The Hon Sir Anthony Mason AC KBE[*]

CHOOSING BETWEEN LAWS

I INTRODUCTION

Putting aside constitutional considerations, we have at last, thanks to *John Pfeiffer Pty Ltd v Rogerson* (‘*John Pfeiffer*’),[1] embarked upon a jurisprudence relating to federal choice of law which promises to be both sensible and satisfying. A similar, but more qualified comment, can be made about international choice of law, following *Regie National des Usines Renault SA v Zhang*.[2]

There is no point in my reviewing all that had taken place before *John Pfeiffer*. It is sufficient to say that from Federation up to *John Pfeiffer* it had been accepted, subject to the minority views in *McKain v R W Miller & Co Pty Ltd*[3] and *Stevens v Head*[4] expressed earlier in *Breavington v Godleman*,[5] that the English choice of law rules applied to international causes of action within the Australian federation.

Thus, it was accepted that an action of tort would lie in one State for a wrong alleged to have been committed in another State, if two conditions were fulfilled: first, the wrong was of such a character that it would have been actionable if it had been committed in the State in which the action was brought; and second, it was not by the law of the State where it was done.[6] The two conditions were known as the *Phillips v Eyre*[7] conditions.

These conditions were by no means free from ambiguity. There was doubt as to the purpose which the conditions served and there was a question about the meaning of the terms ‘actionable’ and ‘justifiable’. Moreover, framed as they were as principles applicable to international torts, the *Phillips v Eyre* conditions were inappropriate rules to apply to intra-national torts in a federal system. So it is not

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[1] (2000) 203 CLR 503.

[2] (2002) 210 CLR 491.

[3] (1991) 174 CLR 1.

[4] (1993) 176 CLR 433.

[5] (1988) 169 CLR 41.

[6] *Koop v Bebb* (1951) 84 CLR 629.

[7] (1870) LR 6 QB1.

surprising that later decisions which applied them in the Australian federal setting came under relentless criticism. Much of the criticism directed at the two most recent of those decisions, *McKain* and *Stevens*, was based on the 'forum-shopping' which they generated. But the criticism was also directed at the continuing uncertainty surrounding the application of the *Phillips v Eyre* conditions and at the substance/procedure distinction upheld by the decisions.

Despite the reformulation of the conditions undertaken by the majority in *McKain* with a view to achieving greater certainty, confusion continued to prevail.[8]

The particular problem with the substance/procedure distinction upheld by the court was that, following decided cases, it attributed too large a content to what may be described as procedural. This distinction meant that limitation defences (*McKain*) and assessment of damages (*Stevens*) were held to be procedural and governed by the law of the form. To hold that these were procedural issues was to drive traditional distinctions beyond their stretching point.

McKain and *Stevens* are stark illustrations of the depths to which undiscriminating adherence to precedent will drive a court. In these cases, the court embraced a distinction which led to an insupportable result, all in the name of adherence to a precedent that enunciated rules which were at best ambiguous and were inappropriate to the situation to which the court was applying them.

II THE CONSTITUTIONAL IMPERATIVE

The first point to be made about *John Pfeiffer* is that it may have taken the *Lange*[9] proposition '[t]he common law cannot be at odds with the Constitution' further than it had travelled pre-*John Pfeiffer*. In *John Pfeiffer*, the majority of the court employed five 'constitutional' matters, which the joint judgment identified, to select a common law choice rule for intra-national torts. The joint judgment went on to say:

> The matters we have mentioned as arising from the constitutional text and structure may amount collectively to a particular constitutional imperative which dictates the common law choice of law rule which we favour. It may be that those matters operate constitutionally to entrench that rule, or aspects of it concerning such matters as a 'public policy exception'. If so, the result

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8 See Martin Davies, 'Exactly what is the Australian Choice of Law Rule in Tort Cases?', (1996) 70 *Australian Law Journal* 711; Martin Davies, Sam Ricketson and Geoffrey Lindell, *Conflict of Laws: Commentary and Materials* (1997) paras. 8.2.6–8.2.7.

