

THE ASCENDANCY OF THE *LEX LOCI DELICTI*: THE PROBLEMATIC ROLE OF THEORY IN AUSTRALIAN CHOICE OF TORT LAW RULES

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Since the High Court's decisions in John Pfeiffer Pty Ltd v Rogerson ('Pfeiffer') and Regie Nationale des Usines Renault SA v Zhang ('Renault'), choice of law disputes for intranational and international torts have been determined by exclusive reference to the lex loci delicti, or the law of the place of the tort. While the Court relied upon principles of certainty, predictability and respect for the reasonable expectations of litigants, it also invoked private international law theory to supply an additional logical basis for the rule. Although the desirability of the lex loci delicti as a choice of law rule has since been questioned as a matter of policy, this article argues that the unsatisfactory nature of the rule in Australian law stems from the failure of the theoretical approach advanced by the Court in Pfeiffer and Renault. This is due primarily to the Court's apparent reliance upon the theoretical paradigm of comity which, in its orthodox form, does not justify strict adherence to the lex loci delicti. The difficulty in accepting the Court's approach is compounded by the logical incompatibility of comity as an explanatory principle with the normative and pragmatic goals of private international law. It is argued that the problematic nature of theory in the context of choice of tort law rules is ultimately attributable to its historical use as an ex post facto means of rationalising a rule which emerged as a matter of convenience or practice, and that the theoretical approach should therefore not inform future attempts to reform choice of tort law rules.

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I INTRODUCTION

The problem of determining the applicable substantive law to govern torts which occur across state or territory boundaries within Australia (‘intranational torts’) and across international borders (‘international torts’) has been described as ‘one of the most vexed questions in the conflict of laws’.¹ To a large extent, the confusion which has ensued in Australia, as well as in other common law jurisdictions, is attributable to the difficulty of reconciling the often incompatible objectives of private international law, including certainty, simplicity in the law’s application and individualised justice.² However, more fundamentally, dissatisfaction with existing solutions stems from the inadequacy of proposed explanations for adverting to one legal system as the governing law of a tort to the exclusion of all others. In the Australian context, this component of the choice of law problem is manifest in the courts’ invocation of ‘theory’ to justify modern choice of tort law rules.

Theory has not always underpinned the Australian approach. For much of the 20th century, Australian choice of law rules were derived from English precedent, with courts applying the ‘double actionability rule’ to determine the governing law of both intranational and international torts.³ While many debated the rule’s

¹ *Boys v Chaplin* [1971] AC 356, 373 (Lord Hodson) (‘Boys’). See also *Nalpantidis v Stark* (1996) 65 SASR 454, 456 (Doyle CJ); Otto Kahn-Freund, ‘Torts in Private International Law’ (1979) 50 *British Year Book of International Law* 200, 201; Sir Lawrence Collins et al (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 14th ed, 2006) vol 2, 1893.

² Amos Shapira, ‘Territorialism, National Parochialism, Universalism and Party Autonomy: How Does One Square the Choice-of-Law Circle?’ (2000) 26 *Brooklyn Journal of International Law* 199, 199; *Boys* [1971] AC 356, 389 (Lord Wilberforce); Willis L M Reese, ‘The Ever Changing Rules of Choice of Law’ in Roeland Duco Kollwijn and Johannes Offerhaus (eds), *De Conflictu Legum: Essays Presented to Roeland Duco Kollwijn and Johannes Offerhaus at Their Seventieth Birthdays* (Sijthoff, 1962) 389.

³ *Musgrave v Commonwealth* (1937) 57 CLR 514, 532 (Latham CJ), 543 (Rich J) (‘Musgrave’); *Koop v Bebb* (1951) 84 CLR 629, 642 (Dixon, Williams, Fullagar and Kitto JJ) (‘Koop’).

effect as a choice of law principle, or as a threshold requirement for justiciability in the domestic courts,⁴ few attempted to explain its intellectual premise.⁵ Despite dissatisfaction with the double actionability rule's apparent arbitrariness and 'parochialism',⁶ it persisted in Australian private international law until the late 20th century.

Attempts by the judiciary to reform choice of law in tort were also largely driven by practical considerations, rather than logic or theory. In 1988, a bare majority of the High Court of Australia ('the Court') in *Breavington v Godleman* ('*Breavington*')⁷ decided to dispense with the double actionability rule. In its place, the Court adopted an approach which favoured the law of the place of the tort's occurrence (the '*lex loci delicti*') as the primary choice of law rule. Moreover, in order to accommodate the growing concern for ensuring individualised justice, this approach permitted a departure from the *lex loci delicti* where it was more appropriate that the dispute be governed by the law of the place to which the suit and the parties had the closest and most real connexion.⁸ When the issue came before the High Court again just three years later in *McKain v RW Miller & Co (South Australia) Pty Ltd* ('*McKain*'),⁹ the objective of certainty instead operated as the main justification for the preferable choice of law rule and, as a result, the double actionability rule was revived.¹⁰ Despite the High Court's focus upon pragmatism, tort choice of law rules remained unpredictable and confusing due to judicial disagreement on the scope, effect and meaning of the double actionability rule.¹¹

At the beginning of the 21st century, the High Court was presented with the opportunity to resolve this uncertainty. In *John Pfeiffer Pty Ltd v Rogerson* ('*Pfeiffer*')¹² a majority of the Court conclusively discarded the double actionability rule for intranational torts and replaced it with the '*lex loci delicti* rule',¹³ which was to apply without exception or deviation, irrespective of the

⁴ C G J Morse, *Torts in Private International Law* (North-Holland, 1978) 45–55; Hessel E Yntema, 'Reviews and Notices' (1949) 27 *Canadian Bar Review* 116, 119; P E Nygh, 'Boys v Chaplin or the Maze of Malta' (1970) 44 *Australian Law Journal* 160, 160–2; *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20, 22–3 (Barwick CJ), 41 (Windeyer J) ('*Anderson*').

⁵ *Koop* (1951) 84 CLR 629, 644 (Dixon, Williams, Fullagar and Kitto JJ).

⁶ Yeo Tiong Min, 'Tort Choice of Law Beyond the Red Sea: Whither the *Lex Fori*?' (1997) 1 *Singapore Journal of International and Comparative Law* 91, 107; Nicky Richardson, 'Double Actionability and the Choice of Law' (2002) 32 *Hong Kong Law Journal* 497, 502; Law Commission and Scottish Law Commission, *Private International Law: Choice of Law in Tort and Delict*, Report, Law Com No 193 and Scot Law Com No 129 (1990) 7 ('*Choice of Law in Tort and Delict*').

⁷ (1988) 169 CLR 41.

⁸ *Ibid* 73–9 (Mason CJ), 89–93 (Wilson and Gaudron JJ), 136 (Deane J); Geoffrey Lindell, 'Regie National des Usines Renault SA v Zhang: Choice of Law in Torts and Another Farewell to *Phillips v Eyre* but the *Voth* Test Retained for *Forum Non Conveniens* in Australia' (2002) 3 *Melbourne Journal of International Law* 364, 366.

⁹ (1991) 174 CLR 1.

¹⁰ *Ibid* 38 (Brennan, Dawson, Toohey and McHugh JJ); *Stevens v Head* (1993) 176 CLR 433 ('*Stevens*').

¹¹ Lindell, above n 8, 366–8; Martin Davies, 'Exactly What Is the Australian Choice of Law Rule in Torts Cases?' (1996) 70 *Australian Law Journal* 711, 712–17; Janey Greene, 'Inflexibly Inflexible: Why Choice of Law in Tort Questions Still Won't Go Away' (2007) 33 *Monash University Law Review* 246, 257.

¹² (2000) 203 CLR 503.

¹³ *Ibid* 540 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

circumstances of the case. Two years later, this approach was extended to international torts in *Regie Nationale des Usines Renault SA v Zhang* ('*Renault*'),¹⁴ entrenching it as the universal tort choice of law principle in modern Australian private international law. While pragmatism continued to inform the Court's approach, it was in these two decisions that theory emerged as an important means of rationalising why the *lex loci delicti* ought to supply the substantive law of a tort.

The purpose of this article is to explain the theoretical frameworks which informed the High Court's approach to tort choice of law in *Pfeiffer* and *Renault* and to elucidate the logical problems that these theories have created in the context of the *lex loci delicti* rule. Broadly, this article argues that the choice of law doctrines invoked by the Court provide limited, if any, support for the *lex loci delicti* rule in its current form. Although this analysis may supply yet another explanation for the unsatisfactory nature of the rule, it is primarily intended to highlight the methodological difficulties which underpin the theoretical approach and which have inhibited the development of adequate choice of tort law rules in Australia.

This argument is levelled in four parts. Part II provides an overview of Australian choice of tort law rules, from the inception of the double actionability rule to the adoption of the *lex loci delicti* in *Pfeiffer* and *Renault*. It suggests that the rationale for accepting the *lex loci delicti* was founded upon two primary considerations: first, the 'comity doctrine' and the concomitant principles of territoriality and respect for foreign laws and institutions; and secondly, the objectives of certainty, predictability and the protection of parties' reasonable expectations.

The rest of this article explains the logical and theoretical problems which emerge from these justifications. Part III considers the 'comity doctrine' as first conceived by the Dutch and American theorists and outlines its traditional scope and effect as a discretionary choice of law principle. This discussion demonstrates that the conceptualisation of comity in Australian law differs from its orthodox meaning, thereby undermining the theory's logical support for the *lex loci delicti*.

Part IV examines the role of certainty, predictability and the reasonable expectations of litigants in the modern approach. It suggests that this objectives-oriented analysis, when employed in conjunction with the Court's theoretical explanation of the *lex loci delicti*, is similar in methodology to that employed by Joseph Henry Beale, who was responsible for the rule's entrenchment in American law in the early 20th century.¹⁵ This methodological comparison highlights the inconsistency between the explanatory and normative principles which informed the High Court's approach, as well as the insufficiency of objectives alone to explain the adoption of the *lex loci delicti* rule.

¹⁴ (2002) 210 CLR 491.

¹⁵ Bert J Miano, 'Choice of Law: Abandoning the "Toothless Old Dog" of *Lex Loci Delecti* in Tort Actions' (1996) 20 *American Journal of Trial Advocacy* 443, 443-4; Eugene F Scoles and Peter Hay, *Conflict of Laws* (West, 1982) 13-14; Symeon C Symeonides, *American Private International Law* (Kluwer Law International, 2008) 65-8.

Finally, Part V considers the role of the *lex loci delicti* in the English common law prior to, and shortly following, the decision in *Phillips v Eyre* ('*Phillips*').¹⁶ This discussion demonstrates that recourse to the *lex loci delicti* has historically been motivated by its impressionistically logical appeal, rather than rational, theoretical thinking. Consequently, it is suggested that the failure of theory in the High Court's approach stems from the ex post facto use of doctrine to explain a rule which emerged as a matter of convenience or practice.

Before proceeding, two preliminary points regarding the scope of this article should be made. First, 'theory' for present purposes encompasses the philosophical and conceptual models or frameworks which dictate the substantive law to govern a tort or explain *why* those dispositive rules ought to apply. As such, this discussion of theory is not limited to the theoretical approach normally associated with the natural law school of thought.¹⁷ Rather, it encompasses a broad cross-section of jurisprudential approaches which employ theory as an explanatory or functional device.¹⁸ Indeed, whether theory provides the most appropriate frame of analysis in private international law has been doubted.¹⁹ Nonetheless, given the Court's reliance upon theoretical paradigms in *Pfeiffer* and *Renault* for the *lex loci delicti*'s jurisprudential bases, scrutiny of these paradigms and their coherence with the *lex loci delicti* remains a relevant inquiry in understanding the futility of theory in the Australian context.

Secondly, the argument advanced in this article may not be directly applicable in the intranational context given the differing considerations which emerge from the *Australian Constitution* and Australia's federal system.²⁰ As such, this article is primarily concerned with the theoretical rationale underpinning choice of law rules for international torts. Nonetheless, it is useful to consider the intranational rules, as they inform our understanding of the development of the Australian approach as well as the policy concerns which apply to all torts.

¹⁶ (1870) LR 6 QB 1.

¹⁷ A V Dicey and A Berriedale Keith, *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens and Sons, 3rd ed, 1922) 18–19; David F Cavers, 'A Critique of the Choice-of-Law Problem' (1933) 47 *Harvard Law Review* 173, 173–6.

¹⁸ Bruce Wardhaugh, 'From Natural Law to Legal Realism: Legal Philosophy, Legal Theory and the Development of American Conflict of Laws since 1830' (1989) 41 *Maine Law Review* 307; Barney Reynolds, 'Natural Law versus Positivism: The Fundamental Conflict' (1993) 13 *Oxford Journal of Legal Studies* 441, 441, 447–8.

¹⁹ Elliott E Cheatham and Willis L M Reese, 'Choice of the Applicable Law' (1952) 52 *Columbia Law Review* 959, 959–60; Alan Reed, 'The Anglo-American Revolution in Tort Choice of Law Principles: Paradigm Shift or Pandora's Box?' (2001) 18 *Arizona Journal of International and Comparative Law* 867, 867; Adrian Briggs, *The Conflict of Laws* (Oxford University Press, 3rd ed, 2013) 5; Michael J Whincop and Mary Keyes, *Policy and Pragmatism in the Conflict of Laws* (Ashgate Dartmouth, 2001) 25.

²⁰ Greg Taylor, 'The Effect of the Constitution on the Common Law as Revealed by *John Pfeiffer v Rogerson*' (2002) 30 *Federal Law Review* 69; Friedrich K Juenger, 'Tort Choice of Law in a Federal System' (1997) 19 *Sydney Law Review* 529, 534–5; Kathleen Foley, 'The *Australian Constitution*'s Influence on the Common Law' (2003) 31 *Federal Law Review* 131.

II THE AUSTRALIAN POSITION — THE EROSION OF DOUBLE ACTIONABILITY
AND THE EMERGENCE OF THE *LEX LOCI DELICTI*

A *Double Actionability in Australian Law*

Prior to *Pfeiffer* and *Renault*, Australian choice of law rules in tort largely followed the English common law and the double actionability rule, as formalised in *Phillips*. Under this rule, torts with a ‘foreign element’ could be litigated in the domestic courts provided that the wrong was of ‘such a character that it would have been actionable if committed in [the forum]’ and was ‘not ... justifiable by the law of the place where it was done’.²¹ Upon satisfaction of these two conditions, the domestic court would apply the law of the forum (the ‘*lex fori*’) as the governing law of the tort.²² This approach was first accepted by the Australian courts in *Musgrave v Commonwealth* (‘*Musgrave*’)²³ and subsequently in *Koop v Bebb* (‘*Koop*’).²⁴ In adopting the rule, the only theoretical consideration entertained by the courts was their rejection of the ‘*obligatio* theory’,²⁵ which suggested that the law of the place of the obligation’s origin ought to determine its existence and extent.²⁶ A majority of the High Court in *Koop* stressed that the forum court ‘enforce[d] an obligation of its own creation in respect of an act done in another country’,²⁷ thereby warranting the exclusive application of the *lex fori*.

