

## CASE NOTE

### NEILSON v OVERSEAS PROJECTS CORPORATION OF VICTORIA LTD\*

#### RENOI AND PRESUMPTIONS ABOUT FOREIGN LAW

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*[In Neilson v Overseas Projects Corporation of Victoria Ltd, the High Court of Australia considered how to approach a choice of law question involving a possible renvoi to Australian law. Of the three possible solutions (rejecting the renvoi, single renvoi and double renvoi), the majority adopted the double renvoi approach without committing itself to doing so in all cases, and without suggesting any solution to the problem of infinite regression, which arises when both the lex causae and the lex fori use the double renvoi approach. This case note suggests that choice of law in general and renvoi in particular should be considered in the context of an analysis of the jurisdictional rules of the relevant foreign law area, including its rules about forum non conveniens. This case note argues that it makes no sense to apply foreign law at all, far less the choice of law rules (including the renvoi rules) of that foreign law, if the relevant foreign courts would not have or retain jurisdiction over the dispute. If an answer to the renvoi question is still called for after this preliminary jurisdictional enquiry, single renvoi is preferable, although it was rejected by a majority of the Neilson Court. This case note also points out that the Neilson Court used the presumption that foreign law is the same as Australian law in a manner that greatly assists forum shopping, while repeating the now routine condemnations of the practice of forum shopping.]*

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\* (2005) 221 ALR 213 ('Neilson').

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## I INTRODUCTION

Renvoi is a question without an answer — or, rather, it is a question with three possible answers, all of which are wrong for some reason or another. This Sphinx-like question arises innocuously enough. Choice of law rules typically select a ‘law’ (often a foreign law) to govern the issues before the court. What does it mean to say that the forum court must apply ‘the law of’ a foreign country or legal system?<sup>1</sup> Does it mean that the court must apply only the domestic law of the legal system in question, meaning the legal rules that would be applied to purely internal matters without any international element? Or rather, does it mean that the forum court must apply the whole of the foreign law, including the choice of law rules? If the court applies the whole of the foreign law, it may find that the foreign legal system’s choice of law rules would select a different law, either that of a third legal system or that of the forum court’s own legal system. What should the forum court do if it finds that the foreign law selected by its choice of law rules would refer the question back to its own law?<sup>2</sup> That is the renvoi question.

There seem to be only three possible answers to that question.<sup>3</sup> First, the forum court could ignore the renvoi problem altogether by ignoring the foreign choice of law rules and applying only the foreign domestic law. That is usually known as ‘refusing the renvoi’. However, that simple solution means that the Australian forum court would apply the foreign domestic law when a court in the foreign jurisdiction would not — an odd outcome to say the least. Second, the forum court could apply the foreign choice of law rules but then ‘accept the renvoi’, applying domestic Australian law. That is usually known as ‘single renvoi’. However, that seemingly sensible solution may amount to a mis-characterisation of the foreign choice of law rules. Those rules may, like the Australian ones, refer to the whole of Australian law, including its choice of law rules, not merely domestic Australian law. Thus, the third solution is to apply the whole of the foreign law, including not only its choice of law rules but also its renvoi rule. That is usually known as ‘double renvoi’, although it is sometimes called ‘total renvoi’ or ‘the foreign court theory’. Unfortunately, that solution has the most profound defect of all. If the foreign court’s renvoi rule is also double renvoi, there is an endless circle or infinite regression of reference, with each legal system’s law referring to the other.

Academics generally love the paradoxical nature of this intellectual puzzle and there is an immense scholarly literature about renvoi.<sup>4</sup> Academic commentators

<sup>1</sup> See, eg, Bruce Welling and Richard Hoffman, “‘The Law of’ in Choice of Law Rules: “Renvoi” Comme Nostalgie de la Boue” (1985) 23 *University of Western Ontario Law Review* 79. Although the phrase ‘legal system’ may seem unfamiliar to some, it is used in this context to reflect the fact that there are several legal systems in countries with a federal system of government. This distinction was elided in the case under review, where differences between the law of Australian states could have, but did not, play a significant part.

<sup>2</sup> This case note will follow the usual practice of focusing on reference back to the forum (‘remission’) rather than focusing on reference on to a third country (‘transmission’).

<sup>3</sup> See generally P E Nygh and Martin Davies, *Conflict of Laws in Australia* (7<sup>th</sup> ed, 2002) 290–2.

<sup>4</sup> *Neilson* (2005) 221 ALR 213, 235, where Gummow and Hayne JJ stated that ‘[a]n immense amount of scholarly literature has been produced.’ Their Honours referred to: Thomas Cowan, ‘Renvoi Does Not Involve a Logical Fallacy’ (1938) 87 *University of Pennsylvania Law Review*

delight in imagining situations that would raise renvoi questions, but real cases remain stubbornly few and far between. That has meant that renvoi is often derided as being a theoretical problem rather than a practical one. It may be that real renvoi questions do arise in practice, but they are either not seen by practising lawyers, or are seen but ignored because of their intractable difficulty. Finally, private international lawyers (or at least the academic ones) have been rewarded for their patience and have seen a member of the High Court of Australia say of a renvoi question: ‘This court does not have the luxury of ignoring the issue’.<sup>5</sup>

The decision of the High Court of Australia in *Neilson* is a very rare event, because it contains an extended consideration of renvoi by a national court of final appeal in a case containing a real renvoi issue. Not surprisingly, the case attracted considerable interest among private international lawyers around the world even before it reached the Court, and the Court’s decision was eagerly awaited. Like most eagerly awaited events, the decision was something of a disappointment. As so often in recent years, the Court did not speak with one voice, or even two or three. The seven Justices produced six judgments and majorities of different composition on different issues. Between them, the six judgments contained support for each of the three ‘wrong’ answers to the renvoi question. A narrow majority chose the answer of double renvoi, which has the most profound and apparently insoluble defect, that of infinite regression. The majority managed to dodge the problem of infinite regression on the facts of the case, without giving any indication of how the problem should be solved when it does arise, or indeed, whether they would give the same answer in a case involving infinite regression. As a result, the decision virtually invites further litigation (and inevitably, further appeals to the High Court).

Although most attention has been focused on the renvoi aspect of the case, another feature seems more likely to have practical consequences in the future. When faced with a question governed by foreign law, Australian courts start, as a general principle, with the presumption that the foreign law is the same as Australian law unless proven otherwise.<sup>6</sup> The presumption played no part in the lower court decisions in *Neilson* but a majority of the High Court used it in a rather novel way. The majority’s use of the presumption highlights the considerable tactical advantages that the presumption offers. Practising lawyers may well find more practical assistance in that part of the decision than in the renvoi part.

34; Erwin Griswold, ‘In Reply to Mr Cowan’s Views on Renvoi’ (1939) 87 *University of Pennsylvania Law Review* 257; O Kahn-Freund, *General Problems of Private International Law* (1976) 285.

<sup>5</sup> *Neilson* (2005) 221 ALR 213, 254, where Kirby J referred to a pithier version of the point made in the introduction to this case note in Martin Davies, Sam Ricketson and Geoffrey Lindell, *Conflict of Laws: Commentary and Materials* (1997) 379, which states that ‘renvoi is a subject loved by academics, hated by students and ignored (when noticed) by practising lawyers (including judges)’.

<sup>6</sup> See Nygh and Davies, above n 3, 325.

## II THE FACTS AND THE DECISIONS BELOW

The first plaintiff, Barbara Neilson, was severely injured when she fell down a flight of stairs in an apartment in Wuhan, China. Barbara Neilson's husband, George Neilson (the second plaintiff), was employed by the first defendant, Overseas Projects Corporation of Victoria Ltd ('OPC') to prepare and teach a course on organisation behaviour for the Wuhan Iron and Steel University.<sup>7</sup> George Neilson's employment contract with OPC required OPC to provide housing for George and his family in Wuhan. OPC provided an apartment that had been built and was maintained by Chinese officials. There was no balustrade at the top of the stairwell in the apartment, which was how Barbara Neilson came to fall down the stairs.

The plaintiffs were Australian nationals, domiciled and ordinarily resident in Western Australia. Upon their return to Western Australia, they sued OPC in contract and tort in the Supreme Court of Western Australia. OPC instituted third party proceedings against its public liability insurer, Mercantile Mutual Insurance Australia Ltd ('MMI'), and also against the insurance broker who arranged the insurance contract.

At first instance, McKechnie J dismissed Barbara Neilson's claims for breach of contract, holding that OPC had no express or implied contractual obligation to provide housing for her and that she could not enforce any contractual obligations owed by OPC to George Neilson.<sup>8</sup> That left her claim against OPC in tort. Applying the choice of law test stated by the High Court in *Regie Nationale des Usines Renault SA v Zhang*,<sup>9</sup> McKechnie J held that Barbara Neilson's tort claim was governed by the law of the place of the tort, which he held to be Chinese law.<sup>10</sup>

Barbara Neilson's counsel did not adduce any evidence about Chinese law but OPC's counsel did. OPC sought to rely on several defences that it said were contained in the 1986 General Principles of the Civil Law of the People's Republic of China, *Min fa tong ze* (PRC) ('*General Principles*'),<sup>11</sup> including a limitation period of one or two years, which would have barred Barbara Neilson's claim; limits on the maximum damages for economic loss; and a provision that only the 'owner, controller or manager of the building' is liable for injuries sustained in relation to buildings.<sup>12</sup> McKechnie J rejected those Chinese defences, holding that Chinese law 'gives me a right to apply the law of Australia'.

