at 859.

157 In *Neilson v OPCV*, the trial judge considered the question of quantum of damages in detail. The issue was not pursued in either appeal. The trial judge held that forum law was the governing law. His Honour evidently thought that if foreign law was the applicable law, then the foreign rules on assessment of damages should be applied: [2002] WASC 231; BC200205850 at [123], [157]–[168].

158 Mortensen, ‘Homing Devices’, above n 76.

159 *Ibid.*, at 861–3, 874.

procedure to encompass quantum of damages. Consequently, the foreign law relating to quantification of damages was excluded. This decision has been criticised.¹⁶⁰ In the United Kingdom it is now of limited significance because the Rome II Regulation specifically provides that assessment of damages is determined by the law of the cause.¹⁶¹ Given that the issue remains open in Australia, this case deserves some consideration.

In *Harding v Wealands*,¹⁶² the claimant, Mr Harding, an Englishman, was injured in a motor vehicle accident in New South Wales, which was caused by the admitted negligent driving of Ms Wealands, an Australian.¹⁶³ At the time of the accident, the parties were living together in England and on holiday in Australia. Ms Wealands owned the vehicle she was driving when the accident occurred. It was registered and insured in New South Wales. The parties returned to England together and cohabited for a short period. Before Ms Wealands returned to live in Australia, she was served in England with initiating process of the English courts in proceedings brought by Mr Harding for damages for personal injury.

The main issue in dispute was whether provisions of the Motor Accident Compensation Act 1999 (NSW),¹⁶⁴ in force at the time of the accident, limited the quantum of damages the claimant could recover in English proceedings.¹⁶⁵ According to the English choice of law rule, NSW law was the governing law.¹⁶⁶ The UK legislation contained a provision stating that nothing in the relevant part of that legislation 'authorises questions of procedure in any proceedings to be determined other than in accordance with the law of the forum'.¹⁶⁷ The claimant argued that the NSW legislation limiting the amount of damages recoverable was inapplicable, as being a foreign procedural rule.

A majority of the English Court of Appeal, influenced by the Australian jurisprudence concerning the definition of procedural matters, held that quantum of damages was an issue of substance.¹⁶⁸ The House of Lords reversed that decision, holding that the UK parliament's intention was to preserve the common law's treatment of quantum of damages at the time the

160 Dougherty and Wyles, above n 137, at 451-3; Beaumont and Tang, above n 101, at 133.

161 Although the Rome II Regulation resolves the issue which arose in *Harding v Wealands*, it leaves unresolved other issues in relation to the law that governs matters of procedure. For critical discussion, see M Illmer, 'Neutrality Matters: Some Thoughts about the Rome Regulations and the So-Called Dichotomy of Substance and Procedure in European Private International Law' (2009) 28 *Civil Justice Q* 237.

162 [2007] 2 AC 1; [2006] 4 All ER 1; [2006] 3 WLR 83; [2006] UKHL 32.

163 Negligence was admitted. The sole issue in dispute was quantum of damages.

164 Sections 124, 125, 127, 128, 130, 134, 137.

165 The claimant estimated that the amount of damages to which he would be entitled under NSW law was 30% less than if English law applied: *Harding v Wealands* [2007] 2 AC 1; [2006] 4 All ER 1; [2006] 3 WLR 83; [2006] UKHL 32 at [18].

166 Private International Law (Miscellaneous Provisions) Act 1995 (UK) s 11. The English Court of Appeal held that the flexible exception in s 12 of that Act was inapplicable: [2005] 1 All ER 415; [2005] 1 WLR 1539; [2004] EWCA Civ 1735 at [20], [21], [45], [76]. The House of Lords did not find it necessary to decide the question, because of their conclusion that the NSW legislation was procedural: *Harding v Wealands* [2007] 2 AC 1; [2006] 4 All ER 1; [2006] 3 WLR 83; [2006] UKHL 32 at [53] per Lord Hoffmann.