²¹ *Phillips v Eyre* (1870) LR 6 QB 1, 28–9 (Willes J) (‘*Phillips*’). Historically, there has been some uncertainty as to whether these conditions were choice of law rules or jurisdictional thresholds: Michael Howard, ‘Conflict of Laws — Tort — *Phillips v Eyre*: Jurisdiction Test or Choice of Law Rule? *Breavington v Godleman & Others* 1988’ (1988) 9 *University of Tasmania Law Review* 192; Elizabeth James, ‘*John Pfeiffer Pty Ltd v Rogerson*: The Certainty of “Federal” Choice of Law Rules for Intranational Torts: Limitations, Implications and a Few Complications’ (2001) 23 *Sydney Law Review* 145, 149. Prior to *John Pfeiffer Pty Ltd v Rogerson* (‘*Pfeiffer*’), it appears that the High Court treated the conditions as jurisdictional. See, eg, *Anderson* (1965) 114 CLR 20, 41–2 (Windeyer J). Cf *Pfeiffer* (2000) 203 CLR 503, 520–1 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

²² Martin Wolff, *Private International Law* (Oxford University Press, 2nd ed, 1950) 486, 491–2; Matthew R Goode, ‘Dancing on the Grave of *Phillips v Eyre*’ (1984) 9 *Adelaide Law Review* 345, 345; *Anderson* (1965) 114 CLR 20, 42 (Windeyer J); *Kolsky v Mayne Nickless Ltd* (1970) 72 SR (NSW) 437, 444–5; *Boys* [1971] AC 356, 386 (Lord Wilberforce), 406 (Lord Pearson).

²³ (1937) 57 CLR 514, 532 (Latham CJ), 543 (Rich J).

²⁴ (1951) 84 CLR 629.

²⁵ *Ibid* 644 (Dixon, Williams, Fullagar and Kitto JJ).

²⁶ *Slater v Mexican National Railroad Co*, 194 US 120, 126 (Holmes J) (1903); *New York Central Railroad Co v Chisholm*, 268 US 29, 32 (Holmes J) (1925), cited in *Koop* (1951) 84 CLR 629, 643–4 (Dixon, Williams, Fullagar and Kitto JJ).

²⁷ *Koop* (1951) 84 CLR 629, 644 (Dixon, Williams, Fullagar and Kitto JJ) (emphasis added).

Apart from this limited conceptual discussion, it appears that the rule was received into Australian law primarily as a matter of precedent. For instance, in *Musgrave*, Latham CJ noted that he was ‘bound’ by the principles in *Phillips* to apply the rule in the Australian context.²⁸ Similarly, the majority joint judgment in *Koop* indicated that the state of authority necessitated the rule’s acceptance.²⁹ Given that the High Court of the time abided by a ‘self-imposed tradition’ of unquestioning adherence to the House of Lords,³⁰ which had itself affirmed the Court of Exchequer Chamber’s decision in *Phillips*,³¹ this deference to precedent at the expense of detailed principled analysis is unsurprising.

The jurisprudential rationale of Australian choice of law rules was also largely absent in the High Court’s subsequent decision in *Anderson v Eric Anderson Radio & TV Pty Ltd* (‘*Anderson*’).³² Windeyer J,³³ along with the other members of the Court,³⁴ agreed that precedent required application of the *lex fori* as the substantive law of the cause, in accordance with the double actionability rule. However, Windeyer J also considered the *lex loci delicti* as a possible alternative, remarking with notable prescience that, while it may be the ‘more logically satisfactory solution’, it may not ‘necessarily produce a more just result; for the *lex loci delicti* may not be the law that best serves the needs of justice’.³⁵

B Failed Attempts at Reform

Australian private international law underwent a fundamental change following the High Court’s decision in *Breavington*.³⁶ Despite Brennan, Toohey and Dawson JJ insisting that the double actionability rule be retained,³⁷ a bare majority dispensed with the rule for intranational torts and adopted the *lex loci delicti* as the primary choice of law rule.³⁸ In justifying this conclusion, Deane, Wilson and Gaudron JJ argued that constitutional imperatives favoured a unitary national legal system which would facilitate greater consistency in the outcome of litigation irrespective of where the claim was brought.³⁹ Mason CJ, on the other hand, looked more to the tenability of the traditional approach in light of

²⁸ *Musgrave* (1937) 57 CLR 514, 532.

²⁹ *Koop* (1951) 84 CLR 629, 642 (Dixon, Williams, Fullagar and Kitto JJ).

³⁰ A R Blackshield, ‘The High Court: Change and Decay’ (1980) 5 *Legal Service Bulletin* 107, 107; *Piro v W Foster & Co Ltd* (1943) 68 CLR 313, 320 (Latham CJ), 325–6 (Rich J), 326–7 (Starke J), 336 (McTiernan J), 341 (Williams J); Michael Kirby, ‘The Old Commonwealth’ in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords 1876–2009* (Oxford University Press, 2009) 339.

³¹ *Carr v Francis Times* [1902] AC 176, 182 (Lord Macnaghten).

³² (1965) 114 CLR 20.

³³ *Ibid* 40.

³⁴ *Ibid* 23 (Barwick CJ), 27 (Kitto J), 34–5 (Taylor J), 38–9 (Menzies J).

³⁵ *Ibid* 46.

³⁶ P E Nygh, ‘The Miraculous Raising of Lazarus: *McKain v R W Miller & Co (South Australia) Pty Ltd*’ (1992) 22 *University of Western Australia Law Review* 386, 388; *Byrnes v Groote Eylandt Mining Co Pty Ltd* (1990) 19 NSWLR 13, 23 (Kirby P), 32 (Hope AJA).

³⁷ *Breavington v Godleman* (1988) 169 CLR 41, 110–12 (Brennan J), 142 (Dawson J), 154–60 (Toohey J) (‘*Breavington*’).

³⁸ *Ibid* 73–9 (Mason CJ), 89–93 (Wilson and Gaudron JJ), 136 (Deane J); Lindell, above n 8, 366.

³⁹ *Breavington* (1988) 169 CLR 41, 87–9, 93–100 (Wilson and Gaudron JJ), 127–35 (Deane J); James Stellios, ‘Choice of Law and the Australian Constitution: Locating the Debate’ (2005) 33 *Federal Law Review* 7, 14.

recent developments in the common law. In particular, the Chief Justice characterised the rule in *Phillips* as a ‘needless complication’ which had become increasingly redundant following the House of Lords’ apparent acceptance of a flexible exception to double actionability in *Boys v Chaplin*.⁴⁰ Consequently, Mason CJ also preferred the *lex loci delicti*, subject to an exception which permitted application of the law of the place to which the case had the ‘closest and most real connexion’.⁴¹ However, in adopting this approach, Mason CJ warned against the mechanical application of the *lex loci delicti*, identifying the inability of a rigid rule to ‘do justice to the infinite variety of cases in which persons come together in a foreign jurisdiction from different legal backgrounds’.⁴² As Windeyer J had suggested more than two decades earlier,⁴³ the interests of justice were to be given primacy in the development of Australia’s choice of law rules.

This ‘new era’ of private international law was short-lived.⁴⁴ In 1991, a majority of the High Court in *McKain*⁴⁵ revived the double actionability rule, rejecting the conclusions in *Breavington* on two grounds. First, the constitutional analysis employed by Deane, Wilson and Gaudron JJ was outright dismissed. The majority found that the applicable choice of law rule was not directed by the ‘full faith and credit’ clause of the *Constitution*,⁴⁶ but rather was the function of the common law.⁴⁷ Secondly, it was acknowledged that the dominant concern in *Breavington* was with neutralising the effect that the plaintiff’s choice of forum may have on the defendant’s liability in tort proceedings.⁴⁸ However, the majority questioned the weight to be ascribed to this objective in the intranational context given that the general similarity in tort laws across the various Australian jurisdictions rendered the risk of forum shopping nugatory.⁴⁹ For the majority, the overwhelming objective of choice of law rules for intranational torts was certainty in their application,⁵⁰ a view which justified a reversion to the more ‘categorical’ double actionability rule.⁵¹ Nonetheless, in coming to this conclusion, the majority expressly noted that its reasoning did not foreclose future consideration of whether the rule was suitable for torts occurring outside Australia.⁵²

⁴⁰ [1971] AC 356, 391–2 (Lord Wilberforce); *Breavington* (1988) 169 CLR 41, 77.

⁴¹ *Breavington* (1988) 169 CLR 41, 77.

⁴² *Ibid* 76.

⁴³ *Anderson* (1965) 114 CLR 20, 46.

⁴⁴ Nygh, ‘The Miraculous Raising of Lazarus’, above n 36, 388; Michael C Pryles, ‘The Law Applicable to Interstate Torts: Farewell to *Phillips v Eyre*?’ (1989) 63 *Australian Law Journal* 158.

⁴⁵ (1991) 174 CLR 1.

⁴⁶ *Australian Constitution* s 118.

⁴⁷ *McKain v R W Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1, 37 (Brennan, Dawson, Toohey and McHugh JJ) (*‘McKain’*); Stellios, above n 39, 13.

⁴⁸ *Breavington* (1988) 169 CLR 41, 73–4, 76 (Mason CJ).

⁴⁹ *McKain* (1991) 174 CLR 1, 38 (Brennan, Dawson, Toohey and McHugh JJ).

⁵⁰ *Ibid*.

⁵¹ *Ibid* 39 (Brennan, Dawson, Toohey and McHugh JJ); *Stevens* (1993) 176 CLR 433.

⁵² *McKain* (1991) 174 CLR 1, 38 (Brennan, Dawson, Toohey and McHugh JJ).

C *The Lex Loci Delicti and Intranational Torts: John Pfeiffer Pty Ltd v Rogerson*

The High Court's decision in *Pfeiffer* heralded the final shift away from the English approach and the emergence of the *lex loci delicti* as the mandatory choice of law rule for intranational torts. David Rogerson commenced proceedings in the Supreme Court of the Australian Capital Territory to recover damages for personal injury suffered while employed by John Pfeiffer Pty Ltd ('Pfeiffer'). Pfeiffer's business activities were predominantly situated in the ACT. However, Mr Rogerson was injured while carrying out carpentry work at the Queanbeyan District Hospital, located in the neighbouring state of New South Wales and only a few kilometres from the Australian Capital Territory border. Under ACT law, Mr Rogerson would have been entitled to \$30 000 in damages, in addition to out-of-pocket expenses. However, under NSW law, the action would have been subject to pt 5 of the *Workers Compensation Act 1987* (NSW), which limited the damages recoverable for workplace accidents and would have reduced Mr Rogerson's damages to out-of-pocket expenses only.

1 *Outcome at First Instance and on Appeal*

At first instance, Master Connolly held that the statutory limitation on damages under NSW law was procedural, rather than substantive, and that therefore the quantum of damages to be awarded was to be determined by ACT law, as the *lex fori*.⁵³ This was subsequently affirmed by the Full Court of the Supreme Court of the Australian Capital Territory⁵⁴ and the Full Court of the Federal Court of Australia.⁵⁵ As characterisation of the statutory limitation as procedural meant that this issue was to be governed by the *lex fori*, the Courts at first instance and on appeal were not required to consider the appropriate governing law for intranational torts.⁵⁶ Nonetheless, Pfeiffer was granted special leave to appeal to the High Court, where it sought to argue that s 118 of the *Constitution* required application of the *lex loci delicti*, rather than the *lex fori*, to the quantification of Mr Rogerson's damages. The High Court thus had the opportunity to settle the choice of law question and resolve the uncertainty which had ensued since its decision in *McKain*.⁵⁷

2 *Outcome in the High Court*

The High Court's decision first sought to clarify the approach to characterising an issue as substantive or procedural. The Court acknowledged that, while the traditional distinction between substance and procedure remained important for choice of law purposes, it was 'very hard, if not impossible' to identify a unifying principle to guide judicial decision-making.⁵⁸ To remove this

⁵³ *Rogerson v John Pfeiffer Pty Ltd* [1997] ACTSC 26 (24 April 1997).

⁵⁴ *John Pfeiffer Pty Ltd v Rogerson* (1997) 142 FLR 183.

⁵⁵ *John Pfeiffer Pty Ltd v Rogerson* [1998] FCA 815 (9 July 1998).

⁵⁶ James, above n 21, 148.

⁵⁷ Greene, 'Inflexibly Inflexible', above n 11.

⁵⁸ *Pfeiffer* (2000) 203 CLR 503, 542–3 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

ambiguity, the majority adopted Mason CJ's classification in *McKain*,⁵⁹ concluding that rules which were 'directed to governing or regulating the mode or conduct of court proceedings' were procedural, while all others were properly characterised as substantive.⁶⁰ As pt 5 of the *Workers Compensation Act 1987* (NSW) affected Mr Rogerson's rights to compensation, the majority concluded that the issue was substantive, rather than procedural,⁶¹ and was to be determined by reference to the legal system which constituted the applicable substantive law.

Secondly, in determining the governing law of the tort, the Court decided to discard the double actionability rule, holding that intranational torts were to be resolved by recourse to the *lex loci delicti*.⁶² Importantly, this rule was to be adopted in its 'rigid' form, in that its application would not admit of any exception or deviation.⁶³ As the accident occurred in NSW, the dispute in *Pfeiffer* was to be governed by NSW law, resulting in the application of pt 5 of the *Workers Compensation Act 1987* (NSW) to the assessment of Mr Rogerson's damages.⁶⁴

3 *The Preferable Choice of Law Rule: Rationale of the Majority*

It must be noted from the outset that the Court in *Pfeiffer* was explicit in separating the principles applicable to intranational torts from those which may apply in the international context.⁶⁵ This was largely due to the significant role ascribed to Australian federalism and the interaction between the *Australian Constitution* and the common law when dealing with intranational torts.⁶⁶ As each state and each territory within the Australian federation form part of a single 'law area', the majority found that choice of law rules should reflect the unified nature of the federal legal system and the respect to be accorded to the interests of other states or territories in resolving disputes which arise within their own territory.⁶⁷

In addition to demarcating the scope of the judgment's application, the Court's advertence to federalism also had implications for the theoretical framework within which intranational choice of law rules were to function. On one hand, the majority explained that the double actionability rule had traditionally been justified by recourse to the 'local law theory', as expounded in American private international law by Judge Learned Hand⁶⁸ and Walter

⁵⁹ *McKain* (1991) 174 CLR 1, 26–7.

⁶⁰ *Pfeiffer* (2000) 203 CLR 503, 543–4 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), quoting *McKain* (1991) 174 CLR 1, 26–7 (Mason CJ).

⁶¹ *Ibid* 542–4 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); James, above n 21, 151.

⁶² *Pfeiffer* (2000) 203 CLR 503, 529–42 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 562–3 (Kirby J).

⁶³ *Ibid* 537–8 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁶⁴ *Ibid* 544–5 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 564 (Kirby J).

⁶⁵ *Ibid* 514–15 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁶⁶ *Ibid* 533–4; Taylor, above n 20; James, above n 21, 152–3.

⁶⁷ *Pfeiffer* (2000) 203 CLR 503, 534–5, 542 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁶⁸ *Guinness v Miller*, 291 F 769, 770 (Learned Hand J) (SD NY, 1923), affirmed in *Hicks v Guinness*, 269 US 71 (1925); *Direction der Disconto-Gesellschaft v United States Steel Corporation*, 300 F 741, 744 (Learned Hand J) (SD NY, 1924).