<sup>7</sup> The university is now known as Wuhan University of Science and Technology: see Wuhan University of Science and Technology, *Introduction* (1 March 2001) <<http://www.wust.edu.cn/en/introduction.html>>.

<sup>8</sup> *Neilson v Overseas Projects Corporation of Victoria Ltd* [2002] WASC 231 (Unreported, McKechnie J, 2 October 2002) [74], [80], [94], [106].

<sup>9</sup> (2002) 210 CLR 491 ('Zhang').

<sup>10</sup> *Neilson v Overseas Projects Corporation of Victoria Ltd* [2002] WASC 231 (Unreported, McKechnie J, 2 October 2002) [123].

<sup>11</sup> For an English translation of the *General Principles*, see China Legislative Information Network System, *General Principles of the Civil Law of the People's Republic of China* <[http://www.chinalaw.gov.cn/jsp/jalor\\_en/disptext.jsp?recno=1&&ttlrec=1](http://www.chinalaw.gov.cn/jsp/jalor_en/disptext.jsp?recno=1&&ttlrec=1)>.

<sup>12</sup> *General Principles* arts 119 (maximum damages), 135, 136 (limitation period), 126 ('owner, controller or manager' liability).

lia<sup>13</sup> based on *General Principles* art 146. In the translation used by the Court,<sup>14</sup> art 146 provided:

With regard to compensation for damages resulting from an infringement of rights, the law of the place in which the infringement occurred shall be applied. If both parties are nationals of the same country or domiciled in the same country, the law of their own country or of their place of domicile may also be applied.<sup>15</sup>

Applying Australian domestic law, McKechnie J concluded that OPC had breached the duty of care it owed to Barbara Neilson and was liable to her for damages in the sum of \$300 000.<sup>16</sup> In the third party proceedings, McKechnie J held that MMI was liable to indemnify OPC.<sup>17</sup>

MMI appealed to the Full Court of the Supreme Court of Western Australia. Although there were three grounds of appeal, McLure J (with whom Johnson J and Wallwork AJ agreed) said: ‘The central issue in this appeal is whether the private international law doctrine of renvoi applies to international tort claims.’<sup>18</sup> After an extensive consideration of the possible answers to the renvoi question and academic criticisms of double renvoi, the Full Court concluded that there should be no renvoi in international tort cases.<sup>19</sup> Accordingly, the Full Court held that the trial judge should have applied Chinese domestic law and should have held that Barbara Neilson’s claim was time-barred by the Chinese statutory limitation provisions.<sup>20</sup> Hence, the appeal was allowed by the Full Court. As a result, Barbara Neilson sought, and was granted, special leave to appeal to the High Court of Australia.

### III THE HIGH COURT OF AUSTRALIA

#### A *All of the Foreign Law or Only Some of It?*

Although McKechnie J did not use the term ‘renvoi’, the approach that his Honour took amounted to single renvoi: the reference to Chinese law as the law of the place of the wrong included reference to the Chinese choice of law rule in art 146 of the *General Principles* which (in McKechnie J’s view) referred the question back to Australian *domestic* law. The Full Court rejected the renvoi, concluding that the reference to Chinese law meant a reference only to Chinese

<sup>13</sup> *Neilson v Overseas Projects Corporation of Victoria Ltd* [2002] WASC 231 (Unreported, McKechnie J, 2 October 2002) [204].

<sup>14</sup> The translation of art 146 appearing on the website referred to in above n 11 is slightly different: The law of the place where an infringing act is committed shall apply in handling compensation claims for any damage caused by the act. If both parties are citizens of the same country or have established domicile in another country, the law of their own country or the country of domicile may be applied.

<sup>15</sup> *Neilson v Overseas Projects Corporation of Victoria Ltd* [2002] WASC 231 (Unreported, McKechnie J, 2 October 2002) [200].

<sup>16</sup> *Ibid* [221].

<sup>17</sup> *Ibid* [274].

<sup>18</sup> *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206, 208.

<sup>19</sup> *Ibid* 214.

<sup>20</sup> *Ibid* 220.

domestic law. Thus, the first question for the High Court to decide was whether the *Zhang* choice of law rule — which selects the law of the place of the wrong (*lex loci delicti*) — requires the court to look at the whole of the foreign law or only at foreign domestic law.

By a 6:1 majority, the Court held that it was necessary to consider the whole of Chinese law, including the Chinese choice of law rules contained in art 146 of the *General Principles*.<sup>21</sup> To do otherwise would risk the result that an Australian court might apply Chinese law when a Chinese court considering the same case would not apply its own law because the Chinese choice of law rules would direct it to the law of another legal system. Gleeson CJ said it was ‘difficult to see’ why Australia’s choice of law rule should seek such a result.<sup>22</sup> Heydon J was less restrained, saying such a result would be ‘absurd’.<sup>23</sup> Applying the whole of the foreign law obviated the need to distinguish between the domestic law of the foreign jurisdiction and its conflict of laws rules, a distinction that Gummow and Hayne JJ said may not be easy to draw.<sup>24</sup> There would also be reduced incentive for forum-shopping if the Australian court were to decide the case exactly as a Chinese court would (or at least were to try to do so), applying all relevant Chinese laws.<sup>25</sup>

Only McHugh J was unhappy with these apparently sensible propositions. His Honour’s dissent identified the problems that lay ahead for the majority. McHugh J found it ‘logically impossible’ to apply the whole of the foreign law.<sup>26</sup> If the Australian court really is to apply the *whole* of the foreign law, it must also apply the renvoi rules of the foreign law, which are no less a part of that law than any other part of it.<sup>27</sup> That is double renvoi. If the renvoi rules of the foreign law do the same as Australian law and look to the whole of the foreign law, one arrives at the infamous ‘infinite regression’ of renvoi. Each legal system’s choice of law rules require it to defer to the choice made by the other. The only way out of this infinite regression is by ‘sacrificing logic to concerns of pragmatism’<sup>28</sup> and applying another solution. Whatever other solution is found, it must involve *not* applying the whole of the foreign law and *not* deciding the case in the way that the foreign court would. This is because the Australian court must apply the foreign law without its inconvenient rule about renvoi (which would be single renvoi), and possibly also minus the whole of its conflict of laws rules (which would be rejecting the renvoi).<sup>29</sup> McHugh J thought it better to reject the doctrine of renvoi altogether by refusing to consider any of the conflict of laws rules of the foreign law. This was applying the foreign law ‘as fully as possi-

<sup>21</sup> *Neilson* (2005) 221 ALR 213, 217–18 (Gleeson CJ), 235–6 (Gummow and Hayne JJ), 256 (Kirby J), 278–9 (Callinan J), 281–2 (Heydon J).

<sup>22</sup> *Ibid* 217.

<sup>23</sup> *Ibid* 281–2.

<sup>24</sup> *Ibid* 237.

<sup>25</sup> *Ibid* 217–18 (Gleeson CJ), 235–6 (Gummow and Hayne JJ), 256 (Kirby J).

<sup>26</sup> *Ibid* 227.

<sup>27</sup> *Ibid* 224.

<sup>28</sup> *Ibid* 225 (McHugh J).

<sup>29</sup> *Ibid* 227 (McHugh J).

ble<sup>30</sup> (meaning, presumably, as fully as ‘logically’ possible), deciding the case as the foreign court would if none of the parties or events had any connection with another legal system.<sup>31</sup>

### B *Double Renvoi or Single Renvoi?*

Of the six Justices in favour of considering the whole of the foreign law, only one, Callinan J, made a clear and unequivocal choice between single and double renvoi. Callinan J chose single renvoi, accepting the reference by the Chinese choice of law rules to Australian law and applying Australian domestic law.<sup>32</sup>

The other five Justices (Gleeson CJ, Gummow, Hayne, Kirby and Heydon JJ) approached the facts of this case in a manner consistent with double renvoi, which called for consideration of the Chinese renvoi rule as well as the other Chinese choice of law rules.<sup>33</sup> All five confined themselves to the facts of this particular case, asking only whether a Chinese court would look to Australian conflict of laws principles.<sup>34</sup> Four of the five (Gleeson CJ, Gummow, Hayne and Heydon JJ) concluded that if a Chinese court applying *General Principles* art 146 were to apply Australian law, it would apply Australian domestic law and not Australian choice of law principles.<sup>35</sup> The fifth member of this group, Kirby J, disagreed, saying that there was insufficient evidence to come to any conclusion about whether China had a renvoi rule.<sup>36</sup>

In other words, Gleeson CJ, Gummow, Hayne and Heydon JJ concluded that Chinese law has no renvoi rule or would reject renvoi. As a result, the ‘infinite regression’ problem did not arise; it only occurs if both laws use a double renvoi approach. Gummow, Hayne and Heydon JJ all said that it was not necessary to say anything about what should be done if double renvoi does lead to infinite regression; their task was only to decide the case before them, not to provide a complete theory of how to deal with renvoi.<sup>37</sup> Kirby J agreed with this proposition.<sup>38</sup> Gleeson CJ said nothing about it. Thus, none of the five Justices who used double renvoi on the facts of this case was prepared to commit to using it in all cases.

### C *What Would a Chinese Court Have Done?*

As we have already seen, all members of the Court except McHugh J agreed that it was necessary to consider the Chinese conflict of laws rules; all but Callinan J (and, necessarily, McHugh J again) agreed that it was necessary to

<sup>30</sup> Ibid 229.

<sup>31</sup> Ibid 228.

<sup>32</sup> Ibid 278.

<sup>33</sup> Ibid 217 (Gleeson CJ), 244 (Gummow and Hayne JJ), 257 (Kirby J), 282–3 (Heydon J).