9 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564.

> would be to restrict legislative power to abrogate or vary that common law rule.[10]

The approach adopted in *John Pfeiffer* has given rise to concern that important elements of the choice of law doctrine are constitutionally dictated so that they are beyond legislative recall should they prove to be deficient.[11] This concern is understandable. The express and implied provisions of a written constitution necessarily constrain the capacity of a democratic legislature to enact laws on a given topic. So, where leeways of choice are available, there is much to be said for preserving the capacity of the legislature to enact a law of its choice, should it find it necessary to do so in the area of private law, especially in connection with torts with all potential scope for variations and alterations in the law. Judge-made solutions are not always the best solutions and they are no more cogent simply because they are offered as interpretations of a constitution.[12]

Sir Owen Dixon was acutely aware of the close interconnection between the common law and the Constitution. There is, however, nothing in his discussion of the topic[13] which suggests that he was an advocate of constitutionalising the common law. Indeed, he considered that the common law was a single system which should receive a uniform interpretation 'throughout Australia' and 'in every jurisdiction of the British Commonwealth where the common law rules'.[14]

That said, it is patently clear that the judges, when formulating the common law, cannot formulate it in a way that is inconsistent with the Constitution. So, in *Lange*, where the court held that the implied freedom of communication as to government and political matters did not create a direct defence to an action of defamation, the implied freedom nevertheless operated indirectly so as to require the common law to be moulded so that it conformed to the Constitution. The consequence of *Lange* is that the legislature cannot legislate so as to confer less protection on a publisher of defamatory matter than that the implied freedom requires. To that extent, to use an inaccurate and distasteful expression, the common law is 'constitutionalised'.

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10 (2000) 203 CLR 503, 535.

11 See Adrienne Stone, 'Choice of Law Rules, the Constitution and the Common Law' (2001) 12 *Public Law Review* 9, 11; S Gageler, 'The High Court on Constitutional Law: The 2001 Term', 15 February 2002 http://www.gtcentre.unsw.edu.au/Conference-Papers-February-2002.asp

12 See *Denver Area Educational Telecommunications Consortium Inc v FCC* (1996) 581 US 727, 728 (Souter J).

13 Owen Dixon, 'Address by the Hon. Sir Owen Dixon KCMG: To the Section of the American Bar Association for International and Comparative Law' (1943) 17 *Australian Law Journal* 138; 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240.

14 Owen Dixon, 'Address ...', ibid.

But *Lange* presents no obstacle to legislative enlargement of the content of the implied freedom by altering the common law of qualified privilege so as to confer greater protection on the publisher of defamatory matter. The Constitution does not dictate a particular common law rule in relation to qualified privilege. It merely requires that it shall have a minimum content. Indeed in *Lange* itself, the court, in expanding the defence of qualified privilege, took it beyond the boundaries of the implied freedom by protecting, where appropriate, discussion of matters concerning the United Nations or other countries, even if it does not relate to the category of communications protected by the implied freedom.[15] In this respect, the law of qualified privilege, as declared in *Lange*, could be altered by statute.

The Constitution may, however, have more pronounced consequences in other areas of the common law. Depending upon the interpretation given to a particular constitutional provision, it could operate so as to mandate indirectly, if not directly, a specific common law rule which could not be altered by the legislature. Although s 118 of the Constitution has not been regarded as a choice of law rule, if it were to be so interpreted, the legislature could not substitute for it another choice of law rule.

III JOHN PFEIFFER AND THE CONSTITUTIONAL IMPERATIVE

John Pfeiffer, rightly in my view, did not regard s 118 of the Constitution as mandating an outcome in that case. Section 118 simply requires that 'full faith and credit' be given 'throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State'. The language of the section does not suggest in any way that it was intended to be a choice of law rule. Nor do the Convention debates provide any evidence that, in putting forward the provision, the framers were animated by the purpose of introducing a choice of law rule. They were concerned to adopt a provision similar to the first part of Article IV s 1 of the United States Constitution, a provision which has never, either before or after 1901, been treated as a choice of law provision.