Wheeler Cook.⁶⁹ Under this approach, the forum court never actually applied the law of a foreign sovereign, but rather ‘enforce[d] an obligation of its own creation in respect of an act done outside [its] territorial jurisdiction’.⁷⁰ As this approach necessarily limited the applicable law to the rules in force within the forum, the Australian courts had reasoned that the *lex fori* governed all tort actions. However, as intranational torts all occur within the single ‘law area’ of Australia, the majority in *Pfeiffer* concluded that the local law theory had no role to play in the federal context and therefore could not supply a principled basis for the appropriate rule.⁷¹ On the other hand, the *lex loci delicti* was predicated upon the proposition that states were sovereign over acts which took place within their own territory.⁷² However, sovereignty was similarly inapplicable in the Australian federal system, as the jurisdictions involved in choice of law disputes formed part of the same sovereign state.⁷³ More generally, the majority held that sovereignty failed to offer any ‘sure and simple basis for preferring one choice of law rule to another’,⁷⁴ a criticism which would suggest that the principle would be an unsatisfactory theoretical premise for choice of law rules in any context.

In light of the unhelpfulness of the traditional theoretical paradigms in explaining which legal system ought to govern an intranational tort, the Court relied upon the need to protect the reasonable expectations of the parties as the ‘chief theoretical consideration’ supporting advertence to the *lex loci delicti*.⁷⁵ Despite the practical difficulties of identifying the place where the tort occurred⁷⁶ and the often fortuitous nature of the *lex loci delicti*,⁷⁷ the majority reasoned that the rule best served the interests of the parties by ensuring predictability and uniformity in the outcome of litigation, irrespective of the forum.⁷⁸ It was due to the significant focus placed upon certainty that a more stringent, inflexible rule was required in order to avoid the unpredictability which flexibility had generated in modern American and English law.⁷⁹ As the rule also accommodated the primarily territorial operation of the law and the presumption that state legislatures had an interest in matters which arose within

⁶⁹ Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws* (Harvard University Press, 1942) 3–47.

⁷⁰ *Pfeiffer* (2000) 203 CLR 503, 526 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) (emphasis altered).

⁷¹ *Ibid* 536 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); Stellios, above n 39, 16.

⁷² *Pfeiffer* (2000) 203 CLR 503, 536 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁷³ *Ibid*.

⁷⁴ *Ibid*.

⁷⁵ *Ibid*; James, above n 21, 154.

⁷⁶ *Pfeiffer* (2000) 203 CLR 503, 538–9 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); Stephen G A Pitel and Jesse R Harper, ‘Choice of Law for Tort in Canada: Reasons for Change’ (2013) 9 *Journal of Private International Law* 289, 299.

⁷⁷ *Pfeiffer* (2000) 203 CLR 503, 539 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁷⁸ *Ibid* 539–40 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁷⁹ *Ibid* 537–8 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); Friedrich K Juenger, *Choice of Law and Multistate Justice* (Martinus Nijhoff, 1993) 146; P J Clarke, ‘*Chaplin v Boys*’ (1970) 21 *Northern Ireland Legal Quarterly* 47, 53; Yeo, above n 6, 115.

their own territory,⁸⁰ the *lex loci delicti* was considered the appropriate rule for intranational torts in the modern Australian context.

D *The Lex Loci Delicti and International Torts: Regie Nationale des Usines Renault SA v Zhang*

Although the principles in *Pfeiffer* were strictly intended to apply only to intranational torts, they were extended to international torts two years later in *Renault*. The plaintiff, Fuzu Zhang, was injured in a motor vehicle accident while visiting New Caledonia. Upon returning to NSW, where he was ordinarily resident, Mr Zhang commenced negligence proceedings in the Supreme Court of New South Wales to recover damages from the Renault companies ('Renault'), alleging that the accident was caused by Renault's negligent design and manufacture of the vehicle. However, Renault sought to have the proceedings permanently stayed on the basis that NSW was a 'clearly inappropriate forum'.⁸¹

1 *Outcome at First Instance and on Appeal*

At first instance, Smart J granted a stay of the proceedings, a decisive factor being his Honour's finding that French law would be the applicable substantive law.⁸² When the matter came before the New South Wales Court of Appeal, all three members of the Court held that this finding was erroneous, as the *lex loci delicti* operated not as the relevant choice of law rule, but rather as a component of justiciability under the double actionability rule.⁸³ As the trial judge's discretion had miscarried, the Court of Appeal re-exercised the discretion and dismissed the stay application. Renault subsequently appealed to the High Court, seeking the reinstatement of the primary judge's decision and an extension of the choice of law rule adopted in *Pfeiffer* to international torts.⁸⁴

2 *Outcome in the High Court*

A majority of the High Court accepted Renault's submissions on the choice of law issue, concluding that the double actionability rule should no longer apply to determine the dispositive law of international torts.⁸⁵ Instead, the *lex loci delicti* was adopted and was to apply to all international torts unless it was contrary to forum public policy.⁸⁶

⁸⁰ *Pfeiffer* (2000) 203 CLR 503, 536–7 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁸¹ *Zhang v Regie Nationale des Usines Renault SA* [2000] NSWCA 188 (27 July 2000) [3].

⁸² *Zhang v Regie Nationale des Usines Renault SA* (Unreported, Supreme Court of New South Wales, 16 October 1998).

⁸³ *Zhang v Regie Nationale des Usines Renault SA* [2000] NSWCA 188 (27 July 2000) [27]–[43] (Stein JA; Beazley and Giles JJA agreeing); *Thompson v Hill* (1995) 38 NSWLR 714, 731 (Kirby P), 741 (Clarke JA).

⁸⁴ *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 506 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) ('*Renault*').

⁸⁵ *Ibid* 515 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁸⁶ *Ibid*.

3 Choice of Law as a Jurisdictional Inquiry

Strictly speaking, the Court's consideration of choice of law was limited by the jurisdictional nature of Renault's stay application. Matt O'Brien suggests that the choice of law inquiry necessarily differs when considered at the jurisdictional phase of a dispute as the Court is directing its attention towards determining, by application of the relevant choice of law rule, 'if the facts of the case allow it to seize jurisdiction'.⁸⁷ As the High Court emphasised in *Renault*, it cannot therefore be presumed that the analytical or interpretive devices developed for the purpose of determining the Court's exercise of its 'long arm' jurisdiction are applicable for choice of law purposes.⁸⁸

Moreover, the essentially preliminary nature of the proceedings in which jurisdictional questions arise shapes the conclusiveness with which the Court must determine the governing law. For instance, in the High Court's decision in *Puttick v Tenon Ltd*,⁸⁹ decided six years after *Renault*, Heydon and Crennan JJ noted:

A conclusion reached on a stay application about what the proper law of a tort is will normally only be a provisional conclusion: it will be a conclusion open to alteration in the light of further evidence called at the trial. A judge considering a stay application may be able to determine the location of the alleged tort despite somewhat unreal or artificial contentions in the pleadings.⁹⁰

However, these observations merely indicate that consideration of the governing law at the jurisdictional stage of a dispute may be subject to factual and evidentiary factors different to those available at trial.⁹¹ The *legal* question facing the Court as to the particular *rule* to be applied in determining the governing law, even at the provisional stage considered in *Renault*, nonetheless remains the same.

4 Rationale of the Majority

In rejecting the double actionability rule, the majority demonstrated a particular dissatisfaction with the theoretical underpinnings which once justified the indiscriminate application of the *lex fori* to international torts. Rather than conceptualising the application of the *lex fori* on the basis of the local law theory,⁹² the majority examined the English and European traditions to conclude that it was an expression of forum public policy.⁹³ As the requirement of actionability under the *lex fori* allowed the rejection of foreign law where it was

⁸⁷ Matt O'Brien, 'Siting the Locus of a Tort for the Purposes of Determining Jurisdiction' (1996) 3 *Canberra Law Review* 139, 142.

⁸⁸ (2002) 210 CLR 491, 519 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). See also Richard Fentiman, 'Tort — Jurisdiction or Choice of Law?' (1989) 48 *Cambridge Law Journal* 191.

⁸⁹ (2008) 238 CLR 265.

⁹⁰ *Ibid* 279. See also *Buttidgeig v Universal Terminal* [1972] VR 626.

⁹¹ Teo Guan Siew, 'Choice of Law in *Forum Non Conveniens* Analysis: *Puttick v Tenon Ltd* [2008] HCA 54' (2010) 22 *Singapore Academy of Law Journal* 440, 445.

⁹² *Koop* (1951) 84 CLR 629, 644 (Dixon, Williams, Fullagar and Kitto JJ); *Pfeiffer* (2000) 203 CLR 503, 526–7 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁹³ *Renault* (2002) 210 CLR 491, 511–15 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); Lawrence Collins et al (eds), *Dicey and Morris on the Conflict of Laws* (Sweet & Maxwell, 13th ed, 2000) vol 1, 525.

merely inconsistent with forum law,⁹⁴ the double actionability rule had extended beyond its 'public policy root'⁹⁵ and could no longer be sustained on any principled ground.

Although the decision to extend the *lex loci delicti* to the international context was not accompanied by the same depth of theoretical analysis which had been committed to debunking the double actionability rule,⁹⁶ two considerations appeared to guide the majority's reasoning. First, the Court was particularly concerned with fulfilling the objectives of private international law. Consistent with *Pfeiffer*, the majority advocated an approach which achieved stability, certainty and predictability in the outcome of litigation.⁹⁷ As the *lex loci delicti* provided a universal means of determining the seat of the parties' rights and liabilities consistent with their reasonable expectations in any particular case, it was deemed the most effective means of achieving these objectives.⁹⁸ It was merely the logical extension of this approach that the rule should admit of no exception (other than on public policy grounds), as any flexibility in the application of the *lex loci delicti* would undermine the predictability and certainty that the rule was intended to promote.

Secondly, the Court's advertence to the *lex loci delicti* appears to derive its theoretical support from the principles of comity, reciprocity and respect for the integrity of foreign laws and institutions. This is implicit in the majority's extensive reliance upon, and endorsement of, the Supreme Court of Canada's decision in *Tolofson v Jensen* ('*Tolofson*'),⁹⁹ in which the same approach was adopted for resolving interprovincial disputes in Canada.¹⁰⁰ In *Tolofson*, La Forest J was committed to proposing an intellectually sound premise for choice of law rules,¹⁰¹ and anchored his approach in the authority of each state to 'make and apply law[s] within its [own] territorial limit[s]'.¹⁰² While this did not give rise to any obligation upon forum courts to enforce the rights or claims of foreign litigants, it did generate a general tendency to allow the application of foreign law as a matter of 'comity'.¹⁰³ As the forum could expect that foreign courts would reciprocate by 'open[ing] their national forums' and respecting the forum's laws when dealing with foreign disputes,¹⁰⁴ it was more consistent in principle to adopt the *lex loci delicti* in resolving the choice of law problem. This

⁹⁴ P B Carter, 'Torts in English Private International Law' (1981) 52 *British Year Book of International Law* 9, 12–13.

⁹⁵ *Renault* (2002) 210 CLR 491, 512–13 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); Matthew Duckworth, 'Regie Nationale des Usines Renault SA v Zhang: Certainty or Justice? Bringing Australian Choice of Law Rules for International Torts into the Modern Era' (2002) 24 *Sydney Law Review* 569, 575.

⁹⁶ Duckworth, above n 95, 576.

⁹⁷ *Renault* (2002) 210 CLR 491, 517–18 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁹⁸ *Ibid* 517 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁹⁹ [1994] 3 SCR 1022.

¹⁰⁰ Robert Yezerki, 'Renvoi Rejected? The Meaning of "the *Lex Loci Delicti*" after *Zhang*' (2004) 26 *Sydney Law Review* 273, 285.

¹⁰¹ Janet Walker, "'Are We There Yet?'" Towards a New Rule for Choice of Law in Tort' (2000) 38 *Osgoode Hall Law Journal* 331, 342.

¹⁰² *Tolofson v Jensen* [1994] 3 SCR 1022, 1047 ('*Tolofson*').

¹⁰³ *Ibid*; Walker, above n 101, 342–3.

¹⁰⁴ *Tolofson* [1994] 3 SCR 1022, 1047 (La Forest J).

was reinforced by the rule's effect in avoiding the 'parochialism and systematic unfairness to defendants'¹⁰⁵ which had allegedly accompanied the double actionability rule through its inherent bias towards the *lex fori*.

5 *Rationale of Kirby J*

Kirby J's judgment in *Renault* provided a more detailed explanation of the reasons for adopting the *lex loci delicti* as the applicable substantive law for international torts. Despite his Honour's insistence that the rule was justifiable by principled analysis,¹⁰⁶ Kirby J's failure to advert to the theoretical paradigms upon which deference to the *lex loci delicti* was premised reveals that his Honour's approach was predominantly motivated by pragmatism. As in the majority judgment, Kirby J was concerned with ensuring greater certainty and conceptual simplicity in choice of law rules.¹⁰⁷ As litigants ordinarily expected that the place of the wrong would govern their rights and duties,¹⁰⁸ consistent application of the *lex loci delicti* was deemed more effective in fulfilling the goals of private international law. Moreover, Kirby J identified the promotion of uniformity in choice of law principles across Australian courts and between foreign states as a significant reason for the rule.¹⁰⁹ In particular, his Honour (somewhat erroneously, it will be seen)¹¹⁰ pointed to the United States as evidence that the rule was 'observed by most jurisdictions of the world'.¹¹¹ It was on this basis that adoption of the *lex loci delicti* was supposed to reduce the opportunities for forum shopping that might otherwise be available under the traditional approach.

E *An Unsatisfactory Solution*

It is evident that the High Court in *Pfeiffer* and *Renault* considered that there were not only strong reasons of policy and practicality supporting its approach, but that a sound theoretical basis existed for consistently applying the *lex loci delicti* to both intranational and international torts. However, even at first glance, it is difficult to accept that the case for rigid adherence to the *lex loci delicti* is as persuasive as the Court believed it to be. Members of the Court in both *Pfeiffer*¹¹² and *Renault*¹¹³ maintained that the rule had retained its force across the world or had otherwise experienced a resurgence in popularity, when in fact the international community had largely moved away from the rule by the beginning of the 21st century. For instance, the United Kingdom had adopted a statutory choice of law rule for international torts in 1995, which applied the law of the place of damage, subject to an exception where the circumstances of the

¹⁰⁵ Catherine Walsh, 'Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Products Liability Claims' (1997) 76 *Canadian Bar Review* 91, 110; *Renault* (2002) 210 CLR 491, 516 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

¹⁰⁶ *Renault* (2002) 210 CLR 491, 535.

¹⁰⁷ *Ibid* 535–6.

¹⁰⁸ *Ibid* 538.

¹⁰⁹ *Ibid* 536–7.

¹¹⁰ See below Part II(E).

¹¹¹ *Renault* (2002) 210 CLR 491, 536–7.