<sup>34</sup> Ibid.

<sup>35</sup> Ibid 217 (Gleeson CJ), 244 (Gummow and Hayne JJ), 282–3 (Heydon J).

<sup>36</sup> Ibid 266.

<sup>37</sup> Ibid 237–8, 245 (Gummow and Hayne JJ), 282–3 (Heydon J).

<sup>38</sup> Ibid 256–7.

consider the Chinese renvoi rule as part of those conflict of laws rules. The relevant Chinese conflict of laws provision was *General Principles* art 146.<sup>39</sup>

The first sentence of art 146 is a choice of law rule similar to that adopted for tort claims by the High Court itself in *Zhang*, but the second sentence contains a ‘flexible exception’ of the kind rejected by the High Court in *Zhang*.<sup>40</sup> All members of the Court agreed that the trial judge, McKechnie J, had been wrong to conclude that the second sentence of art 146 gave *him* the discretion to choose to apply Australian law rather than Chinese law.<sup>41</sup> As Kirby J said:

the duty of the primary judge in the forum was not (and could never properly be) to step into the shoes of a foreign judge, exercising that judge’s powers as if sitting in the foreign court. Instead, it was to ascertain, according to the evidence or other available sources, how the foreign court *itself* would have resolved the substantive rights of the parties in an hypothetical trial conducted before it.<sup>42</sup>

Even McHugh J, who took the view that art 146 should be ignored, phrased the issue by asking ‘how the *Chinese* courts would exercise the flexible exception that is entailed in the word “may”’<sup>43</sup> in the second sentence of art 146.

The expert witness who had given evidence about Chinese law at the trial had said almost nothing about how the second sentence of art 146 was interpreted in China. The paucity of the evidence led the Court to another division of opinion, regarding whether the gaps in the evidence could be filled by making presumptions about what a Chinese court would have done.

#### D *To Presume or Not To Presume?*

When faced with a question of foreign law, an Australian court starts with the presumption that the foreign law is the same as Australian law unless proven otherwise.<sup>44</sup> This rather odd practice is said to derive from the supposed fact (itself a presumption) that ‘Australian courts know no foreign law’,<sup>45</sup> and so must have the state of foreign law proven to them by evidence. The result is that all parties and the court can comfortably ignore foreign law unless one of the parties sees some advantage in proving that it is in some way different from Australian law. That is how the plaintiff’s lawyers approached their preparation for trial in *Neilson*. The plaintiffs did not plead anything about Chinese law and adduced no evidence about it. Kirby J in referring to the transcript of the trial found the plaintiff’s counsel disarmingly admitting to the trial judge at the beginning of the trial: “‘we’re endeavouring to keep well away from the China

<sup>39</sup> For the translation relied on by the Court, see above n 15 and accompanying text.

<sup>40</sup> *Neilson* (2005) 221 ALR 213, 222, where McHugh J referred to *Zhang* (2002) 210 CLR 491, 520 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

<sup>41</sup> *Neilson* (2005) 221 ALR 213, 218 (Gleeson CJ), 240 (Gummow and Hayne JJ), 260 (Kirby J), 274 (Callinan J), 282 (Heydon J). See also at 222–3 (McHugh J). For McKechnie J’s statement that the second sentence gave *him* the discretion to apply Australian law, see above n 13.

<sup>42</sup> *Neilson* (2005) 221 ALR 213, 260 (emphasis in original).

<sup>43</sup> *Ibid* 222 (emphasis added).

<sup>44</sup> Nygh and Davies, above n 3, 325.

<sup>45</sup> *Neilson* (2005) 221 ALR 213, 241 (Gummow and Hayne JJ).



law as we can [sic]”<sup>46</sup> By contrast, the defendant had an interest in showing that the Chinese limitation period was much shorter than the equivalent Western Australian period, so it adduced evidence about Chinese law. As we have seen, that evidence was almost silent about how the second sentence of art 146 would be interpreted in China.<sup>47</sup> That raised the question of whether the court could appropriately revert to the presumption in the absence of adequate proof of foreign law.

A bare majority of the Court (Gummow, Hayne, Callinan and Heydon JJ) held that in asking how a Chinese court would interpret art 146, it was appropriate to apply the presumption and to interpret the provision as an Australian court would have interpreted it.<sup>48</sup> Callinan J (with whom Heydon J agreed on this point) put it thus:

In those circumstances, the absence of relevant evidence of the Chinese approach to the construction and application of Art 146, it is right in my opinion to presume that the Chinese principles of statutory construction are the same as the Australian ones and to use the latter.<sup>49</sup>

Gleeson CJ disagreed, holding that the question whether a Chinese court would have exercised the art 146 discretion to choose Australian law was a question of fact, not law.<sup>50</sup> The general presumption that foreign law is the same as Australian law was ‘devoid of content in this case’, because:

The question is not sufficiently described, in abstract terms, as a question of the construction of Art 146. The question is one as to the considerations that are relevant to a decision to invoke the second sentence of Art 146 of the general principles. There is no Australian law on that subject. In particular, Australian law does not accept a flexible exception to its rule that the *lex loci delicti* governs foreign torts.<sup>51</sup>

McHugh J agreed with Gleeson CJ on this point, finding that the discretion given by the second sentence of art 146 was ‘part and parcel of a rule of law that has no counterpart in Australian law’ because there is no flexible exception to the Australian choice of law rule.<sup>52</sup> Furthermore, according to McHugh J, the onus of proving foreign law lay on the plaintiff, so the presumption could not operate in her favour, as it must operate against the party whose obligation it is to prove foreign law.<sup>53</sup>

<sup>46</sup> Ibid 247.

<sup>47</sup> See above Part III(C).

<sup>48</sup> *Neilson* (2005) 221 ALR 213, 242–3 (Gummow and Hayne JJ), 275 (Callinan J), 280 (Heydon J).

<sup>49</sup> Ibid 275.

<sup>50</sup> Ibid 218.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid 223.

<sup>53</sup> Ibid. See also LexisNexis, *Cross on Evidence*, vol 1 (at 93, January 2006) ¶41 005.

Kirby J went further than Gleeson CJ and McHugh J, holding that the presumption should not be used in this case because it involved an ‘unrealistic fiction’:<sup>54</sup>

the notion that the law of a country so different, with a legal system so distinct, as China is the same as that of Australia, is completely unconvincing. ... With all respect to the majority view, I regard it as straining even credulity to impose on an Australian court the fiction of presuming that the law of China (the place of the wrong), which is an essential element in this case, is the same as the law of Australia. Or that the written law of China would be interpreted *and applied* by a Chinese court in the same way as an Australian judge would do in construing a similar text.<sup>55</sup>

#### E *Chinese Law or Australian Law?*

By a 5:2 majority, the Court held that Australian law should be applied, and that the appeal from the Full Court of the Supreme Court of Western Australia should be allowed. Gummow and Hayne JJ so held because of their use of the presumption, saying that the trial judge was *bound* to conclude that Chinese law would look to the law of the nationality or domicile of the parties, which was Australian law.<sup>56</sup> After using the presumption to consider the kind of factors that would be considered by an Australian judge, Callinan J concluded that ‘on balance, a Chinese court would be likely to prefer Australian law in all of the circumstances.’<sup>57</sup> Heydon J agreed with Callinan J on both the process and the conclusion.<sup>58</sup>

As we have seen, Gleeson CJ disagreed with the majority that it was appropriate to use the presumption to answer the question of what a Chinese court would have done about the discretion in the second sentence of art 146.<sup>59</sup> Gleeson CJ thought that was a question of fact to be determined on the evidence, but concluded that there was ‘just enough’ in the evidence of the expert witness to support the trial judge’s conclusion that Australian law should be applied.<sup>60</sup> Accordingly, his Honour joined the majority in holding that the appeal should be allowed.

McHugh J dissented because his Honour thought that the Chinese choice of law rules should be ignored, and Chinese domestic law applied.<sup>61</sup> Kirby J also dissented. Like Gleeson CJ, Kirby J thought it inappropriate to use the presumption, but his Honour thought that the plaintiff had failed to prove her case that Australian law should be applied.<sup>62</sup>

<sup>54</sup> *Nelson* (2005) 221 ALR 213, 263.

<sup>55</sup> *Ibid* 263–4 (emphasis in original).

<sup>56</sup> *Ibid* 242.

<sup>57</sup> *Ibid* 277.

<sup>58</sup> *Ibid* 282.

<sup>59</sup> *Ibid* 218.

<sup>60</sup> *Ibid* 219.

<sup>61</sup> *Ibid* 229–30.

<sup>62</sup> *Ibid* 264.

## IV COMMENTARY

A *Renvoi* — and Jurisdiction

The majority's quest to apply 'all of the law of [the] place [of the wrong] that local courts would normally apply in deciding the proceedings'<sup>63</sup> makes no sense if the local courts in the foreign jurisdiction would not be interested in deciding the proceedings at all. Perhaps the time has now come to recast the *renvoi* enquiry in terms of jurisdiction rather than choice of law, by focusing first on whether the foreign court would assume jurisdiction.<sup>64</sup> *Neilson* was unusual in that it posed a pure choice of law question, without any challenge to the forum court's jurisdiction. As has often been observed of late, choice of law questions now usually arise tangentially as part of an enquiry into jurisdiction.<sup>65</sup> That, for example, is how the choice of law question arose in *Zhang*, where the central question was whether the proceedings should be stayed on *forum non conveniens* grounds. To focus first on jurisdiction rather than choice of law is both sensible and practical. Many foreign laws have no discernible *renvoi* rule, and some do not even have discernible choice of law rules, but all have jurisdictional rules indicating what claims may properly be brought before their courts.

