The Price of Forum Shopping:

A Reply To Professor Juenger

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1. The Argument Recapitulated

In a stimulating and provocative article, Professor Juenger argues that the distaste for forum shopping held by Australian judges, academics and law reform bodies is misplaced.[1] Australian jurists should embrace the United States' "national legal pastime"[2] of forum shopping and allow plaintiffs the legal benefits available in the forum of their choice. The central problem, he claims, is that Anglo-Australian choice of law methodology is too firmly rooted in the tradition of the nineteenth century German jurist, Savigny, who premised his universal system of choice of law on the idea that the outcome of litigation ought not to vary with the plaintiff's choice of forum.

Juenger claims that the idea of uniformity of decision regardless of forum, or "decisional harmony" as it is termed in the civil law tradition, is fundamentally flawed for two reasons. First, uniformity is unattainable. Not only do some forums offer attractive procedural advantages, but conflicts rules are themselves so varied and malleable that it is futile to expect a uniform outcome to litigation irrespective of the place of trial. Differences in the characterisation of legal relationships and in the use of connecting factors, to mention two examples, "will forever frustrate the quest for uniformity".

Secondly, Juenger claims that uniformity is undesirable. Preoccupation with certainty and predictability distracts attention from the all-important question of the extent to which conflicts rules further the ends of material justice. He prefers the disarray of the American conflicts revolution, with its inherent bias for forum law, to the simpler and more certain rules of the past, such as those articulated in the American Law Institute's first Restatement in 1934.[3] The reason for his preference is that the flexibility of modern choice of law rules allows plaintiffs to circumvent substandard foreign legal rules that unreasonably bar or curtail recovery.

Juenger then offers two palliatives for the practice of forum shopping, which are no doubt intended to sweeten the bitter pill of forum shopping in the mouths of Australian jurists. In the first place, we should be neither surprised nor indignant that lawyers advise their clients to pursue their claims in the forum in which their case can be most favourably presented. To do less

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1 For further elaboration of the argument see Juenger, F K, "Forum Shopping, Domestic and International" (1989) 63 *Tulane LR* 553.

2 Wright, J S, "The Federal Courts and the Nature and Quality of State Law" (1967) 13 *Wayne LR* 317 at 333.

3 American Law Institute, *Restatement of Conflict of Laws* (1934).

may breach legal ethics. In the second place, selection of the forum is not solely in the hands of the plaintiff. The defendant may engage in "reverse forum shopping"[4] by seeking to stay the local action, or by seeking to enjoin the local action in proceedings in a jurisdiction of his or her choice. By recognising the availability of these defensive tactics, we may be dissuaded from regarding the defendant as a hapless victim of the plaintiff's unilateral quest for a favourable forum.

In the critique that follows I suggest that, at least within Australia, forum shopping is not the inevitable or desirable practice that Juenger claims it to be. Legal rules that encourage the practice of forum shopping exact a heavy price of principle and strike at the foundations of the rule of law upon which our legal system is based. Far from evincing misguided concern for a "glib phrase", recent judicial hostility to forum shopping within Australia demonstrates a laudable concern that the law be sufficiently predictable to guide human behaviour so that persons are capable of formulating and executing their life plans.

2. *Decisional Harmony and the Rule of Law*

Savigny posited a system of conflict of laws which he claimed had universal validity. The central problem, in his view, was "[t]o ascertain for every legal relation (case) that law to which, in its proper nature, it belongs or is subject".[5] Recognising that legal rights and obligations might be adjudicated in different countries, Savigny remarked that "in cases of conflict of laws, the same legal relations (cases) have to expect the same decision, whether the judgment be pronounced in this state or in that".[6] Accordingly, once the relevant system of law was ascertained, it was to be applied by the courts of all countries. Later, in the context of explaining that in Roman law persons might be subject to the jurisdiction of either the place of their origin or the place of their domicile, Savigny elaborated his concern for decisional harmony in the following terms:

> Such a concurrence [of jurisdiction] was impossible as to the subordination of the person to the municipal law of different places, for that implies a contradiction. The same person might be sued before different magistrates at the choice of the plaintiff, but he could not be judged according to different, and perhaps contradictory, rules of law.[7]

Savigny's concern that a person might be subject to simultaneously valid but contradictory laws smacks of the long-standing concern of our legal system for the "rule of law". Although this term has been used as a slogan to support all manner of political ideals and principles, F A Hayek has captured the powerful ideal behind the rule of law in the following words:

> Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand — rules which make it pos-

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4 Boyce, D, "Foreign Plaintiffs and Forum Non Conveniens: Going Beyond *Reyno*" (1985) 64 *Texas LR* 193 at 216.

5 Von Savigny, F C, *Private International Law: A Treatise on the Conflict of Laws* (1849), (2nd Guthrie trans, 1880), §348 at 70.