¹¹² (2000) 203 CLR 503, 536–7 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

¹¹³ (2002) 210 CLR 491, 536–7 (Kirby J).

case warranted departure from the prima facie rule.¹¹⁴ A similar approach had been suggested in early negotiations of the *Rome II Regulation*¹¹⁵ in the European Union.¹¹⁶ Even the United States, which Kirby J had advanced as evidence of the rule's popularity, had become disenchanted by the rule,¹¹⁷ with only 10 jurisdictions continuing to observe it in choice of law matters.¹¹⁸

Moreover, the Court's reasoning suffers from selective application of past judicial opinion. For instance, its reliance upon certainty in rejecting flexibility in the rule's operation disregarded previous warnings against the adoption of mechanical choice of law rules and the potential injustice that such inflexibility could produce.¹¹⁹ Similarly, the majority appears to have ignored La Forest J's express admission in *Tolofson* that the *lex loci delicti* could be productive of injustice in the international context,¹²⁰ an opinion which subsequently generated flexibility in the Canadian approach to international torts.¹²¹ In light of these issues, one cannot help but question the tenability of the theoretical reasons advanced in support of the rule.

To assess the legitimacy of this concern, regard must be had to the two primary considerations which informed the adoption of the *lex loci delicti* for international torts. First, as a matter of theory, principles of comity, respect for foreign laws and institutions and the territorial operation of laws supplied the conceptual framework for the interaction between forum and foreign law and the ultimate application of the *lex loci delicti* to international torts. Secondly, this position was supported by reference to the objectives of certainty, predictability and stability in the law's application, as well as the fulfilment of parties' reasonable expectations. By examining these two factors from a theoretical perspective, one discovers that the problematic nature of the Court's approach

¹¹⁴ *Private International Law (Miscellaneous Provisions) Act 1995* (UK) c 42, s 11; *Edmunds v Simmonds* [2001] 1 WLR 1003, 1008–11 (Garland J); Briggs, *The Conflict of Laws*, above n 19, 269–70.

¹¹⁵ *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II)* [2007] OJ L 199/40 ('*Rome II Regulation*').

¹¹⁶ Commission of the European Communities, 'Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("*Rome II*")', (Proposal No COM(2003) 427 final) 11–13; General Secretariat of the Council of the European Union, *Draft Instrument on the Law Applicable to Non Contractual Obligations* [1999] JUSTCIV 112, EU Council Doc No 10231/99 (28 July 1999) 3–4; General Secretariat of the Council of the European Union, *Draft Instrument on the Law Applicable to Non Contractual Obligations (State of Work)* [1999] JUSTCIV 150, EU Council Doc No 11982/99 (9 December 1999) 4; Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (Oxford University Press, 2010) 33–4, 37–43.

¹¹⁷ Scoles and Hay, above n 15, 16, 32–4, 42–6.

¹¹⁸ Luther L McDougal III, Robert L Felix and Ralph U Whitten, *American Conflicts Law* (Transnational, 5th ed, 2001) 450–1; Symeon C Symeonides, 'Choice of Law in the American Courts in 2001: Fifteenth Annual Survey' (2002) 50 *American Journal of Comparative Law* 1, 4; Symeon C Symeonides, 'Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey' (2013) 61 *American Journal of Comparative Law* 217, 279.

¹¹⁹ *Breavington* (1988) 169 CLR 41, 76 (Mason CJ); *McKain* (1991) 174 CLR 1, 38 (Brennan, Dawson, Toohey and McHugh JJ).

¹²⁰ *Tolofson* [1994] 3 SCR 1022, 1062–3; Ross Anderson, 'International Torts in the High Court of Australia' (2002) 10 *Torts Law Journal* 132, 141.

¹²¹ *Hanlan v Sernesky* (1997) 35 OR (3d) 603; *Wong v Wei* [1999] 10 WWR 296 (British Columbia Supreme Court), [10] (Kirkpatrick J); *Lebert v Skinner Estate* (2001) 53 OR (3d) 559; *Wong v Lee* (2002) 211 DLR (4th) 69, 85 (Ontario Court of Appeal).

runs much deeper than mere factual inaccuracies and the selective application of past decisions.

III COMITY AS A SUPPORTING PRINCIPLE OF THE *LEX LOCI DELICTI*

The doctrine of comity was historically invoked as a foundational principle upon which private international law could be based.¹²² Although it is now well-accepted that comity does not serve such a unifying theoretical role,¹²³ it has experienced a resurgence as a guiding principle for the development of various rules designed to assist courts in resolving international disputes.¹²⁴ This can be seen in the majority's judgment in *Renault*, where the doctrine was invoked (albeit indirectly) to explain why Australian domestic courts should defer to the *lex loci delicti* when determining the governing law of international torts.¹²⁵ This Part proposes that the first theoretical difficulty in the modern approach emerges from the explanatory function which comity was intended to serve. This is due to the apparent weight ascribed by the Court to the orthodox conception of comity advanced by Ulrich Huber and Joseph Story. When one considers the scope, content and effect of this traditional comity doctrine, it becomes evident that it does not provide theoretical support for a choice of law rule which favours invariable application of the *lex loci delicti*.

A *The Early Theorists — Ulrich Huber and Joseph Story*

1 *Ulrich Huber and the Dutch School of Thought*

The doctrine of comity was first proposed as a choice of law principle by 17th century Dutch theorists,¹²⁶ the most notable of whom was Ulrich Huber.¹²⁷ It emerged as a response to the theoretical tension between the conceptual framework proposed by the 'statutists', which had prevailed in European private international law since the 13th century,¹²⁸ and the principle of state sovereignty.¹²⁹ The statutists reasoned that the territorial or extraterritorial scope of local dispositive rules depended upon the characterisation of those rules as

¹²² Lord Collins of Mapesbury et al (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol 1, 5; Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in regard to Contracts, Rights, and Remedies, and Especially in regard to Marriages, Divorces, Wills, Successions, and Judgments* (Little, Brown, and Co, 8th ed, 1883) 33–5.

¹²³ Lawrence Collins, 'Comity in Modern Private International Law' in James Fawcett (ed), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (Oxford University Press, 2002) 89, 91–3.

¹²⁴ *Ibid* 91; Lord Collins of Mapesbury et al (eds), *Dicey, Morris and Collins*, above n 122, 6.

¹²⁵ Richard Garnett, '*Renault v Zhang* — A Job Half Done?' (2002) 10 *Tort Law Review* 145, 147–8.

¹²⁶ Juenger, *Choice of Law and Multistate Justice*, above n 79, 20–1.

¹²⁷ Hessel E Yntema, 'The Historic Bases of Private International Law' (1953) 2 *American Journal of Comparative Law* 297, 306.

¹²⁸ *Ibid* 303–4; Scoles and Hay, above n 15, 8–9.

¹²⁹ Hessel E Yntema, 'Proceedings of the 1963 Annual Meeting of the American Foreign Law Association — Part II: Basic Issues in Conflicts Law' (1963) 12 *American Journal of Comparative Law* 474, 477–8.

‘real’ or ‘personal’ respectively.¹³⁰ However, this approach failed to explain *how* and *why* foreign law operated within another state’s borders when each state was only sovereign over its own territory.¹³¹ This tension was particularly acute in the Dutch context. The Dutch Republic secured its independence from Spanish rule following the *Act of Abjuration* in 1581.¹³² As a relatively new nation, its existence was threatened by religious factionalism across the different provinces and conflict between the merchants and noblemen, who sought to increase their influence over the relatively weak central government.¹³³ The Dutch theorists therefore sought to devise a theory of private international law which eased this tension by explaining which laws ought to govern interprovincial disputes while also accounting for the Republic’s growing international trade network.¹³⁴

At the core of the Dutch theory was an understanding of law as an essentially territorial phenomenon whose scope of application was limited by the extent of a sovereign’s authority over his or her own land.¹³⁵ For instance, in his treatise *De Conflictu Legum Diversarum in Diversis Imperiis*, Huber treated territorial sovereignty as the necessary starting point for resolving the choice of law problem. According to Huber, it was axiomatic that ‘[t]he laws of each state [had] force within the limits of that government’ and applied equally to those domiciled in the region as well as those temporarily present.¹³⁶ As a corollary of this ‘territoriality principle’, the laws of one state possessed no authoritative force within the territory of a foreign sovereign. Effect could only be given to foreign laws within another state’s borders by the ‘sanction of the supreme power of the other state’ which was given ‘out of respect for the mutual convenience of nations’.¹³⁷

The content and effect of this final proposition has been the subject of academic disagreement, the resolution of which is important to our understanding of the theoretical coherence of comity in Australian law with the orthodox tradition. Alan Watson argues that Huber considered foreign law to be indirectly binding within the forum, such that it would always prevail unless directly excluded by local law or forum public policy.¹³⁸ Consequently, domestic

¹³⁰ Scoles and Hay, above n 15, 8; Joel R Paul, ‘Comity in International Law’ (1991) 32 *Harvard International Law Journal* 1, 13; Alex Mills, ‘The Private History of International Law’ (2006) 55 *International and Comparative Law Quarterly* 1, 11–12.

¹³¹ Hessel E Yntema, ‘The Comity Doctrine’ (1966) 65 *Michigan Law Review* 9, 18–19.

¹³² Liesbeth Gevers, ‘The King Strikes Back: The Spanish Diplomatic Campaign to Undermine the International Status of the Dutch Republic, 1581–1609’ in P Brood and Raymond Kubben (eds), *The Act of Abjuration: Inspired and Inspirational* (Nijmegen: Wolf Legal Publishers, 2011) 81, 81.

¹³³ Pieter Geyl, *The Netherlands in the Seventeenth Century — Part One: 1609–1648* (Ernest Benn, 1961) 38–63; Pieter Geyl, *The Netherlands in the Seventeenth Century — Part Two: 1648–1715* (Ernest Benn, 1964) 106–21; Paul, ‘Comity in International Law’, above n 130, 15; Elliott E Cheatham, ‘American Theories of Conflict of Laws: Their Role and Utility’ (1945) 58 *Harvard Law Review* 361, 364–5.

¹³⁴ Paul, ‘Comity in International Law’, above n 130, 15; Winston P Nagan, ‘Conflicts Theory in Conflict: A Systematic Appraisal of Traditional and Contemporary Theories’ (1982) 3 *Journal of International and Comparative Law* 343, 415–16.

¹³⁵ Ernest G Lorenzen, ‘Huber’s *De Conflictu Legum*’ (1918) 13 *Illinois Law Review* 375, 376.

¹³⁶ *Ibid*; Donald Earl Childress III, ‘Comity as Conflict: Resituating International Comity as Conflict of Laws’ (2010) 44 *UC Davis Law Review* 11, 19–20.

¹³⁷ Lorenzen, ‘Huber’s *De Conflictu Legum*’, above n 135, 412.

¹³⁸ Alan Watson, *Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws* (University of Georgia Press, 1992) 8–9, 13; Childress, above n 136, 28.

courts had *no* discretion to reject foreign law,¹³⁹ but rather determined the applicable law objectively by reference to the facts of each case.¹⁴⁰ On the other hand, many have considered discretion to be inherent in Huber's theory, as it underpinned the notion that foreign laws were applied due to the tacit consent of the forum.¹⁴¹ Alex Mills suggests that this disagreement is predominantly the product of a conceptual tension in Huber's writing.¹⁴² While Huber's axioms were intended to form part of 'the law of nations',¹⁴³ which was binding on all states and implied comity's non-discretionary character, his treatise simultaneously sought to explain the application of foreign law as a voluntary, consensual act.¹⁴⁴ Consequently, neither characterisation of Huber's final proposition may be completely satisfactory.

For present purposes, one may reconcile these conflicting views on the basis that they define the *extent* of the forum courts' discretion in determining whether to apply foreign law. Clearly, the general notion of consent, and therefore discretion, was an indispensable component of Huber's theory. Indeed, Huber described the comity doctrine by reference to the act of states 'offer[ing] each other a hand',¹⁴⁵ which communicates the sense of 'hospitality', rather than compulsion, implicit in the principle.¹⁴⁶ Moreover, as the doctrine was intended to resolve the conceptual incompatibility of absolute territorial sovereignty with the application of foreign law,¹⁴⁷ characterisation of comity as the compulsory advertence to foreign law would be inconsistent with the premise of the theoretical problem that it was designed to resolve.¹⁴⁸ Nonetheless, given the practical inconvenience and mutual disutility of refusing to recognise foreign laws, this discretion was not unbridled and did not authorise the rejection of foreign laws on any arbitrary basis.¹⁴⁹ As such, the better view is that, while comity was a heavily persuasive factor which encouraged advertence to foreign law, it nonetheless permitted domestic courts legitimately to discard foreign law where forum public policy or the interests of its citizens so warranted.

2 *Comity under Joseph Story*

Comity was incorporated into American private international law in the early 19th century by United States Supreme Court Justice Joseph Story. Story's writings were heavily motivated by his opposition to the American slave trade

¹³⁹ Watson, above n 138, 8.

¹⁴⁰ Ibid 13.

¹⁴¹ Childress, above n 136, 21–2; Paul, 'Comity in International Law', above n 130, 15–17.

¹⁴² Mills, above n 130, 26.

¹⁴³ Joel R Paul, 'The Transformation of International Comity' (2008) 71(3) *Law and Contemporary Problems* 19, 22–3; Arthur Nussbaum, 'Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws' (1942) 42 *Columbia Law Review* 189, 192; Yntema, 'Proceedings of the 1963 Annual Meeting', above n 129, 480–1.

¹⁴⁴ Mills, above n 130, 26.

¹⁴⁵ Ulrich Huber, *Heedensdaegse Rechtsgeleertheit* (Leeuwarden, 1699) 13, quoted in Paul, 'Comity in International Law', above n 130, 17.

¹⁴⁶ Paul, 'Comity in International Law', above n 130, 17.

¹⁴⁷ Childress, above n 136, 22; Yntema, 'The Comity Doctrine', above n 131.

¹⁴⁸ Paul, 'Comity in International Law', above n 130, 17.

¹⁴⁹ Wolff, above n 22, 28.

and a growing consciousness of the tension between free and slave states.¹⁵⁰ Similar to the Dutch theorists' desire to reconcile religious tensions in the Dutch Republic, Story sought to 'localize' the effects of slavery and militate against the risk of conflict emerging out of differences in slave laws between the northern and southern states.¹⁵¹ He believed that this could be achieved by constructing a universal system of rules which gave courts the freedom to determine when and how to apply slavery laws within their own jurisdiction.¹⁵² The flexibility and choice that such a system afforded to forum courts in deciding whether to apply 'foreign' laws relied upon the doctrine of comity, which operated as the foundation to Story's conceptualisation of private international law.¹⁵³

In his *Commentaries on the Conflict of Laws* ('*Commentaries*'), Story borrowed heavily from Huber's understanding of comity.¹⁵⁴ In fact, Huber's axioms were expressly endorsed and adopted by Story to explain the application of foreign law by domestic courts.¹⁵⁵ For instance, Story saw the state government as exclusively and absolutely sovereign within its own territory, the corollary being that any extraterritorial force given to foreign laws was not 'the result ... of any original power to extend them abroad, but of ... respect, which ... other nations [were] disposed to yield to them'.¹⁵⁶ Moreover, Story stressed the discretionary nature of the comity principle, suggesting that the forum could decline to apply foreign law where it would be 'repugnant to its policy or prejudicial to its interests'.¹⁵⁷ As a result, Story shared Huber's view of comity as a means of reconciling territorial sovereignty with the extraterritorial application of foreign laws.¹⁵⁸

Importantly, Story's *Commentaries* focused heavily upon the forum state's sovereign interests as the underlying concern of the comity doctrine, an idea which received less emphasis in Huber's treatise. Story expressly stated that the doctrine '[owed] its origin and authority to the voluntary adoption and consent of nations', rendering it 'in the strictest sense a matter of the comity of nations'.¹⁵⁹ Therefore, it was the role of the sovereign, rather than the courts, to exercise comity. The courts' function was to ascertain the sovereign's own interests and to effectuate the sovereign's will in cases of conflict, balancing it against the

¹⁵⁰ Paul, 'The Transformation of International Comity', above n 143, 24; R Kent Newmyer, *Supreme Court Justice Joseph Story* (University of North Carolina Press, 1985) 372.