Although all of the Justices in *Neilson* referred to Chapter VIII of the *General Principles*,<sup>66</sup> which concerns 'Application of the Law to Civil Relations involving Foreigners', only Kirby J made even passing reference to the 1991 Civil Procedure Law of the People's Republic of China, *Min shi su song fa* (PRC) ('CPL'),<sup>67</sup> which contains the rules of jurisdiction of Chinese courts.<sup>68</sup> Although the CPL was exhibited in evidence before the trial judge in *Neilson*, the Justices of the High Court could hardly be blamed for not focusing on it, as the case was not presented to them on that basis. For the same reason, no reference was made in the High Court to the Supreme People's Court's 1992 *Opinions on Application of the Civil Procedure Law of the People's Republic of China*<sup>69</sup> which provide

<sup>63</sup> Ibid 256 (Kirby J) (emphasis in original).

<sup>64</sup> See Mary Keyes, 'The Doctrine of Renvoi in International Torts: *Mercantile Mutual Insurance v Neilson*' (2005) 13 *Torts Law Journal* 1, 14, where she writes that the 'choice of law rules should be considered in the context of their relationship to jurisdictional principles'. The relationship of *renvoi* to jurisdiction is touched on in Nygh and Davies, above n 3, 299–300, but as Keyes rightly observes at 4 fn 22, the question has 'attracted surprisingly little comment'.

<sup>65</sup> See generally Mary Keyes, *Jurisdiction in International Litigation* (2005). See also Adrian Briggs, *The Conflict of Laws* (2002) v: 'When the world loses its fascination with jurisdictional issues — something it shows no sign of doing anyday soon — it will be time to write a different book; but the broad issue of jurisdiction is where today's litigators focus their attention'.

<sup>66</sup> *Neilson* (2005) 221 ALR 213, 216, 218 (Gleeson CJ), 220, 224 (McHugh J), 232 (Gummow and Hayne JJ), 267 (Kirby J), 275–6 (Callinan J), 280–1 (Heydon J).

<sup>67</sup> For an English translation of the CPL, see China Legislative Information Network System, *Civil Procedure Law of the People's Republic of China* <[http://www.chinalaw.gov.cn/jsp/jalor\\_en/disptext.jsp?recno=1&&ttlrec=2](http://www.chinalaw.gov.cn/jsp/jalor_en/disptext.jsp?recno=1&&ttlrec=2)>.

<sup>68</sup> *Neilson* (2005) 221 ALR 213, 250–1 (Kirby J). Cf at 215, where Gleeson CJ referred to the fact that the CPL was in evidence before McKechnie J without commenting on its contents.

<sup>69</sup> Supreme People's Court, *Opinions on Application of the Civil Procedure Law of the People's Republic of China* (1992) ('*Opinions on CPL*'), cited in Mo Zhang, 'International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System' (2002) 25 *Boston College International and Comparative Law Review* 59, 60.

important judicial guidance for lower Chinese courts to follow when considering procedural matters.<sup>70</sup>

Under the *CPL*, Chinese courts have general territorial jurisdiction over citizens domiciled or habitually resident in China,<sup>71</sup> and may exercise jurisdiction over foreign defendants not domiciled in China only if there is sufficient ground warranting the exercise of the judicial power of the People's courts.<sup>72</sup> Contract disputes concerning 'foreign elements' may be heard if the contract is performed in China,<sup>73</sup> and tort claims may be heard if the place of the tort is in China.<sup>74</sup> Thus, a Chinese court would have had jurisdiction to hear Barbara Neilson's claim if she had brought it in China. However, the Supreme People's Court issued a Notice on Several Notable Matters concerning Adjudication of Civil and Commercial Cases involving Foreign Elements and Enforcement on 17 April 2000, which stated a limited form of *forum non conveniens* doctrine.<sup>75</sup> This Notice stated that where all parties to a civil litigation are non-Chinese and the disputes have no practical connection with China, a People's court may advise the parties to choose alternative courts in other countries because litigation in the People's court would be deemed 'unrealistic' on account of the determination of evidence and enforcement of judgments.<sup>76</sup> One can quite imagine a Chinese court using the Notice to direct Barbara Neilson to an alternative court in Australia if she, an Australian, were to have proceeded with an action in China against an Australian defendant without substantial assets in that country. In other words, there is room for legitimate doubt as to whether a Chinese court would have heard Barbara Neilson's complaint at all if she had decided to sue OPC in China.

The *lex loci delicti* choice of law test adopted by the High Court in *Zhang* seems meaningless if the court in the place of the wrong has no jurisdiction to hear the case, and consideration of the *renvoi* rules in that legal system seems doubly meaningless in such circumstances. Similarly, if the foreign court has jurisdiction under its own rules, but would decline to exercise that jurisdiction, the reasons for applying the foreign law seem much diminished. By declining to hear the case, the foreign court in effect states that any interest it might have in applying its own law is outweighed by other factors, including the convenience of the parties and (in some jurisdictions, at least) convenience to itself.<sup>77</sup> Although it would not be meaningless for the Australian forum court to insist on applying the foreign law in such a case, it nevertheless seems just as perverse to do so as it would be to apply Chinese domestic law if the Chinese choice of law

<sup>70</sup> Zhang, above n 69, 60.

<sup>71</sup> *CPL* art 22.

<sup>72</sup> Zhang, above n 69, 68.

<sup>73</sup> *CPL* art 243.

<sup>74</sup> *Opinions on CPL*, cited in Zhang, above n 69, 68.

<sup>75</sup> Supreme People's Court, Notice on Several Notable Matters concerning Adjudication of Civil and Commercial Cases involving Foreign Elements and Enforcement (2000), as described in Zhang, above n 69, 72–3.

<sup>76</sup> Zhang, above n 69, 73.

<sup>77</sup> For example, the *forum non conveniens* analysis in US federal courts takes into account 'public interest factors' including congestion of the court's docket: see Martin Davies, 'Time to Change the Federal Forum Non Conveniens Analysis' (2002) 77 *Tulane Law Review* 309, 351–64.

rules were to point to Australian law. Should the foreign court not apply its own law, there seems to be little reason why an Australian court should do so, whether the foreign court's refusal stems from its choice of law rules or from its decision to decline jurisdiction.

The first step should surely be to determine whether the foreign court would have or would retain jurisdiction over the dispute. If not, consideration of the foreign choice of law rules is moot. Of course, choice of law questions may intrude into the preliminary jurisdictional enquiry, just as they do in Australia (and as they did in *Zhang*). For example, federal courts in the United States often decline to retain jurisdiction of cases that would be governed by foreign law,<sup>78</sup> particularly if the plaintiff is not a US citizen or resident.<sup>79</sup>

If, for whatever reason, the foreign court would not have or retain jurisdiction according to its own rules (as a Chinese court might not have done in *Neilson* itself), what should the Australian court do? The answer seems simple, if perhaps rather shocking to conflict of laws scholars: the court should apply Australian law, the *lex fori*. What other alternative is there? To apply Chinese law to a case that would not even be heard by a Chinese court seems even more perverse than to apply Chinese law to a case that a Chinese court would consider to be governed by non-Chinese law. The plaintiff can hardly be accused of forum-shopping for juridical advantage under Australian law if the other shop, the foreign court, would be completely closed to him or her. Thus, it may be that the *Neilson* majority arrived at the right conclusion — Australian domestic law — but for the wrong reasons.

Consideration of the foreign choice of law rules (and, perhaps, the foreign renvoi rules) should take place only if the preliminary jurisdictional enquiry indicates that the foreign court would have or would retain jurisdiction. Only then is it meaningful to consider how the foreign court would decide the dispute and by what law. In such a case, the plaintiff might legitimately be suspected of forum-shopping because another forum would at least be open to him or her, one in which the defendant might prefer to be. Nevertheless, despite their routine condemnations of forum-shopping (which continued in *Neilson* itself),<sup>80</sup> it would be hypocritical of Australian courts to be too censorious about the practice when their jurisdictional rules are so generous and their *forum non conveniens* rule so conservative.<sup>81</sup> To use foreign torts as an example, a plaintiff can invoke the jurisdiction of the courts of most Australian states on a claim against a foreign defendant simply by showing that he or she suffered or continues to suffer within the Australian forum any physical, financial or social consequences of an injury

<sup>78</sup> Ibid 358 fn 235.

<sup>79</sup> Ibid 368–70.

<sup>80</sup> *Neilson* (2005) 221 ALR 213, 235 (emphasis added), where Gummow and Hayne JJ stated that:

The first and *most important* premise for considering the issues raised in the appeal is that the rules adopted should, as far as possible, avoid parties being able to obtain advantages by litigating in an Australian forum which could not be obtained if the issue were to be litigated in the courts of the jurisdiction whose law is chosen as the governing law.

<sup>81</sup> Keyes, 'The Doctrine of Renvoi in International Torts', above n 64, 15; see also Richard Garnett, 'Stay of Proceedings in Australia: A "Clearly Inappropriate" Test?' (1999) 23 *Melbourne University Law Review* 30.

or damage first received in the foreign country.<sup>82</sup> The Australian court will retain the expansive jurisdiction unless the defendant can persuade it that it would be ‘clearly inappropriate’ to do so.<sup>83</sup> To continue the usual shopping simile, such rules mean that Australian courts are open all hours and practically begging for business — while paradoxically voicing their disapproval of their customers for taking advantage of their being so accommodating. Because the Australian rules about jurisdiction do such a poor job of restraining forum-shopping, some form of renvoi rule is necessary to ensure that the forum-shopping plaintiff is met by the same outcome in Australia as he or she would receive in the foreign forum.<sup>84</sup> However, that still leaves the question: which type of renvoi should be adopted, single or double?