The Convention Debates throw little illumination on the operation of s 118. They treat the provision as requiring the recognition of the laws, public Acts, records and judicial proceedings of every State, thereby precluding a capacity in another State of the Commonwealth to disregard them.[16] In the Debates, the discussion linked the section to the service of process and the enforcement of judgments.

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[15] (1997) 189 CLR 571.

[16] See John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 961.

In *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd*,[17] the court regarded s 118 as an answer to arguments that effect should not be given to the New South Wales statutory provision (s 25(6) and (7) of the *Moratorium Act 1930-1931* (NSW)) because the provision contravened notions of morality or the fundamental policy of the law, or because its application would work injustice or a fraud.[18] As Evatt J noted,[19] the United States provision has been regarded as prohibiting the courts of one State from '[giving] effect to a substantive defence under the applicable law of another State' (*Bedford Electric Light Co v Clapper*).[20] It seems that the purpose of the constitutional provision is to play a part in making the States part of one nation by eliminating or reducing the prospect of one State refusing to apply the law of another State on local policy grounds.[21]

So, in *John Pfeiffer*, there was no solution in s 118. But the joint judgment said:

> … it may … be that s 118 suggests that the constitutional balance which should be struck in cases of international tort claims is one which is focused more on the need for each State to acknowledge the predominantly territorial interest of each in what occurs within its territory than it is on the plaintiff's desire to achieve maximum compensation for an alleged wrong.[22]

The joint judgment went on to say:

> … it is not necessary in the present matter to resolve other questions respecting s 118. The matter is to be resolved, in our view, by developing the common law to take account of federal jurisdiction as delineated in Ch III of the Constitution and, also, to take account of the federal system in which sovereignty is shared between the Commonwealth and the member States of the federation.[23]

It was necessary then to develop the common law rules in the light of a number of constitutional considerations. They were:

- the existence and scope of federal jurisdiction, including the investment of State courts with federal jurisdiction pursuant to s 77(iii) of the Constitution;
- the position of [the High Court] as the ultimate court of appeal ...;

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17 (1933) 48 CLR 565.

18 Ibid 577 (Rich and Dixon JJ).

19 Ibid 588.

20 (1932) 286 US 145, 160.

21 See *Milwaukee County v ME White Co* (1935) 296 US 268, 277 (Stone J); *Miller v Teale* (1954) 92 CLR 406, 415 (Dixon CJ, McTiernan, Fullagar and Taylor JJ).

22 (2000) 203 CLR 503, 533–4.

23 Ibid 534.

- the impact of ss 117 and 118 of the Constitution upon any so-called 'public policy exception' to a choice of law rule for tort;
- the predominant territorial concern of the statutes of State and Territory legislatures; and
- more generally, the nature of the federal compact.[24]

The joint judgment selected the *lex loci delicti* as the common law choice of rule rather than the *lex fori*. The paramount reason for making that selection was that liability would be fixed and certain, whereas, if the *lex fori* were applied, the existence, extent and enforcement of liability would vary according to the number of forums to which the plaintiff might resort and according to differences between the laws of those forums and, in cases of federal jurisdiction, according to where the court sits.[25] Accordingly, the *lex loci delicti* is to be preferred on the ground that it will result in a single choice of law rule in federal and non-federal jurisdiction, thereby eliminating forum-shopping. To this reasoning are added the comments:

> Moreover and so far as the subject matter permits, it gives effect to the reasonable expectations of parties. And it is a rule which reflects the fact that the torts with which it deals are torts committed within a federation.[26]

The first of these comments presumably means that the parties would ordinarily expect that the law of the place where the tort is committed would govern liability. The second comment presumably reflects the view that we are dealing with the law area of Australia.