¹⁵¹ Paul, 'The Transformation of International Comity', above n 143; Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (University of North Carolina Press, 1981) 13–15.

¹⁵² Story, above n 122, 6–7; Nagan, above n 134, 420; Paul, 'Comity in International Law', above n 130, 22.

¹⁵³ Paul, 'The Transformation of International Comity', above n 143, 25; Story, above n 122, 21–34; Kurt H Nadelmann, 'Joseph Story's Contribution to American Conflicts Law: A Comment' (1961) 5 *American Journal of Legal History* 230, 232.

¹⁵⁴ Nagan, above n 134, 418–19; Watson, above n 138, 19; Ernest G Lorenzen, 'Story's Commentaries on the Conflict of Laws — One Hundred Years After' (1934) 48 *Harvard Law Review* 15, 27.

¹⁵⁵ Story, above n 122, 31; Scoles and Hay, above n 15, 13.

¹⁵⁶ Story, above n 122, 8.

¹⁵⁷ *Ibid* 35; Cheatham, 'American Theories of Conflict of Laws', above n 133, 367.

¹⁵⁸ Yntema, 'The Comity Doctrine', above n 131, 9.

¹⁵⁹ Story, above n 122, 34.

concerns of all states interested in the dispute.¹⁶⁰ Consequently, Story's conception of comity arguably extended the discretion given to domestic courts by Huber's theory by expanding the terms of reference for the courts' discretion beyond mere matters of practical convenience or moral repugnancy.¹⁶¹

3 Comity in Australian Law — Some Conceptual Problems

While the traditional comity doctrine became the subject of significant criticism for much of the 20th century,¹⁶² it has retained some (albeit limited) legitimacy in the Canadian,¹⁶³ Australian¹⁶⁴ and, to a lesser extent, English¹⁶⁵ common law as a principled basis for understanding the forum's application of foreign law. Moreover, it continues to inform the Australian courts' exercise of extraterritorial jurisdiction,¹⁶⁶ the grant of anti-suit injunctions,¹⁶⁷ as well as the assessment of stay applications on *forum non conveniens* grounds.¹⁶⁸ Given its prevalence and elasticity as an explanatory principle in a variety of contexts,¹⁶⁹ it is not surprising that comity implicitly provided a theoretical basis for the High Court's adoption of the *lex loci delicti*.

Indeed, the precise content of the comity doctrine as invoked in *Renault* is less clear: its relevance to the majority's decision was merely by reference to La Forest J's judgment in *Tolofson*, which was described as being of 'particular utility'.¹⁷⁰ Nonetheless, given that the judgment otherwise '[lacked] detailed

¹⁶⁰ Ibid 34–5; Childress, above n 136, 22; Steven R Swanson, 'The Vexatiousness of a Vexation Rule: International Comity and Antisuit Injunctions' (1996) 30 *George Washington Journal of International Law and Economics* 1, 9–10.

¹⁶¹ Paul, 'Comity in International Law', above n 130, 24; Childress, above n 136, 28; Cheatham, 'American Theories of Conflict of Laws', above n 133, 392.

¹⁶² Scoles and Hay, above n 15, 13; Dicey and Berriedale Keith, *A Digest of the Law of England*, above n 17, 10; Michael D Ramsay, 'Escaping "International Comity"' (1998) 83 *Iowa Law Review* 893; Lawrence Collins, 'Comity in Modern Private International Law', above n 123, 91–3; G C Cheshire, *Private International Law* (Clarendon Press, 1935) 6.

¹⁶³ *Tolofson* [1994] 3 SCR 1022, 1047, 1049–50 (La Forest J); *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, 1095 (La Forest J).

¹⁶⁴ Law Reform Commission, *Choice of Law Rules*, Discussion Paper No 44 (1990) [5.1], [5.4]; Peter Kincaid, 'Justice in Tort Choice of Law' (1996) 18 *Adelaide Law Review* 191, 195. But see *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331, 363 (Gummow and Hayne JJ).

¹⁶⁵ Carter, above n 94, 16; *Buck v A-G* [1965] Ch 745, 770 (Diplock LJ); *Rahimtoola v Nizam of Hyderabad* [1958] AC 379, 417. But see Dicey and Berriedale Keith, *A Digest of the Law of England*, above n 17, 10; Lawrence Collins, 'Comity in Modern Private International Law', above n 123, 92; *Adams v Cape Industries plc* [1990] Ch 433, 513 (Slade LJ).

¹⁶⁶ *Agar v Hyde* (2000) 201 CLR 552, 570 (Gaudron, McHugh, Gummow and Hayne JJ); *Contender 1 Ltd v LEP International Pty Ltd* (1988) 82 ALR 394, 398–9 (Brennan J).

¹⁶⁷ *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* [2013] VSCA 237 (6 September 2013), [500]–[502], [519] (Warren CJ, Osborn JA and Macaulay AJA); *Armcel Pty Ltd v Smurfit Stone Container Corp* (2008) 248 ALR 573, 588 (Jacobson J); *TS Production LLC v Drew Pictures Pty Ltd* (2008) 172 FCR 433, 443 (Finklestein J), 449 (Gordon J); *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 395–8 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

¹⁶⁸ *Telesto Investments Ltd v UBS AG* (2012) 262 FLR 119, 145–6 (Ward J); *Colosseum Investment Holdings Pty Ltd v Vanguard Logistics Services Pty Ltd* [2005] NSWSC 803 (10 August 2005), [69] (Palmer J).

¹⁶⁹ Lord Collins of Mapesbury et al (eds), *Dicey, Morris and Collins*, above n 122, 5–9.

¹⁷⁰ *Renault* (2002) 210 CLR 491, 516 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

reasons for its selection of the *lex loci delicti* as the appropriate rule',¹⁷¹ the understanding of comity as outlined by La Forest J, and apparently endorsed by the majority, accordingly assumes greater weight in informing the content of the doctrine in the Australian context.¹⁷² It is on this basis that the Court appears to have ascribed some explanatory value to both Huber's and Story's doctrinal bases to choice of law rules: the judgment appears to invoke Story's axioms of territoriality and sovereign consent in accepting that states, as a matter of comity, will ordinarily respect the laws of another state made within their own territory and, absent a breach of 'some overriding norm', open their national forums for the resolution of foreign disputes.¹⁷³ Given also the importance of Huber's and Story's theses to the Australian understanding of comity at common law prior to *Renault*,¹⁷⁴ it is likely that the doctrine in its orthodox form indirectly influenced the Court's reasoning.

Accepting the validity of this characterisation, the theoretical difficulty in the Court's approach emerges from the disconnect between the orthodox comity doctrine and the adoption of an inflexible *lex loci delicti*, as evident in the significantly reduced role of discretion when determining whether to apply foreign laws. The Court accepted that foreign laws would 'ordinarily' be respected by other states and that the forum court would be 'hesitant to interfere' with those laws,¹⁷⁵ suggesting that the forum court's default approach would be to defer to foreign dispositive tort rules. Indeed, the Court's qualification of this principle by requiring the consistency of foreign laws with the 'interests and internal values of the forum state'¹⁷⁶ indicates a continued adherence to the same caveats identified by Huber and Story and the retention of some discretion.¹⁷⁷ Nonetheless, this is largely immaterial to the Court's approach given its rejection of flexibility at the choice of law stage. As such, the approach adopted in *Renault* appears to conceptualise the rejection of foreign law as the exception to the rule, in contrast to Story's original understanding of comity as a guiding principle designed to assist the court in assessing whether foreign laws should apply.¹⁷⁸

Of course, this argument is more likely to demonstrate a doctrinal departure from Story's, rather than Huber's, view of comity, particularly if one accepts Watson's understanding of Huber's doctrine as imposing an indirectly binding obligation upon the forum court to respect foreign law.¹⁷⁹ The characterisation of Huber's doctrine as generally warranting the application of foreign law subject to

¹⁷¹ Duckworth, above 95, 576.

¹⁷² Yezerski, above n 100.

¹⁷³ *Renault* (2002) 210 CLR 491, 516 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Tolofson* [1994] 3 SCR 1022, 1047 (La Forest J).

¹⁷⁴ See, eg, *Lipohar v The Queen* (1999) 200 CLR 485, 525–6 (Gaudron, Gummow and Hayne JJ); *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 395–6 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

¹⁷⁵ *Renault* (2002) 210 CLR 491, 516 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), quoting *Tolofson* [1994] 3 SCR 1022, 1047 (La Forest J).

¹⁷⁶ *Renault* (2002) 210 CLR 491, 516 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), quoting *Tolofson* [1994] 3 SCR 1022, 1047 (La Forest J).

¹⁷⁷ Lorenzen, 'Huber's *De Conflictu Legum*', above n 135, 403; Story, above n 122, 35–6.

¹⁷⁸ Swanson, above n 160, 10; Harold G Maier, 'Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law' (1982) 76 *American Journal of International Law* 280, 283–4.

¹⁷⁹ Watson, above n 138, 8–9, 13.

the circumstances of the case, proposed above, similarly seems consistent with the High Court's approach. Nonetheless, even if this aspect of the modern Australian approach derives some theoretical legitimacy from Huber's more circumscribed view of judicial discretion, it is unclear how either theorist's view of comity allocates the *lex loci delicti* as the exclusive connecting factor for international torts. First, comity was only effective in explaining *how* foreign law could operate extraterritorially.¹⁸⁰ It did not, of itself, necessitate advertence to foreign law.¹⁸¹ That logical component of Huber's thesis was supplied by the principle of 'acquired rights', which suggested that 'right[s] duly acquired under the law of a particular country should be recognized [everywhere]'.¹⁸² However, the High Court rejected the notion of acquired or vested rights in *Koop*,¹⁸³ and reinforced the theory's irrelevance in *Pfeiffer*.¹⁸⁴ Given that comity alone cannot provide a complete theoretical solution to the choice of law problem,¹⁸⁵ it cannot be considered an effective justification for applying the *lex loci delicti*.

Secondly, for both Huber and Story, discretion remained an inherent part of the court's role, albeit to differing degrees of freedom, as it was through such discretion that the court could do justice in the particular case at hand and account for competing sovereign interests.¹⁸⁶ In fact, the bestowal of such discretion upon the courts under a vague principle lacking in specific parameters was the reason why the theory was the subject of such vehement criticism.¹⁸⁷ Consequently, an inflexible rule which prohibits advertence to the broader interests of the forum at the choice of law stage is fundamentally incompatible with such an understanding of comity. It is for this reason that the *lex loci delicti* in its rigid form, and indeed any fixed rule for torts conflicts, were absent from Story's and Huber's theoretical consideration of civil wrongs.¹⁸⁸

B *A Merely Formalistic Criticism?*

It may be argued that, when one considers the judgment in *Renault* in its entirety, this criticism is merely one of form, rather than substance. For instance, the Court recognised that public policy considerations remained relevant at the

¹⁸⁰ D J Llewelyn Davies, 'The Influence of Huber's *De Conflictu Legum* on English Private International Law' (1937) 18 *British Year Book of International Law* 49, 58.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.* 59; K Lipstein, *Principles of the Conflict of Laws, National and International* (Martinus Nijhoff, 1981) 23–4; Yntema, 'The Comity Doctrine' above n 131, 30.

¹⁸³ *Koop* (1951) 84 CLR 629, 644 (Dixon, Williams, Fullagar and Kitto JJ).

¹⁸⁴ *Pfeiffer* (2000) 203 CLR 503, 526 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

¹⁸⁵ Davies, above n 180, 59–60.

¹⁸⁶ Paul, 'Comity in International Law', above n 130, 6–7; Holly Sprague, 'Choice of Law: A Fond Farewell to Comity and Public Policy' (1986) 74 *California Law Review* 1447, 1449–50.

¹⁸⁷ Herbert F Goodrich, *Handbook of the Conflict of Laws* (West, 3rd ed, 1949) 11–12; Nagan, above n 134, 420.

¹⁸⁸ Joseph Story and Ulrich Huber identified the *lex loci delicti* in discussing criminal law: Story, above n 122, 845; Lorenzen, 'Huber's *De Conflictu Legum*', above n 135, 392–3; Floyd Krause, 'Choice of Law in a Physical Tort' (1965) 14 *De Paul Law Review* 419, 420. However, this was either premised on existing case law or detached from the theoretical paradigm applied to civil wrongs.

jurisdictional, rather than the choice of law, stage of the dispute.¹⁸⁹ Therefore, the discretion envisaged by Huber and Story to facilitate consideration of forum sovereign interests in determining the applicable law could still form part of the court's inquiry, but merely as part of the court's discretionary exercise of jurisdiction or exclusion of foreign law on public policy grounds.¹⁹⁰

However, public policy as a controlling factor in private international law is unlikely to accommodate the discretion inherent in the traditional notion of comity. Joel Paul argues that comity was intended to expand the role of public policy in domestic courts such that choice of law problems could be resolved by reference to competing forum and foreign interests.¹⁹¹ In the modern context, however, public policy only justifies the non-application of foreign law in cases where the foreign state seeks to enforce its governmental interests in the forum¹⁹² or where the application of foreign law would offend fundamental principles of justice, morality or ethics.¹⁹³ Although these considerations may be characterised as sovereign interests, with which comity was traditionally concerned, they are only ever successfully invoked as a basis for the non-application of foreign law in rare and exceptional cases.¹⁹⁴ This judicial restraint implies that the circumstances in which public policy may warrant the displacement of foreign law are heavily restricted, resulting in a truncation of the discretion which comity was originally intended to facilitate.

This has problematic implications for the centrality of forum, rather than foreign, sovereign interests in the traditional comity doctrine.¹⁹⁵ For both Huber and Story, comity permitted the non-application of foreign law not only where it offended forum public policy, but also where it was 'prejudicial' to the interests of the forum's citizens.¹⁹⁶ On this view, the forum court could legitimately revert to the *lex fori* where the *lex loci delicti* was inappropriate in the circumstances of the case or potentially productive of injustice. However, public policy considerations fix upon general notions of morality and ethics, rather than the circumstances of litigants or their dispute. Consequently, the modern approach

¹⁸⁹ *Renault* (2002) 210 CLR 491, 514–15 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); Reid Mortensen, 'Homing Devices in Choice of Tort Law: Australian, British, and Canadian Approaches' (2006) 55 *International and Comparative Law Quarterly* 839, 846.

¹⁹⁰ *Renault* (2002) 210 CLR 491, 515 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

¹⁹¹ Paul, 'Comity in International Law', above n 130, 7.

¹⁹² *Huntington v Attrill* [1893] AC 150, 155–7 (Lord Watson); *United States of America v Inkley* [1989] 1 QB 255, 264–6 (Purchas LJ); *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 45–7 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ).