6 Id §348 at 69-70.

7 Id §357 at 120.

> sible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.[8]

Although Hayek was concerned with the rule of law as it affected relations between citizen and state,[9] Joseph Raz has rightly pointed out that the ideal travels beyond relations with government.[10] The essence of the rule of law is that law "must be capable of guiding the behaviour of its subjects. It must be such that they can find out what it is and act on it."[11] From this basic idea Raz derives many subsidiary principles, such as that laws should be prospective, open, clear and stable, and that the legal machinery for enforcing the law should not deprive it of its ability to guide individual action. As Raz explains it, the philosophical basis of the rule of law is the deontological principle of respect for human dignity, which entails treating humans as persons capable of planning and plotting their future. When the rule of law is violated, the violation may lead to uncertainty (as when the law does not enable people to form definite expectations) or to frustrated expectations (as when the appearance of stability, upon which people have planned their actions, is shattered). Such violations show disrespect for human dignity.

Raz does not consider the operation of conflict of laws rules in his philosophical discussion, but his views are apposite to this question, as recent opinions of the High Court reveal.[12] In *Breavington v Godleman*[13] the High Court had to consider whether the law applicable to an action for damages arising out of a motor vehicle accident was the common law of Victoria, where the action was commenced, or the more restrictive law of the Northern Territory, where the accident occurred. In the course of his judgment, Deane J claimed that the Australian Constitution established a "unitary system of law", by which he meant "a comprehensive legal system in which the substantive law applicable to govern particular facts or circumstances is objectively ascertainable or predictable and internally consistent or reconcilable."[14] The basis for the unitary system of law was to be found, in part, in acceptance of the principle that an individual should not be exposed to the injustice of being subjected

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8 Hayek, F A, *The Road to Serfdom* (1944) at 72. Hayek's writings on the subject extend over half a century. For a critique, see Galligan, D J, *Discretionary Powers: A Legal Study of Official Discretion* (1986) at 202-206.

9 Similar concerns were voiced by Dicey as long ago as 1885 when he claimed that the rule of law entailed the exclusion of arbitrariness or even of wide discretionary authority on the part of the government. See Dicey, A V, *Introduction to the Study of the Law of the Constitution* (10th edn, 1959) at 202.

10 Raz, J, *The Authority of Law* (1979) at 215.

11 Id at 214.

12 It is ironic that Brennan J has been a vocal adherent to the rule of law in the past, given that in recent cases he has upheld orthodox choice of law rules which threaten that principle. In *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 238-239, his Honour rejected a broad *forum non conveniens* test on the ground that it was inimical to the rule of law to repose too wide a discretion in judges to determine the appropriate place of trial. If judges ought not to be permitted to create rights and liabilities of litigants by the exercise of a broad judicial discretion, one may question why a plaintiff should be given a discretion to affect the defendant's rights by a self-serving selection of forum.

13 (1988) 169 CLR 41.

14 Id at 121. For a critique of other aspects of Deane J's judgment, see Opeskin, B R, "Constitutional Dimensions of Choice of Law in Australia" (1992) 3 *Public LR* 152 at 161-165.

to the requirements of contemporaneously valid but inconsistent laws.[15] Dean J went on to say that:

> it would be to substitute the bedlam of a Babel for an ordered system of law to recognise the right of each of the country's court systems ... to speak at the same time but in conflicting terms about the lawfulness, consequences or attributes of a particular act or thing in a particular place at a particular time.[16]

This concern for predictability of legal consequences led Dean J to conclude that the law of the Northern Territory (the *lex loci delicti*), rather than the law of Victoria (the *lex fori*), should govern the issue of liability.[17] Were it otherwise, the legal consequences of a particular act done in a particular part of Australia would vary according to where in the country proceedings were instituted. In *Breavington* such a result would have been especially perverse given that the motor vehicle accident occurred in the Northern Territory, that the principal parties were both resident in the Territory at the time of the accident, and that both vehicles were presumably registered there.

As Deane J's judgment illustrates, there is a clear relationship between the rule of law and the goal of decisional harmony articulated by Savigny. So long as the legal consequences of a defendant's actions depend on the discretion of the plaintiff in choosing a forum for litigation, it is not possible for the defendant to know his or her rights and obligations with sufficient certainty in advance of acting. As a consequence, the law may serve as a poor guide for human action. If one accepts, as Raz does, that the rule of law is an ideal to be highly cherished,[18] Savigny's allied goal of decisional harmony is a centrally important value for a system of conflict of laws.