167 Private International Law (Miscellaneous Provisions) Act 1995 (UK) s 14(3)(b).

168 *Harding v Wealands* [2005] 1 All ER 415; [2005] 1 WLR 1539; [2004] EWCA Civ 1735.

legislation was passed as procedural.¹⁶⁹ They held that according to the common law as at the time the legislation was enacted, the relevant provisions of the NSW legislation were procedural and were therefore inapplicable.¹⁷⁰

Members of the House of Lords did not consider the merits of the English common law rule which treated quantum of damages as a matter of procedure, but simply concluded that they were bound to apply it. This conclusion meant that the court did not directly consider the proper scope of procedure, nor the justifications for applying forum law to the assessment of damages. Lord Rodger correctly foreshadowed that the policy expressed in the UK legislation ‘may be criticised as being liable to encourage forum shopping or on some other ground’, but he emphasised that the courts were obliged to apply it as ‘the policy of the legislature’.¹⁷¹ Similarly, Lord Hoffmann asserted that ‘the question was not what the law should be but what parliament thought it was in 1995’.¹⁷² Lord Rodger noted the prejudice to the defendant’s insurers in applying English law to the quantification of damages, but was unmoved by that concern, because ‘the impact on the [NSW] scheme of applying a different scale of damages in claims litigated in this country is unlikely to be anything other than marginal’.¹⁷³

The better view, supported by a majority of commentators, is that quantification of damages in both intranational and international torts should be determined by the law of the place of the tort, subject to the public policy exception.¹⁷⁴ It would be inconsistent with the reforms to the tort choice of law rule and to the narrow definition of procedure for the Australian courts to apply forum law to quantify damages.¹⁷⁵ But there is a risk that they may do so. They may be fortified by the equivocation expressed in the joint judgment in *Renault v Zhang* which anticipates that it might be permissible to apply forum law to quantify damages. There are two further reasons which indicate that forum law might be applied. First, the perceived difficulty in proving foreign law in relation to the quantification of damages is often given as a sufficient justification for excluding its application.¹⁷⁶ As noted above, this difficulty is overstated. In most cases, expert evidence as to the application of the relevant foreign law should be sufficient. Second, the legal system where the impact of a tort is felt is often thought to have a strong interest in the application of its own law particularly in relation to the quantification of damages, and the place where the tort occurred is often assumed to have a relatively lesser interest in the application of its law.¹⁷⁷

169 *Harding v Wealands* [2007] 2 AC 1; [2006] 4 All ER 1; [2006] 3 WLR 83; [2006] UKHL 32 at [6] per Lord Woolf, [36], [51] per Lord Hoffmann, [67] per Lord Rodger, [83] per Lord Carswell. Lord Bingham agreed with Lord Hoffmann and Lord Rodger.

170 *Ibid.*, at [11] per Lord Woolf, [42] per Lord Hoffmann, [77] per Lord Rodger.

171 *Ibid.*, at [64].

172 *Ibid.*, at [51].

173 *Ibid.*, at [77].

174 Beaumont and Tang, above n 101, at 133–4, 136.

175 Mortensen, ‘Homing Devices’, above n 76, at 859.

176 ALRC, above n 11, p 137 (recommending that in international cases, quantification of damages should be treated as a matter of procedure because of the difficulties in applying foreign law).

177 Lord Wilberforce concluded in *Chaplin v Boys* that Malta had no interest in the outcome of a particular dispute agitated in the English courts between English litigants: [1971] AC 356

The recognition and balancing of state interests in this way is not comfortably accommodated in the Australian law relevant to multistate torts. In US jurisprudence, it is applied in governmental interest analysis and its progenies. In English law and in European instruments, it is applied in the flexible exceptions. In *Harding v Wealands* Lord Hoffmann noted that the possible justifications for applying a flexible exception on the facts of that case 'are the reasons why the assessment of damages is traditionally characterised as a matter for the *lex fori*'.¹⁷⁸ His Lordship did not himself identify the justifications for applying the flexible exception, but the connections to the forum in that case were that at the time of the tort both parties were resident in the forum; they were in a relationship based in the forum before the tort occurred and for some time after it; and the effects of the tort would be felt in the forum. At least one member of the House of Lords seemed inclined to the view that New South Wales did not have much interest in the application of its law in a single case.¹⁷⁹ It is not entirely clear that the factors which are relevant to the flexible exception can legitimately be considered in justifying the application of forum procedural law rather than foreign rules of procedure. It may be more relevant to take these factors into account under the rubric of the flexible exception.