¹⁹³ *Kaufman v Gerson* [1904] 1 KB 591, 598–9 (Collins MR), 600 (Mathew LJ); *Loucks v Standard Oil Co of New York*, 120 NE 198, 202 (Cardozo J) (NY Ct App, 1918); *Royal Boskalis Westminster NV v Mountain* [1999] QB 674, 726 (Phillips LJ); *Stern v National Australia Bank* [1999] FCA 1421 (15 October 1999) [143] (Tamberlin J); *Jenton Overseas Investment Pte Ltd v Townsing* (2008) 221 FLR 398, 403–4 (Whelan J).

¹⁹⁴ *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1078–9 (Lord Nicholls of Birkenhead); *Stern v National Australia Bank* [1999] FCA 1421, [143] (Tamberlin J), reasoning upheld in *Stern v National Australia Bank Ltd* (2000) 171 ALR 192, 210 (Hill, O'Connor and Moore JJ); Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 2nd ed, 2011) 247.

¹⁹⁵ Childress, above n 136, 27–8; Paul, 'Comity in International Law', above n 130, 24.

¹⁹⁶ Story, above n 122, 33; Davies, above n 180, 61; Sprague, above n 186, 1450.

removes the court's ability to consider the parties' relationship with each other, the forum and the place of the tort and to select the law which is most appropriate for the administration of justice, thereby further limiting the scope of discretion which comity originally recognised.¹⁹⁷ Ultimately, the relocation of the court's discretion to the preliminary public policy inquiry has the broader effect of reinforcing the bias towards the *lex loci delicti* which follows from the Court's interpretation of comity as deference to foreign law. This inconsistency between the modern role of comity in favouring foreign law and the orthodox role of comity in 'protect[ing] and affirm[ing] the forum law'¹⁹⁸ confirms the lack of historical or doctrinal support for the *lex loci delicti* rule as adopted by the High Court, even when one considers the rule against the broader private international law methodology.

IV THE DISUTILITY OF THE OBJECTIVES-ORIENTED APPROACH IN JUSTIFYING THE *LEX LOCI DELICTI*

The pragmatic function of choice of law rules in serving the objectives of private international law was a dominant theme in *Pfeiffer* and *Renault*, as well as the decisions which came before them.¹⁹⁹ Similarly, subsequent considerations of the *lex loci delicti* rule have focused primarily upon issues of practicality. When the High Court in *Neilson v Overseas Projects Corporation of Victoria Ltd* ('*Neilson*')²⁰⁰ revisited its reasons in *Renault* to clarify the content of the *lex loci delicti*,²⁰¹ attention was only directed towards the rule's value in accommodating 'requirements of certainty', reducing opportunities for forum shopping, and respecting the normal expectations of litigants.²⁰² These principles have also informed academic discourse, focusing the debate upon the practical value of the *lex loci delicti*. For instance, modern commentators criticise the rule for the unnecessary weight which it ascribes to certain objectives at the expense of others as well as its failure to fulfil those objectives.²⁰³ Although these criticisms are relevant when assessing the desirability of the rule, this Part suggests that the second theoretical difficulty in the High Court's modern approach lies in the failure of 'objectives analysis' to explain why one legal system should supply the dispositive rules of the tort to the exclusion of all others. Moreover, by considering the role of private international law objectives in the methodology of such orthodox scholars as Joseph Henry Beale, this Part will further demonstrate the fundamental incompatibility between the pragmatic objectives of the *lex loci delicti* and the theoretical premise supplied by the comity doctrine.

¹⁹⁷ Story, above n 122, 33.

¹⁹⁸ Paul, 'Comity in International Law', above n 130, 24.

¹⁹⁹ *McKain* (1991) 174 CLR 1, 39 (Brennan, Dawson, Toohy and McHugh JJ).

²⁰⁰ (2005) 223 CLR 331.

²⁰¹ *Ibid* 357 (Gummow and Hayne JJ).

²⁰² *Ibid* 363–4, 366–7 (Gummow and Hayne JJ), 389–90 (Kirby J), 408–9 (Callinan J).

²⁰³ Pitel and Harper, above n 76, 298–303; A J E Jaffey, 'The Foundations of Rules for the Choice of Law' (1982) 2 *Oxford Journal of Legal Studies* 368, 387–92; James Audley McLaughlin, 'Conflict of Laws: The Choice of Law *Lex Loci* Doctrine, the Beguiling Appeal of a Dead Tradition, Part One' (1991) 93 *West Virginia Law Review* 957, 981–2.

A *The Role of Private International Law Objectives in Joseph Henry Beale's Approach*

The importance of certainty, uniformity and the fulfilment of parties' reasonable expectations is reminiscent of the dogmatic approach advanced by American scholar Joseph Henry Beale.²⁰⁴ Beale's approach was predicated upon the belief that all choice of law questions could be handled satisfactorily by a small, discrete set of rigid rules derived from some overarching principle.²⁰⁵ This was evident from Beale's understanding of the common law as 'a system of thought based upon principles which covered every possible occurrence'.²⁰⁶ The unifying principle in Beale's thesis was a 'highly specialized' understanding of territorial sovereignty, known as the 'vested rights theory'.²⁰⁷ Similar to the '*obligatio* theory' proposed by Holmes J,²⁰⁸ Beale argued that each cause of action was subject only to one law, that being the law governing the conduct from which the rights and obligations of the parties emerged.²⁰⁹ As this theory definitively allocated the relevant connection for a tort to the place of its occurrence, there was no principled reason to depart from the *lex loci delicti* in resolving the choice of law question. This gave rise to a system of 'mechanical jurisprudence [which] promoted rigid and uniform jurisdiction-selecting rules',²¹⁰ 'certain[ty] in [the law's] application',²¹¹ and the prevention of forum shopping.²¹²

Although Beale's approach was highly conceptual, it also embodied pragmatic concerns which had been generated by dissatisfaction with the comity doctrine. Comity's vagueness made it unhelpful as a functional choice of law principle because it failed to provide guidance to parties as to the likely outcome of litigation.²¹³ Moreover, by bestowing discretion upon the courts in determining the applicable law, it carried the possibility that a claim could be decided differently depending upon the judge and the circumstances of the case.²¹⁴ This not only threatened the prevailing philosophical understanding that

²⁰⁴ Joseph H Beale, *A Treatise on the Conflict of Laws* (Baker, Voorhis & Co, 1935); American Law Institute, *Restatement of the Law (Second): Conflict of Laws 2d* (1971).

²⁰⁵ Cheatham and Reese, 'Choice of the Applicable Law', above n 19, 959; Perry Dane, 'Vested Rights, "Vestedness", and Choice of Law' (1987) 96 *Yale Law Journal* 1191, 1195–6.

²⁰⁶ Beale, *A Treatise on the Conflict of Laws*, above n 204, 48.

²⁰⁷ Cheatham, 'American Theories of Conflict of Laws', above n 133, 369.

²⁰⁸ *Slater v Mexican National Railroad Co*, 194 US 120, 126 (1904); *Western Union Telegraph Co v Brown*, 234 US 542, 547 (1914).

²⁰⁹ Joseph Henry Beale Jr, *A Selection of Cases on the Conflict of Laws* (Harvard Law Review, 1902) vol 3, 517; Scoles and Hay, above n 15, 13–14; *Loucks v Standard Oil Co of New York*, 120 NE 198, 201 (Cardozo J) (NY Ct App, 1918); Lea Brilmayer, 'Rights, Fairness, and Choice of Law' (1989) 98 *Yale Law Journal* 1277, 1281–5.

²¹⁰ Patrick J Borchers, 'Conflicts Pragmatism' (1993) 56 *Albany Law Review* 883, 896–8; Reed, above n 19, 880.

²¹¹ Reed, above n 19, 880; Robert A Leflar, 'Choice-Influencing Considerations in Conflicts Law' (1966) 41 *New York University Law Review* 267.

²¹² Juenger, *Choice of Law and Multistate Justice*, above n 79, 89–90.

²¹³ Beale, *A Treatise on the Conflict of Laws*, above n 204, 1964–5; *ibid* 90.

²¹⁴ Beale, *A Treatise on the Conflict of Laws*, above n 204, 1965; Cheatham, 'American Theories of Conflict of Laws', above n 133, 369.

only one law could govern a tort,²¹⁵ but also allowed pro-forum prejudices and judicial suspicion of foreign law to influence the decision.²¹⁶ By contrast, the vested rights approach was more compatible with such ‘jurisprudential policy’ concerns as ‘certainty, ease of application, simplicity for legal advisors, and the systemic discouragement of forum shopping’.²¹⁷

B *The Limited Value of Australian Pragmatism*

Indeed, the theoretical foundations to Beale’s approach have been persuasively discredited.²¹⁸ For instance, Beale’s conception of the legal system as consisting of a discrete set of rules was rejected due to its reliance entirely upon the fictional assumption that courts adhered blindly and uniformly to fixed legal principles.²¹⁹ David Cavers contributed particularly to this critique, demonstrating that courts regularly invoked various ‘escape devices’ in order to avoid the seemingly harsh result of the rigid rules of the *First Restatement on the Conflict of Laws*.²²⁰ Similarly, the ‘vested rights’ theory was ‘attacked as a tautology’.²²¹ As R D Carswell explains, ‘[i]t is impossible to say that one must give effect to vested rights until one knows which rights have been vested — and it is impossible to know this until one has applied the rules for choice of law’.²²² Moreover, as the theory sought to identify the governing law by reference to a single connecting factor, it failed to accommodate the diverse factual scenarios in which the choice of law question might arise as well as those circumstances in which rights could be said to vest in more than one location.²²³

Nonetheless, Beale’s methodology is relevant here due to its similarity to the approach taken by the High Court in *Pfeiffer* and *Renault*. Specifically, Beale proposed an intellectual basis for adopting an essentially pragmatic model for choice of law rules. The only difference is that comity appears to have replaced the vested rights theory as the explanatory principle underpinning the modern Australian approach, supplying the logical premise for a rule whose ultimate appeal is its pragmatism, simplicity and certainty.

This methodological similarity informs our analysis in two ways. First, it highlights the need for consistency between the theoretical premise — which explains *why* a certain system of law is to govern international torts — and the proposed objectives which that rule is intended to achieve. For Beale, the

²¹⁵ Juenger, *Choice of Law and Multistate Justice*, above n 79, 90; Beale, *A Treatise on the Conflict of Laws*, above n 204, 1964–5; Cheatham, ‘American Theories of Conflict of Laws’, above n 133, 367.

²¹⁶ Cheatham, ‘American Theories of Conflict of Laws’, above n 133, 367.

²¹⁷ Reed, above n 19, 880; Friedrich K Juenger, ‘Conflict of Laws: A Critique of Interest Analysis’ (1984) 32 *American Journal of Comparative Law* 1, 2.

²¹⁸ Cook, above n 69, 3–8; Cheatham, ‘American Theories of Conflict of Laws’, above n 133, 379–85.

²¹⁹ Hessel E Yntema, ‘The Hornbook Method and the Conflict of Laws’ (1928) 37 *Yale Law Journal* 468, 474; Ernest G Lorenzen, ‘Territoriality, Public Policy and the Conflict of Laws’ (1924) 33 *Yale Law Journal* 736, 748; Borchers, above n 210, 888–9.

²²⁰ Cavers, above n 17, 181–7; Borchers, above n 210, 889.

²²¹ Joel R Paul, ‘The Isolation of Private International Law’ (1988) 7 *Wisconsin International Law Journal* 149, 162.

²²² R D Carswell, ‘The Doctrine of Vested Rights in Private International Law’ (1959) 8 *International and Comparative Law Quarterly* 268, 279.

²²³ Cheatham, ‘American Theories of Conflict of Laws’, above n 133, 383–4.

pragmatic considerations of certainty and simplicity were compatible with, and achievable by, a theory which rigidly allocated one legal system to resolve all choice of law problems. However, in the Australian context, the same consistency does not arise between the objectives of certainty and predictability and the traditional notion of comity. As comity traditionally operated as a guiding principle upon which judges could rely in determining the governing law of a tort,²²⁴ it was itself inherently uncertain. It allowed judges to weigh the interests of the forum state against those of the foreign sovereign in determining which law should apply,²²⁵ an approach which relied upon judicial discretion for its functionality. Indeed, Story did not consider this potential uncertainty to be a problematic feature of his theory. Rather, he was willing to accept that it was necessary, as any attempt to define principles with too much precision would be to 'go too far, to define and fix that which cannot, in the nature of things, be defined and fixed'.²²⁶ Consequently, certainty cannot be realised in a system which is predicated upon comity in its traditional form. This conclusion not only demonstrates the incompatibility of the High Court's theoretical premise with the objectives of the *lex loci delicti*, but also reinforces the incoherence of a rigid *lex loci delicti* with the comity doctrine.

Secondly, Beale's methodology reveals the limited value of an objectives-oriented approach in exclusively explaining the primacy of the *lex loci delicti*. Accepting that comity in the Australian context is without a doctrinal basis, the only remaining justifications for the *lex loci delicti* are the objectives of certainty, predictability and the fulfilment of parties' reasonable expectations. However, these principles are essentially normative, in that they specify the parameters by which the efficacy of choice of law rules may be assessed.²²⁷ Apart from the reasonable expectations of the parties, discussed below, they possess no explanatory value, as they fail to rationalise why the place of the tort's occurrence provides the only legal system capable of achieving those objectives.²²⁸ This is demonstrated by the fact that certainty and predictability may be realised by uniform adherence to the *lex fori*²²⁹ or the *lex loci delicti*.²³⁰ It is for this reason that the vested rights theory, as an explanatory principle, played an important role in Beale's approach, and why its deconstruction by the legal realists²³¹ was so decisive in displacing the *lex loci delicti* in American law.²³² Consequently, even when the rule's inefficacy in achieving its intended

²²⁴ Swanson, above n 160, 10; Maier, above n 178.

²²⁵ Childress, above n 136, 27; Paul, 'Comity in International Law', above n 130, 6–7.

²²⁶ Story, above n 122, 28–9, citing *Saul v His Creditors*, 5 Mart NS 569, 595–6 (Porter J) (La Sup Ct, 1827).

²²⁷ Shapira, 'Territorialism, National Parochialism, Universalism and Party Autonomy', above n 2.

²²⁸ John Keeler, 'Torts in Australian Private International Law' (1971) 4 *University of Tasmania Law Review* 17, 28.

²²⁹ Wolff, above n 22; Goode, above n 22.

²³⁰ Th M de Boer, 'The Purpose of Uniform Choice-of-Law Rules: The *Rome II Regulation*' (2009) 56 *Netherlands International Law Review* 295, 305; Willis L M Reese, 'Choice of Law: Rules or Approach' (1972) 57 *Cornell Law Review* 315, 321.

²³¹ Wardhaugh, above n 18, 342–7; Cook, above n 69; Ernest G Lorenzen, *Selected Articles on the Conflict of Laws* (Yale University Press, 1947).

²³² Reed, above n 19, 880–1; Nagan, above n 134, 436.

objectives²³³ is put to one side, it is difficult to see how the theoretical framework of the modern Australian approach supports adherence to the *lex loci delicti*.