The real difficulty with renvoi lies in the infinite regression that is possible under the double renvoi approach. That problem could be avoided on the facts of *Neilson* because of the view that the majority took of the Chinese renvoi rule (or rather the lack of one) pursuant to *General Principles* art 146, but it cannot be avoided forever. The majority airily declined to say anything about infinite regression, saying that they had no obligation to provide a complete theory of renvoi.<sup>85</sup> In doing so, however, they ensured that when (and if) they *are* called on to provide a complete theory of renvoi, it will necessarily be incoherent. As McHugh J pointed out, Cassandra-like, the only possible way out of the problem of infinite regression involves abandoning, to a greater or lesser extent, the commitment to look at the whole of the foreign law.<sup>86</sup> As a result, no matter what solution the majority adopts in the future to avoid infinite regression (single renvoi or no renvoi), its ‘complete theory’ will be a kind of ad hoc expediency that will run something like this: the double renvoi technique of considering the foreign renvoi rule is acceptable if (as in *Neilson*) the foreign renvoi rule is not also a double renvoi rule; if the foreign renvoi rule *is* a double renvoi rule, then it must be ignored to avoid the infinite regression. In other words, double renvoi is all right so long as it is harmless. In order to make the distinction in question, the court will have to look at the content of the foreign renvoi rule in order to be able to know whether to apply it or ignore it.

The majority may seek to defend that position by saying that its task is not to weave the law into a coherent, seamless web, but rather to decide individual cases. That sounds good enough on its face, but the traditional Anglo-Australian approach usually uses choice of law rules (‘indicative rules’) that indicate the

<sup>82</sup> *Federal Court Rules 1979* (Cth) O 8 r 1(ad); *Uniform Civil Procedure Rules 2005* (NSW) r 11.2, sch 6(e); *Supreme Court Rules 1997* (NT) r 7.01(1)(k); *Uniform Civil Procedure Rules 1999* (Qld) r 124(1)(l); *Supreme Court Rules 1987* (SA) r 18.02(fa); *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 7.01(1)(j); *Girgis v Flaherty* (1985) 4 NSWLR 248, 266 (McHugh JA); *Brix-Nielsen v Oceaneering Australia Pty Ltd* [1982] 2 NSWLR 173, 177, 178 (Master Allen); *Challenor v Douglas* [1983] 2 NSWLR 405, 409 (Cross J); *Darrell Lea Chocolate Shops Pty Ltd v Spanish-Polish Shipping Co Inc; The Katowice II* (1990) 25 NSWLR 568, 577 (Carruthers J).

<sup>83</sup> *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

<sup>84</sup> Adrian Briggs, ‘In Praise and Defence of Renvoi’ (1998) 47 *International and Comparative Law Quarterly* 877, 881.

<sup>85</sup> *Neilson* (2005) 221 ALR 213, 237–8, 245 (Gummow and Hayne JJ), 282–3 (Heydon J), 256–7 (Kirby J).

<sup>86</sup> *Ibid* 227.

legal rules to be applied ('dispositive rules') no matter what their content.<sup>87</sup> An Australian court can normally only refuse to apply the foreign law indicated by its choice of law rules in a very limited class of cases: if the foreign law is a revenue law, a penal law or an expropriatory law in gross violation of human rights, or purporting to have an extraterritorial effect, or if application of the foreign law would in some way offend against Australian public policy.<sup>88</sup> It could be argued that Australian public policy demands that an Australian court should refuse to apply a foreign double renvoi rule because that would produce infinite regression. That would provide a semblance of a reasoned approach, but it would also involve a considerable extension of the 'public policy' exception to take account of concerns of judicial convenience as well as justice between the parties.

As it is understood at the moment, the public policy exception allows an Australian court to refuse to apply a foreign law if to do so would be to validate an outcome *between the parties* that is in some way offensive to Australian public policy. For example, in *Royal Boskalis Westminster NV v Mountain*,<sup>89</sup> the English Court of Appeal refused to enforce a contract that would have been enforceable under its governing Iraqi law, because to do so would be to ignore the outrageous duress that one contracting party (the then Iraqi Government) had brought to bear on the other party. Consider, by way of contrast, what would have happened in *Neilson* if Chinese law had contained a double renvoi rule. That rule would not have indicated an outcome *as between the parties* that would have been unfair, unjust or otherwise contrary to Australian public policy. It would, however, have indicated an outcome that would pose insuperable problems for the Australian court. Allowing a court to refuse to apply a foreign law for its own convenience is something very different from allowing a court to refuse to apply a foreign law in order to protect one of the parties from that law's harshness.

It might also be objected that the problem of infinite regression is largely theoretical, as the only other legal systems that use the double renvoi approach are in common law countries that tend to have much the same choice of law rules and connecting factors as Australia does, so it is unlikely that there will be a foreign law that both uses double renvoi and chooses a law different from that indicated by the Australian choice of law rule.<sup>90</sup> However, this underestimates the possibility of finding a conflict of conflicts rules between Australia and a common law legal system that also has a double renvoi rule. Rather surprisingly, some telling examples are to be found in the judgment of Gummow and Hayne JJ, members of the majority in *Neilson* who were otherwise sanguine about the need to provide a 'complete theory' of renvoi:

<sup>87</sup> See W R Lederman, 'Classification in Private International Law' (Pt 1) (1951) 29 *Canadian Bar Review* 3; W R Lederman, 'Classification in Private International Law' (Pt 2) (1951) 29 *Canadian Bar Review* 168.

<sup>88</sup> Nygh and Davies, above n 3, ch 18.

<sup>89</sup> [1999] QB 674.

<sup>90</sup> See, eg, Keyes, 'The Doctrine of Renvoi in International Torts', above n 64, 6.

The same kinds of question about choice of law may be presented not only where, as the appellant contended to be the case here, the law of the forum and the law of the place choose different connecting factors to determine the applicable law. They may be presented in at least three other kinds of case. Thus, they may be presented where the law of the forum and the law of the place use the same connecting factor but apply it differently. They may be presented where the two jurisdictions would characterise the problem differently. They may be presented if the law of the place applies no single connecting factor but seeks to identify the so-called proper law of the tort.

The present case is not of these kinds. But it is easy to imagine cases where different legal systems would identify differently the place of commission of a tort, like defamation, or liability for defective products. It is easy to imagine cases where different legal systems would characterise a particular claim differently (as a claim in contract rather than tort or vice versa). It is well known that some foreign jurisdictions have adopted the proper law of the tort as the applicable choice of law rule.<sup>91</sup>

Let us consider an extended example that combines two of the possibilities identified by Gummow and Hayne JJ. Imagine a product manufactured in Australia by an Australian manufacturer and distributed in the United States (among other places). The product poses some small, but irreducible, inherent risk of injury. That risk of injury could be reduced or removed by appropriate labelling, but the packaging of the product does not bear adequate risk warnings. Products injure consumers in several US states. Two vacationing Australians buy the product, one in Montana, and one in New Jersey. Both are injured by the product. On their return to Australia, they sue the Australian manufacturer in Australia.

The Australian court would plainly have jurisdiction because of the presence of the defendant. In order to determine where the tort in question occurred, the court would apply the rule enunciated by the Privy Council in *Distillers Co (Biochemicals) Ltd v Thompson*:

The right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question: where in substance did this cause of action arise?<sup>92</sup>

It would most probably conclude that the torts in question occurred in the United States, because the key feature of the wrongful activity was the defendant's failure to give the consumers an adequate warning of the irreducible risks of the product. That was the result in the *Distillers Case* itself. Applying the rule in *Zhang*, the court would then have to apply the *lex loci delicti*, the laws of the respective US states. Following the approach adopted by the majority in *Neilson*, it would look to the whole of each state's law, including the conflict of laws rules.

Montana has rejected use of the *lex loci delicti* as its choice of law rule; instead it uses the 'most significant relationship to the occurrence and the parties' rule in

<sup>91</sup> *Neilson* (2005) 221 ALR 213, 239.

<sup>92</sup> [1971] AC 458, 468 (Lord Pearson) ('*Distillers Case*'). This test was approved and applied by the High Court of Australia in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 567 (Mason CJ, Deane, Dawson and Gaudron JJ).



the *Restatement (Second) of Conflict of Laws* § 145 (1971) ('*Restatement (Second)*').<sup>93</sup> Under § 146 of the *Restatement (Second)*, the law of the place where the injury occurred is taken to have the most significant relationship *unless* some other law has a more significant relationship under the principles stated in § 6.<sup>94</sup> The factors listed in § 6(2) include:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of the law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

Applying those factors to a case with so many contacts with Australia and so few with Montana, a Montana court might well choose Australian law.

New Jersey's choice of law rule is a flexible 'governmental interest' standard, which requires application of the law of the state with the greatest interest in resolving the particular issue that is raised in the underlying litigation.<sup>95</sup> Application of that standard in product liability cases in New Jersey has often resulted in selection of the law of the state of manufacture,<sup>96</sup> on the basis that the state of manufacture has 'a strong interest in encouraging the manufacture and distribution of safe products for the public'.<sup>97</sup> Thus, the New Jersey choice of law process might also select Australian law, because Australia was the place of manufacture.