The double actionability rule is rejected for both federal and non-federal jurisdiction. Even if ss 117 and 118 do not achieve the result of their own force, it would be incongruous in a federal system if the court in one jurisdiction were to say of the laws of another jurisdiction that they violate fundamental principles of justice or public policy.

A guiding principle is that a litigant who invokes the jurisdiction of a court must take the procedure and the remedies of that court as he finds it. This principle has an important application in the context of the substance/procedure divide.

The court noted, however, that it is

> conceivable that, in some cases, if the forum does not provide curial relief of the kind provided by the law of the State or Territory in which the events occurred, that forum would be a clearly inappropriate forum.[27]

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[24] Ibid 535.
[25] Ibid 539.
[26] Ibid 540.
[27] Ibid 542.

The decision in *Zhang* makes demonstrably clear what was otherwise evident in *John Pfeiffer*, namely that the conclusions reached in the joint judgment could readily have been reached by developing the common law rules, without invoking constitutional considerations. Indeed, much of the argumentation in favour of the *lex loci delicti* as against the *lex fori* turns on general law considerations, rather than on constitutional considerations, putting aside the existence and scope of federal jurisdiction.

So far as the 'constitutional considerations' are concerned, one is left with an impression that there is an over-emphasis on their constitutional character. Perhaps the court felt that it needed a constitutional justification for developing the common law and all the more so because it was overruling two recent decisions it had made.

The impression to which I have referred is created partly by the iteration of the five constitutional considerations identified by the court other than the first — the existence and scope of federal jurisdiction. Two of them — the position of the High Court as an ultimate court of appeal and the nature of the federal compact — do not add much to the reasoning. Nor does a third — the predominant territorial concern of State and Territory statutes — leap to the mind as a significant 'constitutional' consideration. And a fourth consideration — ss 117 and 118 of the Constitution — had no impact upon the case, the reach of these provisions being left for some other occasion. These were matters which Gummow J had used to distinguish the Australian position from the Untied States position in his illuminating article 'Full Faith and Credit in Three Federations'.[28] The expression 'constitutional considerations' is, in the specific context, an imprecise expression, evidently designed to embrace specific provisions of the Australian Constitution such as ss 117 and 118 and other considerations which relate to the context of the Constitution and to its consequences but are not directly attributable to its provisions or to its structure as distinct from the structure of the federation that it creates.

It may be that the tangential nature of some at least of the five constitutional considerations, quite apart from the absence of argument upon the point, led the authors of the joint judgment to refrain from expressing any conclusion upon the question whether the common law principle enunciated by the court could be legislatively altered. Alternatively, and more likely, the court may have considered that the question should be left open by reason of its possible impact. Also left unresolved was the impact of ss 117 and 118 on the public policy exception.

Be this as it may, while the joint judgment may indicate that 'constitutional considerations', in the very broad sense of that expression, may have influenced the reasoning to the conclusion on the appropriate choice of law rule selected in *John*

[28] (1995) 46 *University of South Carolina Law Review* 979.

Pfeiffer, the judgment neither asserts nor demonstrates that those considerations dictated this conclusion. Moreover, it is one thing to say that an express provision or an implication drawn from the text and structure of the Constitution mandates a particular common law rule or a minimal common law rule. It is another thing to say that when regard is had, exclusively or otherwise, to the existence of the Australian Federation, or even the nature of the Australian Federation, and the conclusion is reached that a particular common law rule is the most appropriate to our situation, that process of reasoning results in a rule that is dictated by the Constitution, or more specifically, the text or structure of the Constitution. In such a situation, though it may be possible to say in a general way that the Constitution has informed, even influenced, the result, the Court is simply using the Constitution and its operation as an essential part of the setting in which it formulates the appropriate common law rule.