C *The Reasonable Expectations of Litigants*

The final objective invoked to support the *lex loci delicti* was the protection of reasonable party expectations.²³⁴ This principle warrants particular attention because, unlike the objectives of certainty and predictability, its conceptualisation as a manifestation of the justice objective arguably gives it some explanatory value. Where parties expect their rights and obligations to be governed by a certain legal regime, it is likely that they will rely upon that regime in conducting themselves, rendering it unjust to hold them to different, unanticipated legal standards.²³⁵ This is particularly relevant in the Australian context, where choice of law rules are ‘jurisdiction-selecting’. These rules merely refer the forum court to the legal system whose dispositive laws are to govern, without having regard to the precise content of those laws.²³⁶ As the forum relinquishes control over the rules of substantive justice to be applied to each dispute, ensuring respect for parties’ reasonable expectations provides a minimum criterion of justice by which the jurisdiction-selecting choice of law rule may be justified.²³⁷ Against this rationale, advertence to the *lex loci delicti* would be explicable if litigants reasonably expected their relationship to be governed by the law of the place of the tort’s occurrence.

This principle is problematic, however, due to its circularity and arbitrariness. The invocation of parties’ expectations appears to be premised upon the proposition that parties to a tortious dispute would reasonably expect their conduct to be governed only by the *lex loci delicti*. By relying upon ‘reasonable’ or ‘justified’ expectations, the possibility that the parties may not have *actually* held such expectations becomes irrelevant, as any other possible expectation would not warrant protection.²³⁸ However, this approach involves circuitous reasoning: while parties’ reasonable expectations are intended to supply the relevant choice of law rule, it is the legal regime prevailing in the forum which objectively determines what those expectations are, effectively resulting in the

²³³ Pitel and Harper, above n 76, 298–9; Adrian Briggs, ‘The Legal Significance of the Place of a Tort (*Regie National des Usines Renault SA v Zhang*)’ (2002) 2 *Oxford University Commonwealth Law Journal* 133, 135–7; Joost Blom, ‘Whither Choice of Law? A Look at Canada and Australia’ (2004) 12 *Willamette Journal of International Law and Dispute Resolution* 211, 221–9, 234–6.

²³⁴ *Pfeiffer* (2000) 203 CLR 503, 536–7 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Renault* (2002) 210 CLR 491, 538 (Kirby J).

²³⁵ Kincaid, above n 164, 198–9; J A Clarence Smith, ‘Torts and the Conflict of Laws’ (1957) 20 *Modern Law Review* 447, 459; *Metall und Rohstoff A G v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, 445–6 (Slade LJ).

²³⁶ Kincaid, above n 164, 198; Cavers, above n 17, 182–7.

²³⁷ Cheatham and Reese, ‘Choice of the Applicable Law’, above n 19, 970–1; Amos Shapira, ‘Protection of Private Interests in the Choice-of-Law Process: The Principle of Rational Connection between Parties and Laws’ (1970) 24 *Southwestern Law Journal* 574, 577.

²³⁸ Kincaid, above n 164, 198; Cheatham and Reese, ‘Choice of the Applicable Law’, above n 19, 971; David G Owen, ‘Expectations in Tort’ (2011) 43 *Arizona State Law Journal* 1287, 1302–3.

affirmation of existing laws by reference to those laws themselves.²³⁹ This feeds into the principle's arbitrariness, as it allows a court to identify the desirable rule and to rationalise that rule *ex post facto* upon fictitious speculations as to the expectations reasonably held by parties in any given circumstance.²⁴⁰ On this reasoning, parties' reasonable expectations may be employed to justify any choice of law rule, rendering the principle relatively unhelpful as an objective criterion for the identification of a tort's substantive law.

Even if one accepts that only 'reasonable' expectations merit legal protection, the principle still may not support uniform advertence to the *lex loci delicti*. Although litigants may generally expect their conduct to be judged by standards which are territorially-defined,²⁴¹ this is not always the case. Peter Kincaid suggests that these standards may also be referable to one's environment, such as the shared domicile or nationality of the parties to a dispute, which may not coincide with the territory in which the dispute arises.²⁴² This possibility was adverted to in *Scott v Lord Seymour*,²⁴³ in which Wightman J relied upon the parties' common English nationality in allowing the recovery of damages for a battery committed in Naples, notwithstanding that Neapolitan law did not recognise any such right to damages.²⁴⁴ When one considers the more sophisticated circumstances which may influence parties' expectations²⁴⁵ and the reasonableness of expecting a legal system other than the *lex loci delicti* to govern in certain cases,²⁴⁶ the explanatory value of this principle breaks down.

V AN ENGLISH PERSPECTIVE — THE 'SELF-EVIDENT' RELEVANCE OF THE *LEX LOCI DELICTI*

The foregoing discussion demonstrates that theoretical paradigms are not only unhelpful in explaining why the place of the tort's occurrence must supply the only relevant connecting factor, but also generate further inconsistencies in the broader approach to the choice of law question. Indeed, one may consider this result incongruous given that the underlying purpose of theory is to provide some rational basis upon which rules may be formulated. Nonetheless, the unsatisfactory nature of theory may be explained by its historical function in rationalising choice of law rules which had already been established as a result of practice and experience. This is particularly evident from the origins and role of the *lex loci delicti* in English private international law prior to, and immediately following, *Phillips*. In the English context, the *lex loci delicti* was ascribed significance due to its 'axiomatic' or 'self-evident' appeal, rather than through

²³⁹ Bailey H Kuklin, 'The Plausibility of Legally Protecting Reasonable Expectations' (1997) 32 *Valparaiso University Law Review* 19, 32; P J Kozyris, 'Justified Party Expectations in Choice-of-Law and Jurisdiction: Constitutional Significance or Bootstrapping?' (1982) 19 *San Diego Law Review* 313, 318.

²⁴⁰ Shapira, 'Protection of Private Interests', above n 237.

²⁴¹ Kincaid, above n 164, 201; *Choice of Law in Tort and Delict*, above n 6, 15.

²⁴² Kincaid, above n 164, 201–2; Clarence Smith, above n 235, 460; J H C Morris, 'The Proper Law of a Tort' (1951) 64 *Harvard Law Review* 881, 885; Keeler, above n 228.

²⁴³ (1862) 158 ER 865.

²⁴⁴ *Ibid* 872; Clarence Smith, above n 235, 460.

²⁴⁵ Walker, above n 101, 353–5, 366–7.

²⁴⁶ Kincaid, above n 164, 202–6.

any process of deductive theoretical reasoning.²⁴⁷ This Part argues that, as suggested by Windeyer J in *Anderson*,²⁴⁸ the *lex loci delicti* was retained due to its apparent logical value and was rarely sustained on any rational basis. As a result, the theoretical incoherence of the High Court's approach may be deemed an inevitable consequence of the rule's primarily impressionistic value.

A *The Varying Roles of the Lex Fori and Lex Loci Delicti in Early English Practice*

Prior to *Phillips*, English private international law was primarily concerned with the courts' jurisdiction over torts committed abroad rather than the law governing such claims.²⁴⁹ By the end of the 18th century, the issue of jurisdiction had been resolved²⁵⁰ and the focus had shifted to assessing the extent to which the courts should advert to foreign law in determining liability.²⁵¹ In answering this question, judicial thinking rarely entertained the notion that the dispositive rules could be sourced from the *lex loci delicti*. Rather, the merits of a tortious claim were determined exclusively by reference to the *lex fori* as the choice of law rule.²⁵² Nonetheless, the courts ascribed some significance to the *lex loci delicti*, recognising that civil liability for tortious conduct could not be imposed in the forum where the defendant would not be liable under the law of the place of the tort's occurrence.²⁵³ This is evident in the judgment of Lord Mansfield in *Mostyn v Fabrigas*,²⁵⁴ in which his Lordship held that '[f]or whatever is a justification in the place where the thing is done, ought to be a justification where the cause is tried'.²⁵⁵

As one would expect from the 'supremely pragmatic'²⁵⁶ nature of the English common law, this understanding of the differing roles of the *lex fori* and *lex loci delicti* was largely without a theoretical basis. C G J Morse suggests that the primacy of the *lex fori* stemmed from the English courts' peculiar procedural rules and historical emphasis upon jurisdiction, rather than choice of law.²⁵⁷ Originally, the parties to a dispute were required to identify the 'venue' of the litigation, as it was from this physical locality that the court would draw

²⁴⁷ E F Roberts, 'A Rule Is a Rule because It Is the Rule: Intellectual Crisis in Conflict of Laws' (1964) 9 *Villanova Law Review* 200, 201–3.

²⁴⁸ (1965) 114 CLR 20, 46.

²⁴⁹ Moffatt Hancock, *Torts in the Conflict of Laws* (University of Michigan Press, 1942) 1–5; Morse, *Torts in Private International Law*, above n 4, 25.

²⁵⁰ *Mostyn v Fabrigas* (1774) 98 ER 1021 (Lord Mansfield); *Holman v Johnson* (1775) 1 Cowper 341; *Rafael v Verelst* (1776) 96 ER 621.

²⁵¹ Hancock, above n 249, 5.

²⁵² Morse, *Torts in Private International Law*, above n 4, 9.

²⁵³ *Ibid* 25–6; *Blad's Case* (1673) 3 Swans 603, 604 (Lord Nottingham); *Dutton v Howell* (1693) 1 ER 17, 22–3.

²⁵⁴ (1774) 98 ER 1021.

²⁵⁵ *Ibid* 1029.

²⁵⁶ Briggs, *The Conflict of Laws*, above n 19, 5.

²⁵⁷ Morse, *Torts in Private International Law*, above n 4, 8–11; R H Graveson, *Comparative Conflict of Laws: Selected Essays* (North-Holland, 1977) vol 1, 4.

members of the jury.²⁵⁸ However, where a tort occurred abroad, the plaintiff could invoke a fictitious averment that the foreign place was in fact a place within England, which the defendant could not dispute.²⁵⁹ This ‘fiction of *laying the venue*’ had the effect of ‘naturalis[ing]’ the international tort in England, rendering it a wholly local act which could only be governed by the *lex fori*.²⁶⁰

As this procedural fiction was only applicable to ‘transitory’ actions, or actions which could have arisen in any place,²⁶¹ the foreign elements inherent in such actions may have warranted some role for the *lex loci delicti*. However, precisely *why* this was the case was never clearly articulated in the early decisions.²⁶² It has been argued that two principled justifications for this approach are nonetheless implicit in early judicial reasoning. First, the courts may have been concerned with the injustice of subjecting a defendant to liability under English law in the absence of liability under the *lex loci delicti*.²⁶³ This contention is reinforced by the fact that the recognition of foreign law was primarily directed towards assisting the defendant, suggesting that it was the defendant’s interest which attracted the court’s attention.²⁶⁴ Nonetheless, this reasoning proceeds upon the basis that it was unfair to judge the defendant’s conduct by English standards ‘if [the defendant] had complied with the laws and customs of the land in which he found himself’.²⁶⁵ On this logic, it would have been equally unfair to determine the extent of a defendant’s liability by reference to English standards where the rules governing the content and scope of liability differed under forum and foreign law. As such, it is unclear why this rationale only warranted consideration of the *lex loci delicti* as a threshold concern for the court hearing the matter.

Secondly, some have argued that this approach was informed by notions of comity or respect for foreign sovereigns.²⁶⁶ However, D J Davies suggests that the understanding of comity received into English law was that posited by Huber,²⁶⁷ whose thesis ascribed a substantive role to foreign law in determining liability in the forum courts.²⁶⁸ As the *lex loci delicti* in English law rarely

²⁵⁸ Alexander N Sack, ‘Conflicts of Laws in the History of the English Law’ in Alison Reppy (ed), *Law: A Century of Progress 1835–1935* (New York University Press, 1937) vol 3, 342, 344; R H Graveson, *Conflict of Laws: Private International Law* (Sweet & Maxwell, 7th ed, 1974) 135; P M North, *Cheshire’s Private International Law* (Butterworths, 9th ed, 1974) 493.

²⁵⁹ Hancock, above n 249, 2; Morse, *Torts in Private International Law*, above n 4, 8–9; Kirsty J Hood, *Conflict of Laws within the UK* (Oxford University Press, 2007) 13; *Dowdale’s Case* (1605) 77 ER 323.

²⁶⁰ Morse, *Torts in Private International Law*, above n 4, 9 (emphasis altered); Kurt Lipstein, ‘*Phillips v Eyre*, A Re-Interpretation’ in Ernst von Caemmerer, Soia Mentschikoff and Konrad Zweigert (eds), *Ius Privatum Gentium: Festschrift für Max Rheinstein zum 70 Geburtstag am 5 Juli 1969* (J C B Mohr (Paul Siebeck), 1969) vol 1, 411, 412–13.

²⁶¹ P E Nygh, ‘The Territorial Origin of English Private International Law’ (1964) 2 *University of Tasmania Law Review* 28, 33.

²⁶² Hancock, above n 249, 7; Morse, *Torts in Private International Law*, above n 4, 10–11.

²⁶³ *Blad’s Case* (1674) 3 Swans 603, 604 (Lord Nottingham); *Dobree v Napier* (1836) 2 Bing NC 781, 796–7 (Tindal CJ); Morse, *Torts in Private International Law*, above n 4, 26.

²⁶⁴ Hancock, above n 249, 7.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid* 7–8; *Scott v Lord Seymour* (1862) 158 ER 865, 873 (Blackburn J).

²⁶⁷ Davies, above n 180; Carswell, above n 222, 272–3.

²⁶⁸ See above Part III(A)(1).

supplied the governing law of the tort, it is questionable whether comity provided any significant jurisprudential support for the English approach. This is reinforced by the incompatibility between the doctrine's support for the application of foreign law in certain circumstances to determine tortious liability and the English courts' uniform adherence to the *lex fori*. Consequently, it is likely that the function of the *lex loci delicti* in early choice of law questions stemmed from considerations of expediency rather than any conceptual basis.²⁶⁹

B *The Double Actionability Rule and the Emergence of Theoretical Analysis*

The role of foreign and forum law in early English law was formalised as a choice of law principle in *Phillips*, in which the double actionability rule was first formulated.²⁷⁰ The action was instituted by Alexander Phillips, a resident of St Thomas in the English colony of Jamaica. Phillips sought damages from Edward John Eyre, a former Governor of Jamaica, who had assaulted, arrested and imprisoned Phillips in the course of suppressing a rebellion in 1865. Eyre argued that any unlawful conduct on his part had been validated by a retrospective *Act of Indemnity* passed by the Jamaican legislature shortly after the rebellion. The Court of Queen's Bench found in favour of Eyre,²⁷¹ and the decision was affirmed on appeal to the Court of Exchequer Chamber.

In contrast to the early decisions, Willes J did attempt to invoke theory to justify the court's consideration of the *lex loci delicti* in the choice of law process. Willes J conceptualised tortious liability as an obligation which emerged out of the law of the place of the wrong and took effect irrespective of the forum in which it was invoked.²⁷² This is evident from the following passage:

A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto ... And in like manner the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law.²⁷³

As this principle necessitated that regard be had to the *lex loci delicti*, Willes J concluded that the *Act of Indemnity* operated to exonerate the defendant of liability under Jamaican law and thereby barred the claim in the English forum.²⁷⁴

This analysis is problematic, however, as the obligation principle appears incompatible with the ultimate application of the *lex fori* to determine the defendant's liability. The principle itself suggests that an obligation derives its character and force from the place where it accrued.²⁷⁵ However, as the double actionability rule facilitates the enforcement of a claim and the realisation of an obligation by reference to the *lex fori* as the substantive law, it may effectively alter the substance of that obligation by subjecting it to rules of differing content

²⁶⁹ Morse, *Torts in Private International Law*, above n 4, 26.