At this point, it is appropriate to repeat that many, perhaps most, US courts (federal and state) would decline to exercise jurisdiction in our hypothetical case involving an Australian plaintiff, an Australian defendant and Australian law.<sup>98</sup> There would then be no apparent reason to apply anything other than Australian law, notwithstanding *Zhang* and the *lex loci delicti* rule, because the courts in the place of the wrong would decline jurisdiction. However, let us go on to consider what the Australian court should do about *renvoi* on the rather unrealistic assumption that the preliminary jurisdictional enquiry would indicate that the courts in Montana and New Jersey would retain jurisdiction but apply Australian law.

<sup>93</sup> *Phillips v General Motors Corporation*, 995 P 2d 1002, 1007 (Regnier J) (Mont, 2000) ('*Phillips*').

<sup>94</sup> *Restatement (Second)* § 146 (1971).

<sup>95</sup> *State Farm Mutual Automobile Insurance Co v Estate of Simmons*, 417 A 2d 488, 492–3 (Handler J) (NJ, 1980); *Veazey v Doremus*, 510 A 2d 1187, 1189–90 (Pollock J) (NJ, 1986).

<sup>96</sup> *Gantes v Kason Corporation*, 679 A 2d 106 (NJ, 1996). The Supreme Court of New Jersey applied New Jersey law as state of manufacture despite more pro-manufacturer law in Georgia, which was the place of purchase and injury and where the claim would have been time-barred.

<sup>97</sup> *Ibid* 111 (Handler J).

<sup>98</sup> See Davies, above n 77, 315 fn 17, which makes an observation in relation to *forum non conveniens* practice in federal courts. Thirty states, the District of Columbia and all US territories engage in a *forum non conveniens* analysis effectively identical to that undertaken in federal courts.

If we assume that courts in New Jersey and Montana would choose Australian law on the facts of our hypothetical, our Australian court must next, following *Neilson*, consider the New Jersey and Montana renvoi rules. New Jersey has emphatically rejected the use of renvoi: reference to a foreign law by New Jersey choice of law rules means reference to domestic law.<sup>99</sup> On the other hand, there is a recent example of the Supreme Court of Montana considering the whole of the foreign law indicated by its choice of law of process in a torts case.<sup>100</sup> Although the Court did not use the word ‘renvoi’ to describe that process, Symeon C Symeonides has, with justification, described the Court’s reasoning as ‘a renvoi-type syllogism’.<sup>101</sup> If the Montana Court were to do the same when considering the facts of our hypothetical, it would consider the Australian choice of law rules.<sup>102</sup>

What should our Australian court do now? In the case brought by the plaintiff injured in New Jersey, it should apply Australian domestic law because that would be the result indicated by New Jersey’s no-renvoi rule, just as the *Neilson* majority applied Australian law because of what they concluded to be China’s no-renvoi rule.

In the case brought by the plaintiff injured in Montana, the position would not be as clear, because Montana has not yet adopted a renvoi rule.<sup>103</sup> If the Australian court were to respond to that uncertainty about Montana law in the way the majority of the High Court did in *Neilson*, it should remedy the lack of information by presuming Montana law to be the same as Australian law. That would lead to an uncomfortable result as it would immediately lead to infinite regression, which occurs when both jurisdictions use double renvoi. Australia’s choice of law rules would look to Montana’s choice of law rules, which would look

<sup>99</sup> *Re Damato*, 206 A 2d 171, 175–6 (Labrecque JAD) (NJ Super Ct App Div, 1965); *Breslin v Liberty Mutual Insurance Co*, 341 A 2d 342 (Lynch JAD) (NJ Super Ct App Div, 1975). The latter case was affirmed in *Breslin v Liberty Mutual Insurance Co*, 354 A 2d 635 (NJ, 1976), both applying the *Restatement on Conflict of Laws* § 7 (1934).

<sup>100</sup> *Phillips*, 995 P 2d 1002 (Mont, 2000).

<sup>101</sup> Symeon C Symeonides, ‘Choice of Law for Products Liability: The 1990s and Beyond’ (2004) 78 *Tulane Law Review* 1247, 1298.

<sup>102</sup> In *Phillips*, three out of four members of a Montana family died in an accident in Kansas while driving from Montana to North Carolina in a car manufactured by the defendant in Michigan which was bought by one of the victims in North Carolina. Applying the *Restatement (Second)* approach described above, the *Phillips* Court declined to apply Kansas law (the law of the place of death, which was indicated under § 146) because it concluded that Montana law had a more significant relationship according to the factors listed in § 6: *Phillips*, 995 P 2d 1002, 1014–15 (Regnier J) (Mont, 2000). The Court reinforced that conclusion by considering the law of the two other states that might also have been regarded as having a more significant relationship than Kansas under the § 6 factors, namely Michigan (the state of manufacture) and North Carolina (the state of purchase). The Court considered the choice of law rules in both states and concluded that neither would apply its own law; North Carolina because it uses a strict *lex loci delicti* test and Michigan because of a case decided by a Michigan court, *Farrell v Ford Motor Co*, 501 NW 2d 567 (Mich Ct App, 1993), in which the court applied Michigan’s ‘governmental interest’ approach and concluded that Michigan had little interest in applying its own law when its only contact with the dispute was the location of the manufacturer: *Phillips*, 995 P 2d 1002, 1011, 1012–13 (Regnier J) (Mont, 2000).

<sup>103</sup> In *Phillips*, the Supreme Court of Montana did not need to adopt a renvoi rule. Its ‘renvoi-like syllogism’ was done to confirm that neither North Carolina nor Michigan would apply its own domestic law. Both states’ choice of law rules pointed to Kansas but the Supreme Court of Montana had already rejected the use of Kansas law for other reasons: *Phillips*, 995 P 2d 1002, 1009–13 (Regnier J) (Mont, 2000).

back at Australia's choice of law rules, and so on. The Australian court could avoid that outcome simply by applying Australian law and ignoring Montana's 'renvoi-type syllogism', thus accepting the renvoi. It would then be able to apply Australian law to both the Montana plaintiff and the New Jersey plaintiff, a satisfying result given the similarity between their claims. In order to arrive at that result, however, it would have to use double renvoi in the New Jersey case and single renvoi in the Montana case. Or, to put it another way, it would have to apply the foreign renvoi rule when it proved convenient (as it would in the New Jersey case), but not when it proved inconvenient (as it would in the Montana case). To repeat what was said above: double renvoi is all right so long as it is harmless. Perhaps only academics would be displeased with such a result but it must be said: that is not much of a 'complete theory'.<sup>104</sup>

If Montana were to have a *single* renvoi rule, the result would be even less desirable. The Australian court would look to Montana law, which would refer the question back to Australian law including Australia's choice of law rules, which would refer the question back to Montana law — where it would stay, if Montana accepted the renvoi. That would produce the overall result that the New Jersey plaintiff's claim would be governed by Australian domestic law, but the Montana plaintiff's claim would be governed by Montana domestic law. Given the similarity between the two cases, it seems very undesirable to treat them differently because of the relatively obscure fact that Montana and New Jersey have different renvoi rules. That might be conceptually pure if one is committed to double renvoi, but the High Court in *Neilson* did not seem to be all that interested in conceptual purity nor all that committed to double renvoi.

This example illustrates why it would be far better to use single renvoi in all cases, accepting the reference back from the foreign choice of law rules and then applying domestic Australian law. That would allow our hypothetical court to apply Australian domestic law to both the New Jersey plaintiff and the Montana plaintiff, but it would have the additional advantage of arriving at that conclusion by the same process of reasoning in both cases. Accepting the renvoi is what is done in most civil law countries.<sup>105</sup> It would further be consistent with the outcome indicated by the preliminary jurisdictional enquiry suggested above. We saw there that if the foreign court would not have or retain jurisdiction in the case, there seems to be no reason not to apply Australian domestic law given the other court's lack of interest.<sup>106</sup> If the foreign court would retain jurisdiction but

<sup>104</sup> Admittedly, this criticism is somewhat reminiscent of the apocryphal story about former US Secretary of State Madeleine Albright meeting with a French government official who is said to have responded to a proposed plan of action with the words, '[t]hat may work well in practice but how does it work in theory?'

<sup>105</sup> Nygh and Davies, above n 3, 291, referring in particular to the example of Italy, which adopted a single renvoi approach in 1995: see *Legge 31 maggio 1995, n 218 Riforma del sistema italiano di diritto internazionale privato* (Italy) art 13, an English translation of which appears as *Reform of the Italian System of Private International Law*, 35 ILM 765 (1996). See also Andrea Bonomi, 'The Italian Statute on Private International Law' (1999) 27 *International Journal of Legal Information* 247, 255–6.

<sup>106</sup> See above Part III(A).

would have no interest in applying its own law,<sup>107</sup> why should an Australian court insist on doing something different? The only thing that needs to be sacrificed to achieve this result is the commitment to apply the whole of the foreign law *including its renvoi rule*.

Admittedly, applying the foreign choice of law rules but not the foreign renvoi rule also means sacrificing logical consistency to expediency of outcome. That is the reason why single renvoi is also, in a sense, a ‘wrong’ answer to the renvoi question, which is why McHugh J thought it better to refuse renvoi altogether. Single renvoi does, however, have the advantage of requiring the forum court at least to consider whether the foreign court would apply its own domestic law to a case with foreign elements. It may not be the best of all possible worlds, but it does seem to be the least bad of them. Unfortunately, only Callinan J in *Neilson* was clearly in favour of single renvoi. Unless some future case involving infinite regression persuades the court to reconsider *Neilson*’s adherence to double renvoi, single renvoi has lost the day — to what, however, is not yet clear.