In many cases in which the common law is 'informed by the structure and institutions established by the Constitution', to use the words of McHugh and Gummow JJ in *Commonwealth v Mewett*,[29] neither the text nor the structure of the Constitution will dictate the result. In other cases, it will be otherwise. *Mewett* was such a case because there s 75(iii), in conferring original jurisdiction on the High Court in matters which the Commonwealth is a party, abolished the common law immunity of the Crown.

If, of course, no other rule or an aspect of a rule could be consistent with the Constitution, then it is proper to speak of the rule or an aspect of it as having been mandated by the Constitution, even if the same rule might have been developed by other non-constitutional means. Then it would be correct to say that the rule or an aspect of it is mandated by the text or the structure of the Constitution.

With the impact of ss 117 and 118 on the public policy exception as yet unresolved, and without knowing how far the reasoning in *John Pfeiffer* is dictated by the existence and scope of federal jurisdiction, it is not possible to determine how the Court would answer the question whether the legislature could vary or abrogate the rule selected by the Court. Apart from the impact of ss 117 and 118 on the public policy exception, there is nothing in the joint judgment which indicates that the Court is pre-disposed to the view that the common law choice of law rule is unalterable by the legislature.[30]

This uncertainty in itself is perhaps a further reason for displaying a lack of enthusiasm for 'constitutionalising' the common law in this area. It promises to

[29] (1997) 191 CLR 546.

[30] For a discussion of this question, see Greg Taylor, 'The Effect of the Constitution on the Common Law as Revealed by *John Pfeiffer v Rogerson*' (2002) 30 *Federal Law Review* 69.

generate new legislative 'no go areas', the boundaries of which may prove extremely difficult to define with precision and then perhaps only by reference to theoretical or conceptual considerations.

There is, in any event, something odd about the notion of 'developing the common law' when all you are doing is to 'constitutionalize' it. In fact, you may only succeed in stultifying its development, unless you are prepared to develop it by developing the interpretation of the Constitution. The continued use of the expression 'common law', to describe constitutionally mandated law, simply describes a new species of unalterable common law, at least unalterable by the legislature, though alterable by the judges in so far as they alter their interpretation of the Constitution.

IV ZHANG

Predictably, *Zhang* applied the choice of law rule selected in *John Pfeiffer* to international torts, subject to the public policy reservation but without the flexible exception. That aspect of the principle is perhaps the only debatable aspect of the decision, apart from its treatment of *forum non conveniens*. My preference would have been for the retention of the flexible exception to cater for exceptional cases such as the case where the entire connection of the parties was with the forum other than the place of the accident. The flexible exception is an aspect of the *lex loci delicti* principle in its application to international torts in the United Kingdom. In Canada its application to the international torts has been retained with an indication that there would be few cases falling for consideration,[31] while in the United States the concept of the proper law of the tort has been applied.

The court supports its decision on this point by asserting, with some justification, that the proper law approach has generated conflicting decisions in the United States with consequent uncertainty. The court's decision is consistent with its general preference for fixed rules devoid of qualifications which call for the judicial development of criteria. The description in *Chaplin v Boys* of the exception as 'flexible' was almost certain to invite its rejection by the High Court. Certainty is the paramount consideration.

The court nonetheless acknowledges that the considerations relevant to the flexible exception may often be dealt with under the public policy reservation, that is, the refusal to apply a foreign law on the ground of public policy. It is by no means clear to me that there is the likelihood of a cross-over from flexible exception considerations to public policy reservation.

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31 *Tolofson v Jensen* [1994] 3 SCR 1022, 1054 (La Forest J).

The flexible exception was crafted by the House of Lords in order to avoid some of the uncertainty that had arisen in the United States in relation to the proper law of the tort. Although the proper law of the tort did not appeal to the High Court, the majority acknowledged that the flexible exception reflected the American 'government interest analysis' which was at the heart of the proper law of the tort concept. Yet the majority also acknowledged that 'the modern tendency is to frame [the public policy reservations] with closer attention to the respective governmental interests involved'.[32] It might be thought that, if this be so, then the flexible exception could be retained. But instead, the court considered that it led to treating the flexible exception considerations under the public policy reservation.