²⁷⁰ (1870) LR 6 QB 1, 28–9 (Willes J).

²⁷¹ *Phillips* (1869) LR 4 QB 225 (Cockburn CJ, Lush and Hayes JJ).

²⁷² *Phillips* (1870) LR 6 QB 1, 28–9; Hancock, above n 249, 10–11.

²⁷³ *Phillips* (1870) LR 6 QB 1, 28.

²⁷⁴ Hancock, above n 249, 11; Peter Handford, 'Edward John Eyre and the Conflict of Laws' (2008) 32 *Melbourne University Law Review* 822, 844–8.

²⁷⁵ O Kahn-Freund, 'The *Lex Loci Delicti* and Its Crisis' in *Le Recueil des cours* (Martinus Nijhoff, 1968) vol 124, 36, 38–9.

and scope. One would therefore expect that true adherence to the obligation theory would logically require deference to the *lex loci delicti*, rather than the *lex fori*, as the substantive law. This is confirmed by judgments which have also invoked this understanding of an obligation's universal enforceability and effect. For instance, when Phillimore J considered this notion in *The Halley*,²⁷⁶ it provided the principled basis for his Honour's conclusion that the English courts ought to defer to the *lex loci delicti* as the applicable law.²⁷⁷ Similarly, the 'obligatio theory'²⁷⁸ in American law supported an invariable application of the *lex loci delicti* on the basis that a tort generated an obligation which '[followed] the [plaintiff], and may be enforced wherever the [plaintiff] may be found'.²⁷⁹ The fact that the doctrine invoked in *Phillips* is identical to that invoked by both American²⁸⁰ and early English jurists to reach a different conclusion as to the governing law casts doubt upon the intellectual soundness of the rule's limited role for the *lex loci delicti*.

C The Irrelevance of Theory Exposed

Despite the various reasons which arguably supported the early development of English choice of law rules, it appears that there was never truly a sound basis for explaining why the *lex loci delicti* played the limited role that it ultimately assumed under the double actionability rule. Whether conceptual coherence was truly the English judiciary's concern at the time, however, is to be doubted. The English common law tradition is renowned for its empiricism and pragmatism in developing the law.²⁸¹ Judicial instinct was to test legal rules against the normal practical experience and expectations of the people, having regard to the law's purpose of promoting justice and convenience.²⁸² This is reflected in the primary role of the common law, as opposed to theoretical scholarship, in developing the early English rules of private international law.²⁸³ Principles designed to resolve disputes which involved a foreign element were adapted from pre-existing jurisdictional rules²⁸⁴ and were gradually adjusted over time, having regard to the circumstances of novel cases and the need to ensure a just outcome.²⁸⁵ As

²⁷⁶ (1867) LR 2 Adm & Ecc 3, 17–18.

²⁷⁷ *Ibid*, revd *The Liverpool, Brazil and River Plate Steam Navigation Co Ltd v Benham* (1868) LR 2 PC 193, 203–4 (Selwyn LJ); *Godard v Gray* (1870) LR 6 QB 139; *Schibbsby v Westenholz* (1870) LR 6 QB 155.

²⁷⁸ *Slater v Mexican National Railroad Co*, 194 US 120, 126 (Holmes J) (1904); *Western Union Telegraph Co v Brown*, 234 US 542, 547 (Holmes J) (1914).

²⁷⁹ Stig Strömholm, *Torts in the Conflict of Laws: A Comparative Study* (P A Norstedt & Söners förlag, 1961) 26; Ernest G Lorenzen, 'Tort Liability and the Conflict of Laws' (1931) 47 *Law Quarterly Review* 483, 485–6.

²⁸⁰ A H Robertson, 'The Choice of Law for Tort Liability in the Conflict of Laws' (1940) 4 *Modern Law Review* 27, 39.

²⁸¹ G C Cheshire, *Private International Law* (Clarendon Press, 6th ed, 1961) 36.

²⁸² P M North and J J Fawcett, *Cheshire and North's Private International Law* (Butterworths, 12th ed, 1992) 39; Whincop and Keyes, above n 19, 15–17.

²⁸³ C G J Morse, 'Making English Private International Law' in James Fawcett (ed), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (Oxford University Press, 2002) 273, 276–7; Nygh, 'The Territorial Origin of English Private International Law', above n 261, 39–40.

²⁸⁴ Nygh, 'The Territorial Origin of English Private International Law', above n 261, 28, 39.

²⁸⁵ Graveson, *Comparative Conflict of Laws*, above n 257, 3–4.

such, the early rules were not directed towards the development of a coherent system of principles, but were based ‘on experience rather than logic’.²⁸⁶

Indeed, one cannot deny that theory did eventually assume increasing relevance in English private international law. For instance, when faced with the proposition of applying foreign law to the exclusion of the law of the forum, early English courts did occasionally invoke the exclusively territorial operation of law, as conceptualised by Huber, to dismiss the issue.²⁸⁷ Similarly, as international trade and commerce throughout the British Empire promoted the proliferation of English private international law, greater reliance was placed on the writings of European and emerging English scholars,²⁸⁸ giving theory a small yet significant role to play in the law’s development.²⁸⁹

Nonetheless, the gradual emergence of theory reveals the true reason for its limited utility in explaining choice of law rules. The early references to Huber operated to rationalise the already well-entrenched territorialism of English choice of law rules.²⁹⁰ Similarly, the shift towards theory in the late 19th century was focused upon bringing order to the fragmented and incomplete common law rules which had developed largely unassisted by foundational principles of law.²⁹¹ Consequently, when the function of the *lex loci delicti* was considered in *Phillips*, theory did not provide a priori principles from which the rule could be deduced, but rather was invoked to explain a rule which had developed as a matter of instinct, impression and experience. This has been identified by Elliott Cheatham, who notes that theoretical explanations do not ‘purport to be a guide in a new situation but only a juristic explanation after the event’.²⁹² It is for this reason that theory has proven unpersuasive in explaining the peculiarities of choice of law rules, as it has normally been invoked in an attempt to provide a universal and coherent, yet ultimately artificial, understanding of rules which developed in a relatively ad hoc and incoherent fashion.

VI CONCLUDING REMARKS — IS THERE A WAY FORWARD?

Given the historical failure of theory as an explanatory mechanism in choice of tort law, the wholly unsatisfactory nature of the High Court’s theoretical approach in adopting the *lex loci delicti* was to be expected. *Pfeiffer* and *Renault* considered the choice of law question at a time when the ‘conflicts revolution’

²⁸⁶ *Ibid* 3.

²⁸⁷ *Robinson v Bland* (1760) 97 ER 717; *Holman v Johnson* (1775) 1 Cowper 341, 343 (Lord Mansfield); *Dalrymple v Dalrymple* (1811) 161 ER 665.

²⁸⁸ Graveson, *Comparative Conflict of Laws*, above n 257, 6–7.

²⁸⁹ North and Fawcett, *Cheshire and North’s Private International Law* (12th ed), above n 282, 14.

²⁹⁰ Nygh, ‘The Territorial Origin of English Private International Law’, above n 261, 40.

²⁹¹ John Alderson Foote, *Foreign and Domestic Law: A Concise Treatise on Private International Jurisprudence, Based on the Decisions in the English Courts* (Stevens and Haynes, 1878) v–vii; A V Dicey, ‘Private International Law’ (1912) 28 *Law Quarterly Review* 341, 341; O Kahn-Freund, *General Problems of Private International Law* (Sijthoff International, 1976) 130, 134.

²⁹² Cheatham, ‘American Theories of Conflict of Laws’, above n 133, 373–5; Childress, above n 136, 29.

had left tort choice of law rules in America in a state of disarray,²⁹³ with a multiplicity of approaches and competing theoretical paradigms gaining footholds across the United States.²⁹⁴ Moreover, the inability to resolve the choice of law problem, which had troubled private international law scholars for over a century, had given rise to a growing disenchantment with choice of law theory, with many arguing that it had no role to play in constructing appropriate rules and methodologies.²⁹⁵ As such, the High Court was attempting to revive an approach which had been decisively undermined, both as a matter of principle as well as through the experiences of comparable common law jurisdictions.

Indeed, one may question the validity of this theoretical discussion on the basis that intellectual coherence was perhaps not, in truth, the Court's primary goal in adopting the *lex loci delicti*. Significant weight was placed upon practical considerations in *Pfeiffer* and *Renault*, as outlined in Part IV. As factors which had prevailed in the Court's historical adherence to the double actionability rule,²⁹⁶ it is plausible that the objectives of private international law were weighing heavily on the minds of the High Court judges at the beginning of the 21st century, particularly given the decade of uncertainty which had followed *Breavington* and *McKain*.²⁹⁷ Nonetheless, even if one accepts that the Court's advertence to theory was, at best, superficial, this merely reinforces the conceptual problems which theoretical reasoning can create, particularly when employed in conjunction with an approach which gives explanatory and normative weight to the pragmatic objectives of private international law.

While this analysis may arguably supply an additional basis for questioning the desirability of the *lex loci delicti* rule, at least in its current inflexible form, it does not resolve the long-running debate as to the appropriate choice of law rule to be adopted, a question which lies beyond the scope of this article.²⁹⁸ Nonetheless, it does have important implications for the way in which reform in this area of law should be carried out. First, it suggests that the theoretical paradigms traditionally employed in choice of tort law literature are unworkable, not only due to their failure to explain the rules adopted, but also due to their incompatibility with such objectives as certainty, justice, protection of litigants' expectations and uniformity in the application of the law. While these principles similarly lack significant explanatory value, it would appear more sustainable to adopt an approach which gives primacy to social values and the policy concerns

²⁹³ Kermit Roosevelt III, 'The Myth of Choice of Law: Rethinking Conflicts' (1999) 97 *Michigan Law Review* 2448, 2449; Hillel Y Levin, 'What Do We Really Know about the American Choice-of-Law Revolution?' (2007) 60 *Stanford Law Review* 247, 248; Christopher A Whytock, 'Myth of Mess? International Choice of Law in Action' (2009) 84 *New York University Law Review* 719, 721.

²⁹⁴ Symeonides, *American Private International Law*, above n 15, 112–31; McDougal, Felix and Whitten, above n 118.

²⁹⁵ Stewart E Sterk, 'The Marginal Relevance of Choice of Law Theory' (1994) 142 *University of Pennsylvania Law Review* 949, 951–2.

²⁹⁶ *McKain* (1991) 174 CLR 1, 39 (Brennan, Dawson, Toohey and McHugh JJ); *Stevens* (1993) 176 CLR 433, 466 (Gaudron J).

²⁹⁷ Greene, 'Inflexibly Inflexible', above n 11, 257; Lindell, above n 8, 365–8.

²⁹⁸ See, eg, Kincaid, above n 164; Leflar, above n 211; Blom, above n 233; Anthony Gray, 'Flexibility in Conflict of Laws Multistate Tort Cases: The Way Forward in Australia' (2004) 23 *University of Queensland Law Journal* 435.

of the law, rather than one which employs theory to achieve a result which is justified neither in principle nor in common-sense.

Secondly, and more importantly, it highlights the limited effectiveness of judicial reform of choice of law rules. Although judicial pronouncements operate as an important means by which the common law is gradually developed, that development is largely achieved by the application of pre-existing ‘fundamental principles’.²⁹⁹ Consequently, courts are rarely permitted to depart from established legal rules unless those rules are not ‘soundly based’ in accepted legal principle.³⁰⁰ However, in circumstances where those underlying principles are themselves unsatisfactory, as is the case with choice of tort law rules, there remains sparse legal guidance for law reform. This is particularly problematic in light of the view, inherent in the first conclusion expressed above, that dogmatism should yield to pragmatism in certain fields of private international law,³⁰¹ as the extent to which courts may reform the law by reference to notions of justice, social necessity or convenience remains controversial.³⁰² As such, there now appears to be a greater need for parliamentary intervention, as has been the approach in the United Kingdom³⁰³ and the European Union.³⁰⁴

That being said, the criticisms levelled against the High Court’s theoretical approach in *Pfeiffer* and *Renault* should not be taken as necessarily applying uniformly to other areas of private international law. As Gummow and Hayne JJ noted in *Neilson*,³⁰⁵ adopting a ‘single overarching theory’ to inform every question about choice of law would ‘wrongly assume that identical considerations apply in every kind of case in which a choice of law must be made’.³⁰⁶ Consequently, one cannot assume that the breakdown of the explanatory value of theory in the tort context would be experienced in all areas of the law. Rather, the differing considerations which apply to the private international law of, for instance, personal status, property ownership, and contract may supply a conceptual framework in which the preferable choice of law rule is more compatible with the theoretical approach.³⁰⁷ Indeed, the relationship between tort law and the choice of law approach is particularly troublesome in comparison to other areas of substantive law. The fact that views differ as to whether the proper function of tort law is the deterrence of wrongdoing, the compensation of loss or the reallocation of wealth and

²⁹⁹ *Myers v DPP* [1965] AC 1001, 1021–2 (Lord Reid).

³⁰⁰ H T Gibbs, ‘Judicial Activism and Judicial Restraint: Where Does the Balance Lie?’ (Paper presented at Constitutional Law Conference, University of New South Wales, 20 February 2004) 5–6; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 378 (Lord Goff).

³⁰¹ O Kahn-Freund, *General Problems of Private International Law* (Martinus Nijhoff, 1974) 290. See also Sterk, above n 295; Briggs, *The Conflict of Laws*, above n 19; Whincop and Keyes, above n 19, 25; Cheatham and Reese, ‘Choice of the Applicable Law’, above n 19, 959–60; Reed, above n 19, 867.

³⁰² Sir Owen Dixon, ‘Concerning Judicial Method’ (1956) 29 *Australian Law Journal* 468, 472; Gibbs, above n 300, 5; Michael Kirby, ‘Judicial Activism’ (1997) 27 *Western Australian Law Review* 1, 16.

³⁰³ *Private International Law (Miscellaneous Provisions) Act 1995* (UK) c 42, s 11.

³⁰⁴ *Rome II Regulation* [2007] OJ L 199/40.

³⁰⁵ (2005) 223 CLR 331.

³⁰⁶ In the context of determining the proper approach to the issue of renvoi, see *ibid* 366.

³⁰⁷ Janey Greene, ‘Choice of Law in Tort — The Song That Never Ends’ (1998) 26 *Federal Law Review* 349, 351. See generally Jaffey, above n 203.

transaction costs indicates that the substantive concerns of the law point in conflicting directions, rendering any choice of law rule partly unsatisfactory.³⁰⁸ Similarly, Janey Greene argues that tort law lacks the ‘internal logic’ inherent in many other areas of law from which the choice of law rule may be naturally deduced, as any presumptive starting point would turn on party expectations which cannot be said to be uniform nor universally entitled to protection.³⁰⁹ As such, the conceptual difficulties of tort law more generally may further suggest the need to dispense with traditional theoretical paradigms when determining the appropriate choice of law rules to apply in international and, to a lesser extent, intranational tort disputes.

³⁰⁸ Greene, ‘Choice of Law in Tort’, above n 307, 351.

³⁰⁹ *Ibid* 352.