#### B *We Do Not Presume*

In Australian (and English) courts, foreign law is a question of fact, but it is ‘a question of fact of a peculiar kind’,<sup>108</sup> because it need not be proved in the same way as other relevant facts. As Gummow and Hayne JJ explained in *Neilson*:

If there is thought to be some deficiency in the evidence, the ‘presumption’ that foreign law is the same as the law of the forum comes into play. ... Neither the absence of pleading the relevant content of foreign law nor the absence of proof would be fatal to the case of the party relying on the relevant provision of foreign law.<sup>109</sup>

That is an invitation to forum-shopping, if ever there were one. The *lex loci delicti* rule in *Zhang* is supposed to remove the incentive for forum-shopping, particularly when buttressed by the absence of a ‘flexible exception’, because it ensures that a plaintiff who has suffered harm as a result of a foreign tort can expect to have his or her claim determined by the same law in an Australian court as if the claim had been pursued in the place of the wrong. Yet, if the plaintiff comes to an Australian court and makes no effort to plead or prove the foreign law on which his or her claim depends, the claim will be determined by Australian law in any event. Thus, the presumption about foreign law undercuts the underlying intention of the *Zhang* rule by providing the plaintiff with a positive incentive simply to ignore foreign law, unless it is in some way more

<sup>107</sup> In US states like Michigan and New Jersey, which use a ‘governmental interest’ analysis for choice of law purposes, it would be literally true to say that the foreign jurisdiction would have no interest in applying its own law. If it did have an interest in applying its own law, it would do so for that reason alone.

<sup>108</sup> *Parkasho v Singh* [1968] P 233, 250 (Cairns J).

<sup>109</sup> *Neilson* (2005) 221 ALR 213, 242–3, where their Honours cited *Zhang* (2002) 210 CLR 491, 518–19 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), in which the High Court held that it was unnecessary for the plaintiff to plead the foreign law to establish a cause of action. See also Richard Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (1998) 143–53, where he explained the notion that ‘[a] party may rely upon foreign law without pleading its content or proving it.’

favourable than Australian law. That is why it was possible for Barbara Neilson's counsel to admit so frankly that: "We're endeavouring to keep well away from the China law as we can [sic]".<sup>110</sup> By 'keeping well away from' foreign law, the plaintiff can cast a considerable practical burden on the defendant, as the English *Report on Practice and Procedure in Defamation* pointed out in 1991:

the plaintiff can use this right as a daunting tactical ploy against the defendants by simply asserting, so it seems, that the foreign law is presumed to be the same as English law and leaving it to the defendants to incur the considerable cost of showing the contrary.<sup>111</sup>

What kind of a burden is transferred to the defendant by this 'daunting tactical ploy'? Is it the persuasive burden of *proving* that foreign law is different from Australian law or is it merely an evidentiary burden, which would leave the onus of proof on the plaintiff? After *Neilson*, there can be little doubt that it is the former, which makes the plaintiff's 'tactical ploy' of silence even more powerful.

The majority (Gummow, Hayne, Callinan and Heydon JJ) applied the presumption and interpreted the second sentence of *General Principles* art 146 as an Australian court would because the *defendant* had not given enough evidence about how the sentence would be interpreted in a Chinese court. Thus, the plaintiff succeeded in getting Australian law applied to her case simply by *suggesting* that art 146 (which had been put in evidence by the defendant) might provide reason for a renvoi to Australian law. By doing so, she cast the burden of proving otherwise on the defendant. This was too much for McHugh J, who pointed out indignantly (but to no avail) that: 'the evidential presumption is said to operate against, not in favour, of the party whose obligation it is to prove foreign law'.<sup>112</sup>

Another extraordinary feature of the majority's use of the presumption is that the majority applied it to the Chinese process of statutory interpretation, rather than the substantive Chinese rules about renvoi. There was some evidence about how a Chinese court might read the second sentence of art 146,<sup>113</sup> but there was no evidence at all about whether a Chinese court would read the word 'law' in that sentence as meaning the whole of Australian law. Why did the majority not then respond by presuming the Chinese renvoi rule to be the same as the Australian renvoi rule? Because if it had, its judges would have been obliged to presume that the Chinese renvoi rule was the same as the one they had just adopted, double renvoi, which would instantly have produced an infinite regression problem. Again, McHugh J protested in vain:

In the absence of evidence, this court would ordinarily assume that Chinese law is identical to Australian law. On that hypothesis and for the purposes of resolving this appeal, the court would presume that Chinese law concerning the applicability of renvoi to the choice of law rule in tort was the same as under Aus-

<sup>110</sup> See above n 46 and accompanying text.

<sup>111</sup> Supreme Court Procedure Committee, Lord Chancellor's Department, United Kingdom, *Report on Practice and Procedure in Defamation* (1991) 47.

<sup>112</sup> *Neilson* (2005) 221 ALR 213, 223. See also LexisNexis, above n 53, vol 1 (at 93, January 2006) ¶41 005.

<sup>113</sup> *Neilson* (2005) 221 ALR 213, 219 (Gleeson CJ).

tralian law. Hence, if the Australian choice of law in tort selects ‘the whole of the law of that place’, then the Chinese choice of law in tort would be presumed to select also ‘the whole of the law’ of its chosen country.<sup>114</sup>

This disagreement as to *to what* the presumption should be applied should also prove helpful to potential forum-shoppers, who can surely learn from the majority’s manipulation of the question in assessing when the presumption should apply.

As we have already seen, Kirby J blasted the whole idea of the presumption as being an ‘unrealistic fiction’.<sup>115</sup> His Honour is surely right, but that is not quite enough to dispose of the presumption completely. The concept of corporate personality is a fairly unrealistic fiction too, but it is a helpful one because of the difficulties that would arise in making sense of corporate activity if it were to be abandoned.<sup>116</sup> By contrast, the standard presumption is not essential, as there is a workable alternative to it. All of the difficulties posed by the presumption, as well as the ‘daunting tactical ploy’ available to forum-shopping plaintiffs, could be avoided if foreign law were to be treated as law, not fact.

Foreign law has always been treated as fact because it is said — with considerable circularity — that the court cannot take judicial notice of foreign laws.<sup>117</sup> It may once have been true to say, as Gummow and Hayne JJ did in *Neilson*, that ‘Australian courts know no foreign law’<sup>118</sup> but it surely is no longer. Gummow and Hayne JJ themselves referred to English, French, US and Canadian decisions in the footnotes to their judgment. No-one who wanted to rely on a proposition of English law in argument to an Australian court would think of calling expert evidence about English law, and if pressed, an Australian court would surely feel comfortable taking judicial notice of English law. Is Australia still so parochial that it cannot treat other foreign laws in the same way?

How revolutionary a change would it be to abandon the whole notion that foreign law must be proved as fact? If the US experience is anything to go by, the change is more daunting in prospect than in fact. Until 1966, the position in the United States was the same as in England and Australia. Foreign law had to be proved as fact, usually by calling evidence from expert foreign witnesses.<sup>119</sup> Federal courts often had to consider state law to find the rules of evidence about establishing the content of foreign law, and the state law procedures were often inefficient, time-consuming and expensive.<sup>120</sup> As a result, the *Federal Rules of*

<sup>114</sup> *Ibid* 226.

<sup>115</sup> *Ibid* 263.

<sup>116</sup> There are, admittedly, some critics of the doctrine of corporate personality: see, eg, Phillip Blumberg, ‘The Corporate Entity in an Era of Multinational Corporations’ (1990) 15 *Delaware Journal of Corporate Law* 283.

<sup>117</sup> See Fentiman, above n 109, 64: ‘The key to the English position is its restrictive doctrine of judicial notice. It lies in two principles: facts are generally excluded from judicial purview and foreign laws are facts.’

<sup>118</sup> *Neilson* (2005) 221 ALR 213, 241.

<sup>119</sup> *Black Diamond Steamship Corporation v Robert Stewart & Sons Ltd*, 336 US 386, 396–7 (Frankfurter J) (1949); *Cuba Railroad Co v Crosby*, 222 US 473, 478–9 (Holmes J) (1912); *Walton v Arabian American Oil Co*, 233 F 2d 541, 543 (Frank, Lumbard and Waterman JJ) (2<sup>nd</sup> Cir, 1956).

<sup>120</sup> *Federal Rules of Civil Procedure* r 44.1 (2006) (Advisory Committee Notes to 1966 Amendment), citing A Nussbaum, ‘Proving the Law of Foreign Countries’ (1954) 3 *American Journal*

*Civil Procedure* (US) were changed in 1966, with the adoption of r 44.1, which provides:

A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the *Federal Rules of Evidence*. The court's determination shall be treated as a ruling on a question of law.

Rule 44.1 gives a court very broad freedom to consider *any* relevant material about foreign law.<sup>121</sup> A District Court is no longer obliged to rely on the testimony of expert witnesses about foreign law.<sup>122</sup> It may use the unsworn testimony or opinion letter of a foreign lawyer (whether admitted to practice or not),<sup>123</sup> or even the evidence of a non-lawyer.<sup>124</sup> It may read and take judicial notice of the words of a foreign statute,<sup>125</sup> or it may engage in its own independent research in other sources.<sup>126</sup> Because the content of foreign law is now declared to be a question of law, not fact, an appeal court will review the District Court's determination *de novo*, and it, too, may consider any relevant materials, not only those considered by the District Court.<sup>127</sup> As a result, it has been said that foreign law should be argued and briefed just like domestic law.<sup>128</sup> However, a District

*of Comparative Law* 60. For a comprehensive examination of the common law position before statutory intervention, see Arthur Nussbaum, 'The Problem of Proving Foreign Law' (1941) 50 *Yale Law Journal* 1018; Otto Sommerich and Benjamin Busch, 'The Expert Witness and the Proof of Foreign Law' (1953) 38 *Cornell Law Quarterly* 125.