3. *The Attainability of Decisional Harmony in Australia*

Even if decisional harmony is accepted as a desirable quality of a legal system, the question remains whether it is attainable in practice. Juenger argues that it is not. In the first place, he claims that there are significant procedural differences between jurisdictions, which make some forums more attractive than others in the eyes of potential plaintiffs. United States courts, for example, are often favoured because of the possibility of trial by jury in civil suits (with the likelihood of large damages awards), rules as to costs and attorneys' fees, generous discovery rules, and the like. In the second place, conflicts rules themselves differ between jurisdictions, both as to their use of connecting factors and as to the manner in which legal relationships are characterised. All this, it is said, suggests that decisional harmony is an ideal remote from reality and doomed from the outset.

I agree with Juenger's conclusion that the prospect of decisional harmony is remote in international litigation, and probably in interstate American litigation as well.[19] Differences in procedure and choice of law rules are too large

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15 Above n13 at 123.

16 Id at 135.

17 All other justices reached the same conclusion, though by different paths.

18 Above n10 at 222.

19 In the United States, choice of law rules vary widely from state to state, and the constitutional requirements of due process and full faith and credit exert only a minimal influence

to warrant any realistic hope of attaining uniform outcomes regardless of the forum. Recognition of these differences need not, however, cause us to abandon completely the quest for decisional harmony in international litigation. As Raz reminds us,[20] the rule of law is not a quality that is either present or absent in a legal system — it is a matter of degree. All things equal, a greater degree of conformity to the rule of law is preferable to a lesser degree of conformity because it enables people to better plan their lives. It is for this reason that attempts to unify the substantive law[21] and choice of law rules[22] of different countries ought not to be disparaged. In particular subject areas, individuals are able to make their plans in the knowledge that stable and predictable laws will apply to their actions, wherever a subsequent dispute might be litigated.

However, the antipathy toward forum shopping voiced in recent Australian cases has not been expressed in the context of international litigation, but in intra-Australian cases. In *Stevens v Head*[23] the High Court was concerned with the law applicable to an action commenced in Queensland to recover damages in respect of a motor vehicle accident in New South Wales.[24] In *McKain v R W Miller & Co (SA) Pty Ltd*[25] the High Court was concerned with the limitation period applicable to an action commenced in New South Wales to recover damages in respect of an accident that occurred on board a ship in South Australian waters. And in *Breavington v Godleman*[26] the High Court was concerned with the law applicable to an action commenced in Victoria to recover damages in respect of a motor vehicle accident in the Northern Territory. No matter how dismal the prospect of decisional harmony in international and interstate American litigation, the same conclusions cannot be drawn in relation to litigation within the Australian federation.

The critical difference between intra-Australian litigation on the one hand and international or interstate American litigation on the other is that the high degree of uniformity in Australian law and procedure makes the prospect of decisional harmony a real and attainable goal. Both procedural law and choice of law rules are so substantially similar throughout the Australian states and territories that the likelihood of different Australian courts reaching different substantive outcomes by virtue of the place of trial is small. These claims warrant elaboration.

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over the content of those rules. See Opeskin above n14 at 173-177.

20 Above n10 at 222, 228.

21 Many international organisations have been established to promote the unification of private law, such as the International Institute for the Unification of Private Law (UNIDROIT), and the United Nations Commission on International Trade Law (UNCITRAL). For a comprehensive discussion of organisations engaged in the unification of substantive law, see David, R, *The International Unification of Private Law*, in David, R (ed), *International Encyclopedia of Comparative Law* (1971) vol 2, ch 5.

22 The Hague Conference on Private International Law has drafted many international conventions that aim to unify choice of law rules of participating states. For Australia's participation in these conventions, see below n34.

23 (1993) 176 CLR 433.

24 There was some international dimension to the case because the plaintiff was ordinarily resident in New Zealand. However, this aspect of the case assumed no importance in the reasoning of the Court.

25 (1991) 174 CLR 1.

26 Above n13.

Many of the procedural factors that attract international litigants to the United States as surely "as a moth is drawn to the light"[27] are absent in Australia. Juries in civil trials tend to be comparatively modest in their awards, use of contingency fees is unethical or unlawful in all Australian jurisdictions,[28] and rules of pre-trial discovery are not unduly generous. Australian jurisdictions are therefore unlikely to attract international forum shoppers by reason of the munificence of their procedural law. Moreover, because rules of procedure are very similar throughout the country, differences in procedural law offer only the most marginal inducements to forum shoppers seeking the most favourable venue within Australia. As one commentator has recently described the situation:

> the concepts embodied in the rules of each jurisdiction vary only marginally. The most significant variations are in the management of litigation. While this is important, the basic concepts of such procedures as pleadings, discovery and interrogatories, summary and default judgment and trial processes vary little, if indeed at all.[29]

Uniformity in Australian practice and procedure will be further enhanced if recent proposals for a uniform law of evidence are implemented. In 1987 the Australian Law Reform Commission (ALRC) recommended that a uniform law of evidence be adopted in all federal courts, regardless of the state in which they sit.[30] In the following year the New South Wales Law Reform Commission recommended that the ALRC's draft Evidence Bill be adopted in New South Wales, with only slight changes.[31] The principal reason given for adopting the great bulk of the ALRC's proposals was that uniformity would avoid the possibility of differences in the law of evidence adding "another dimension to the choice of forum".[32]

In addition to the substantial similarity of procedural laws, the near identity of Australian choice of law rules offers great promise of decisional harmony in intra-Australian litigation. Amongst the reasons for the marked similarity of Australian choice of law rules are the following:

(i) All law districts in Australia share the legal tradition of the English common law, which was inherited in colonial times. Accordingly, basic

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27 *Smith Kline & French Laboratories Ltd v Bloch* [1983] 1 WLR 730 at 733, per Lord Denning MR.