Though the flexible exception is criticised by the High Court for its uncertainty and unpredictability, perhaps it supplies a sounder basis on which to apply forum law than the exclusion of foreign procedural law, which rests on a definition the application of which is uncertain and unpredictable, and on justifications most of which are incompatible with the purposes of the tort choice of law rule. In addition, more reliance might directly be placed on the public policy exception to limit the application of foreign law which is unacceptable from the forum's perspective, as might be required, for example, where the foreign measure of damages is clearly exorbitant or inadequate.¹⁸⁰

III Conclusion

While substantive rules and even choice of law rules between states have tended to converge, variations in procedures not only persist, but show signs of proliferating.¹⁸¹ Since procedural rules frequently affect outcomes in multistate cases,¹⁸² the parties have incentives to dispute the characterisation of a foreign rule as procedural. Like all the techniques which result in the

at 392; [1969] 2 All ER 1085; [1969] 3 WLR 322. Several members of the High Court in *Neilson v OPCV* stated that China had no interest in the outcome of a particular dispute agitated in the Australian courts between Australian litigants: (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54; BC200507308 at [17] per Gleeson CJ, [251] per Callinan J (with whom Heydon J relevantly agreed, at [275]). See Illmer, above n 161, at 253.

178 [2007] 2 AC 1; [2006] 4 All ER 1; [2006] 3 WLR 83; [2006] UKHL 32 at [53].

179 *Ibid.*, at [77] per Lord Rodger (with whom Lords Bingham, Woolf and Carswell generally agreed, at [1], [2], [79]).

180 Weintraub, above n 144, at 321.

181 A F Lowenfeld, 'Introduction: The Elements of Procedure: Are They Separately Portable?' (1997) 45 *Am J of Comp L* 649 at 650, 652; Fentiman, above n 119, p 41; Davies, above n 3; *Garsec Pty Ltd v His Majesty the Sultan of Brunei* (2008) 250 ALR 682; [2008] NSWCA 211; BC200807985 at [121].

182 *McKain v Miller* (1991) 174 CLR 1 at 25 per Mason CJ; 104 ALR 257; [1991] HCA 56; BC9102614; *Pfeiffer v Rogerson* (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36;

application of forum law, the application of forum procedural law allows forum shopping. Given that forum shopping is presently not well-controlled by the Australian rules of jurisdiction, it is important that courts are especially careful when applying forum law.

In developing the new tort choice of law rule, the High Court emphasised the unsuitability of applying forum law. The exceptions to the requirement that foreign law be applied if the tort occurred outside the forum should therefore have very limited application in multistate torts. In Australia, the courts are now directed to define procedure narrowly. This article argues that, notwithstanding the apparent consistency between the reformed tort choice of law rule and the narrow definition of procedure, there are inconsistencies between the purposes of choice of law for tort and most of the conventional justifications for the non-application of foreign procedural law. Particular uncertainty remains in Australia as to how quantum of damages will be treated in international torts. It is possible that Australian courts might follow the direction taken in other common law jurisdictions and resort too readily to the application of forum law, generally, and in the context of quantification of damages in particular.

Even after reforms which have limited the scope of procedure, *Dacey, Morris & Collins* suggests that ‘a court may be tempted to extend the meaning of “procedure” in order to evade an unsatisfactory choice of law rule’.¹⁸³ The High Court’s decisions in *Renault v Zhang* and *Pfeiffer v Rogerson* were important steps in modernising and improving the tort choice of law rule. This article contributes to a literature which suggests that the Australian rules relevant to multistate tort litigation require further refinement, especially taking into consideration the inter-relation between issues which are usually considered in isolation from each other. In particular, closer attention must be paid to the relationship between jurisdictional and choice of law rules, and the interaction between choice of law rules and the techniques which allow the application of forum law, even where the tort occurred outside the forum.

BC200003351 at [98]; Davies et al, above n 40, p 333; Lowenfeld, above n 181, at 650; *Garsec Pty Ltd v His Majesty the Sultan of Brunei* (2008) 250 ALR 682; [2008] NSWCA 211; BC200807985 at [121].

183 *Dacey, Morris & Collins*, above n 72, p 177.