<sup>121</sup> *Trinidad Foundry & Fabricating Ltd v M/V KAS Camilla*, 966 F 2d 613, 615 (Dubina J) (11<sup>th</sup> Cir, 1992).

<sup>122</sup> *United States v First National Bank of Chicago*, 699 F 2d 341, 343–4 (Fairchild J) (7<sup>th</sup> Cir, 1983).

<sup>123</sup> *Kalmich v Bruno*, 553 F 2d 549, 555 fn 4 (Pell J) (7<sup>th</sup> Cir, 1977), cert denied 434 US 940 (1977).

<sup>124</sup> See *A/S Kredit-Finans v Cia Venetico de Navegacion SA of Panama*, 560 F Supp 705, 709 (Pollak J) (ED Pa, 1983), in which the District Court allowed the affidavit of a Norwegian bank official about the validity of ship mortgages under Norwegian law. The case was affirmed in *Cia Venetico de Navegacion SA of Panama v Presthus*, 729 F 2d 1446 (3<sup>rd</sup> Cir, 1984) (Table).

<sup>125</sup> See, eg, *Re Fotochrome Inc*, 377 F Supp 26, 29 (Weinstein J) (ED NY, 1974), where the District Court took judicial notice of a Japanese statute; *Grupo Protexa SA v All American Marine Slip*, 20 F 3d 1224, 1239, 1241 (Greenberg J) (3<sup>rd</sup> Cir, 1994), where the court relied on expert witnesses and the text of Mexican statutes.

<sup>126</sup> *Twohy v First National Bank of Chicago*, 758 F 2d 1185, 1193–5 (Cummings CJ) (7<sup>th</sup> Cir, 1985), where the court researched journal articles and treatises about Spanish law; *Trans Container Services (Basel) AG v Security Forwarders Inc*, 752 F 2d 483, 486–7 (Goodwin J) (9<sup>th</sup> Cir, 1985), where the court researched English cases, statutes and treatises; *Cia Sud Americana de Vapores SA v ITO Corporation of Baltimore*, 940 F Supp 855, 861 (Smalkin J) (D Md, 1996), where the District Court conducted independent research on Chilean law.

<sup>127</sup> See, eg, *Trans Container Services (Basel) AG v Security Forwarders Inc*, 752 F 2d 483, 486 (Goodwin J) (9<sup>th</sup> Cir, 1985), in which it was stated that '[t]his court must independently satisfy itself that the trial court relied upon the correct law in its application of English law.' Interestingly, the position is much the same under Anglo-Australian law, where the appellate court has the duty to examine the evidence of foreign law before the trial judge and to decide for itself whether that evidence justified the conclusion to which the trial judge came: see Nygh and Davies, above n 3, 328–9. This is one of the ways in which foreign law is 'a question of fact of a peculiar kind' under the Anglo-Australian system: *Parkasho v Singh* [1968] P 233, 250 (Cairns J).

<sup>128</sup> Milton Pollack, 'Proof of Foreign Law' (1978) 26 *American Journal of Comparative Law* 470, 475, cited with approval in *Curtis v Beatrice Foods Co*, 481 F Supp 1275, 1285 (SD NY, 1980).

Court is not *obliged* to engage in independent research about foreign law.<sup>129</sup> The court may insist that the proponent of foreign law present evidence on the question,<sup>130</sup> and in the absence of such evidence may still fall back on the traditional presumption that foreign law is the same as the law of the forum.<sup>131</sup>

A flexible rule like the United States r 44.1 would not have been much help to the High Court in *Neilson*, which had to rely on the record of fact and evidence that came up to it from below. Such a rule would undoubtedly have been of assistance to McKechnie J at first instance and it would clearly be of assistance to counsel preparing cases concerning foreign law, as it has been in the United States since 1966. Perhaps most importantly, it would remove the tactical advantage that a plaintiff can now obtain in Australia simply by remaining silent about foreign law, thereby casting a full-blown burden of persuasion onto its opponent.

## V CONCLUSION

When Sir Anthony Mason was Chief Justice of the High Court of Australia, his Honour made the following very telling observation: ‘As a judge I have always marvelled at the sagacity and perception of academic lawyers who make their views known after, not before, the High Court has delivered its judgment.’<sup>132</sup>

Although the commentary in this case note has been made after the event, the Justices who decided *Neilson* can hardly echo Sir Anthony Mason’s complaint about a lack of academic guidance, at least about *renvoi*. Quite apart from the ‘immense scholarly literature’ on *renvoi* in general,<sup>133</sup> several helpful case notes about the decision of the Full Court of the Supreme Court of Western Australia in *Neilson* were published while the case was pending before the High Court.<sup>134</sup> Nevertheless, as we have seen, a majority of the High Court in *Neilson* declined to offer a ‘complete theory’ of *renvoi*,<sup>135</sup> even for torts cases.<sup>136</sup> Gummow and Hayne JJ offered the following icy dismissal of academic efforts:

The judge in this case, Pollack J, was also the author of the article. The case was affirmed in *Curtis v Beatrice Foods Co*, 633 F 2d 203 (2<sup>nd</sup> Cir, 1980) (Table).

<sup>129</sup> *Bartsch v Metro-Goldwyn-Mayer Inc*, 391 F 2d 150, 155 fn 3 (Friendly J) (2<sup>nd</sup> Cir, 1968); *McGhee v Arabian American Oil Co*, 871 F 2d 1412, 1424 fn 10 (Fletcher J) (9<sup>th</sup> Cir, 1989).

<sup>130</sup> *Grupo Protexa SA v All American Marine Slip*, 20 F 3d 1224, 1239 (Greenberg J) (3<sup>rd</sup> Cir, 1994); *Pfizer Inc v Elan Pharmaceutical Research Corporation*, 812 F Supp 1352, 1360–1 (Longo-bardi J) (D Del, 1993), where it was stated that ‘a court is not required to engage in its own research and has the right to insist that the proponent of the foreign law present evidence on the question.’

<sup>131</sup> *United States v Westinghouse Electric Corporation*, 648 F 2d 642, 647 fn 1 (Duniway J) (9<sup>th</sup> Cir, 1981); *Banco de Credito Industrial SA v Tesoreria General de la Seguridad Social de Espana*, 990 F 2d 827, 836 (Duhe J) (5<sup>th</sup> Cir, 1993), cert denied 510 US 1071 (1994).

<sup>132</sup> Sir Anthony Mason, ‘Legal Liability and Professional Responsibility’ (1992) 14 *Sydney Law Review* 131, 131.

<sup>133</sup> See above n 4.

<sup>134</sup> See, eg, Keyes, ‘The Doctrine of Renvoi in International Torts’, above n 64; Robert Yezerki, ‘Renvoi Rejected? The Meaning of “The Lex Loci Delicti” after *Zhang*’ (2004) 26 *Sydney Law Review* 273; Nicholas Bender, ‘Renvoi’ (2004) 78 *Australian Law Journal* 450. See also Elizabeth Crawford, ‘The Uses of Putativity and Negativity in the Conflict of Laws’ (2005) 54 *International and Comparative Law Quarterly* 829, 841–3, which mentions the Full Court decision in *Neilson* in a section on *renvoi*.

<sup>135</sup> See above nn 37–8 and accompanying text.



But the scholarly debate has focused more upon theoretical explanations for the method of solution than upon the principal and essentially practical concern of the courts, which is to decide the controversies that are tendered by the parties for decision.<sup>137</sup>

How ironic, then, that the High Court's decision in *Neilson* provides little assistance to those who must actually engage in the 'essentially practical' process of preparing cases for trial and then trying them. By its own admission, the majority has done no more than tell us how *General Principles* art 146 should be interpreted — using Australian methods of interpretation.<sup>138</sup> What should counsel or a trial judge do in future when considering a case in which the *lex loci delicti* rule in *Zhang* points to a foreign law? We know at least that *Neilson* requires consideration of the whole of the foreign law but what should counsel or the trial judge do if the foreign choice of law rule points back to Australian law or on to the law of a third legal system? A 'complete theory' of renvoi, at least for torts cases, might have helped with that 'essentially practical' question, but complete theory have we none, so there must be more litigation and more appeals. Perhaps the most illuminating part of the High Court's decision in *Neilson*, so far as practising lawyers are concerned, will be the lesson in how to manipulate the presumption about foreign law to avoid an inconvenient outcome.

<sup>136</sup> *Neilson* (2005) 221 ALR 213, 237–8, where Gummow and Hayne JJ pointed out that it may be inappropriate to seek a 'single overarching theory of renvoi' for all types of case because different kinds of case 'differ in important respects.'

<sup>137</sup> *Ibid* 235.

<sup>138</sup> Interestingly, the Massachusetts Superior Court recently came to much the same conclusion as the High Court about the interpretation of the second sentence of *General Principles* art 146, apparently using Massachusetts methods of interpretation. In *Lou ex rel Chen v Otis Elevator Co*, No 200100267, 2004 WL 504697, [\*4] (Mass Dist Ct, 13 February 2004), the Massachusetts Superior Court applied Massachusetts law to a claim brought by a US citizen injured in China by an escalator manufactured by a US company. The Court held that Massachusetts had a more significant relationship with the parties than China did, but also said that in light of the second sentence of *General Principles* art 146, the US elevator manufacturer could not say it had a settled expectation that Chinese law would apply.