A *Forum non conveniens*

The more debatable aspect of *Zhang* is the treatment of the *forum non conveniens* issue. Apart from an argument about the effect of Rule 10.6A(2)(b) and Rule 11.8(1)(h) of the Supreme Court Rules 1970 (NSW) , the parties did not challenge the 'clearly inappropriate forum' test, which had been approved in *Voth v Manildra Flour Mills Pty Ltd*.[33] So it was not to be expected that the court would reconsider the adoption of the *Spiliada* test.[34] In *Voth*, the majority had rejected that test, preferring the 'clearly inappropriate forum' formulation put forward in *Oceanic Sun Line Special Shipping Co Inc v Fay*.[35] In *Spiliada*, the House of Lords held that a stay would be granted only if there was some other forum which was more appropriate as the natural forum for the trial of the action. The *Spiliada* test prevails in other common law jurisdictions such as Canada and New Zealand. Australia is alone in subscribing to the *Voth* mutation.

As Professor Lindell has pointed out in a case note,[36] there was a distinct possibility that *Voth* could be seen as a staging post, leading to the ultimate adoption of the *Spiliada* test. Indeed, the joint judgment in *Voth* predicted, inaccurately as it transpired, that the application of the *Spiliada* and *Voth* tests would not lead to significantly different results.

However, *Zhang* does not support the 'staging post' prophecy. As the court pointed out in *Zhang*, in cases where the question is 'complex and finely balanced, the court may more readily conclude that it is not a clearly inappropriate forum'.

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32 (2002) 210 CLR 491, 513.

33 (1990) 171 CLR 538.

34 *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460.

35 (1988) 165 CLR 197.

36 Geoffrey Lindell, '*Regie National des Usines Renault SA v Zhang* - Choice of Law in Torts and Another Farewell to *Phillipps v Eyre* but the *Voth* test retained for *forum non conveniens* in Australia' (2002) 3 *Melbourne Journal of International Law* 364–82.

The majority's decision on the interpretation of the Rules may also be seen as supporting a determination to abide by the *Voth* test. Rule 10.6(2)(b) provided that the court may make an order to set aside service of process on the ground that the court 'is an inappropriate forum for the trial of the proceedings'. The expression 'clearly inappropriate' was not used. There is force in the minority view that the language of the Rule mandates a departure from the *Voth* test. The majority thought otherwise, no doubt influenced by the undesirability of introducing yet another test, one hitherto not acted upon by any jurisdiction, into the arena, particularly another test which would apply only to service outside Australia, leaving *Voth* to occupy the rest of the field.

B *The Application of the Voth Test in Zhang*

The application of the *Voth* test is somewhat surprising in that the trial judge had stayed the proceedings on the ground that the trial should be held in France or New Caledonia (the plaintiff to choose between the two). The accident occasioning the plaintiff's injuries had occurred in New Caledonia, witnesses who saw the accident were in New Caledonia, the investigating police officer subsequently moved to France and the car had been manufactured (and presumably designed) in France. Negligent driving, design and manufacture were all issues. And, even more importantly, it was French law which governed the rights and liabilities of the parties. On the other hand, the plaintiff and his son, who was with him in New Caledonia, a number of expert engineering and medical witnesses, as well as others, were in New South Wales. The plaintiff had very limited resources and solicitors who were prepared to act in New South Wales on a contingency fee basis, Discovery, interrogatories and legal aid were available in New South Wales but not in France or New Caledonia in the relevant class of case.

In the end, however, the significance of the application in *Zhang* of the *Voth* test is that it reinforces the difference between that test and the *Spiliada* test, and makes the prospect of adopting *Spiliada* more remote.