28 See *Clyne v New South Wales Bar Association* (1960) 104 CLR 186 at 202; Weisbrot, D, *Australian Lawyers* (1990) at 221-222; Disney, J et al, *Lawyers* (2nd edn, 1986) at 424-429. The various Bar Rules also proscribe contingency fees. For example, the New South Wales Bar Association Rules, No 82, provides that "[a] barrister shall not make an arrangement that his fees or any portion thereof are to be returned or refunded if disallowed on taxation or on the happening of any other event ...".

29 Cairns, B C, *Australian Civil Procedure* (3rd edn, 1992) at v. See also Aronson, M I, Hunter, J B and Weinberg, M S, *Litigation: Evidence and Procedure* (4th edn, 1988) at 6.

30 Australian Law Reform Commission, *Evidence*, Report No 38 (1987). Under existing law, federal courts must apply the law of evidence and procedure of the state or territory in which they sit: section 79 of the *Judiciary Act* 1903 (Cth).

31 New South Wales Law Reform Commission, *Evidence*, Report No 56 (1988). Neither the federal nor state proposals has yet been enacted.

32 Id at 6. A similar concern has been voiced by Doyle, J J, "Uniform Evidence Legislation" in Zariski, A (ed), *Evidence and Procedure in a Federation* (1993) at 36.

concepts and principles of the conflict of laws are the same in all states and territories.

(ii) The common law of Australia is uniform throughout the land as a result of the role of the High Court as the final court of general appeal.[33] The High Court's decision as to the content of a common law choice of law rule will settle the issue for the whole of Australia.

(ii) Australia's adherence to international conventions on the unification of private international law has ensured national uniformity in choice of law rules in some areas.[34] This has come about as state or federal parliaments have legislated to ensure that domestic law conforms with Australia's international treaty obligations.[35]

(iii) There is a growing practice of federal-state co-operation to achieve uniform solutions to problems that lie beyond the legislative reach of federal parliament. For example, between 1978 and 1982 uniform legislation on domicile was enacted by federal, state and territory governments, effecting important reforms in the common law rules.[36] Similarly, states and territories are currently in the process of implementing uniform legislation to characterise limitation periods as part of the substantive law of the state or territory.[37]

(iv) Federal legislation has increasingly unified Australian law in areas previously subject to disparate state law. For example, federal legislation on marriage and divorce[38] has eliminated conflict of laws issues in family law matters within Australia.

(v) Finally, if a recent report of the Australian Law Reform Commission is implemented,[39] choice of law rules in Australia will be further unified. The Commission has recommended that federal, state and territory

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33 Although the High Court's original jurisdiction is confined to specified federal matters (ss75 and 76 of the Constitution), its appellate jurisdiction is unlimited as to subject matter (s73 of the Constitution).

34 Australia is party to the following Hague Conventions on Private International Law, which are in force for Australia from the date shown: Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions 1961 (21 November 1986); Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 (22 December 1992); Convention on the Recognition of Divorces and Legal Separations 1970 (23 November 1985); Convention on Celebration and Recognition of the Validity of Marriages 1978 (1 May 1991); Convention on the Civil Aspects of International Child Abduction 1980 (1 January 1987); and Convention on the Law Applicable to Trusts and on their Recognition 1985 (1 January 1992). For further information on participation in the Hague Conventions as at 1 August 1993, see (1993) 40 *Netherlands Int'l LR* 257.

35 For example, the Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions 1961 is given effect throughout Australia by uniform state legislation: see for example *Wills, Probate and Administration Act* 1898 (NSW), Part 1A.

36 *Domicile Act* 1982 (Cth); *Domicile Act* 1979 (NSW); *Domicile Act* 1981 (Qld); *Domicile Act* 1980 (SA); *Domicile Act* 1980 (Tas); *Domicile Act* 1978 (Vic); *Domicile Act* 1981 (WA); *Domicile Act* 1979 (NT). The legislation came into effect on 1 July 1982.

37 See, for example, *Limitation (Amendment) Act* 1993 (NSW), and *Choice of Law (Limitation Periods) Act* 1993 (NSW).

38 *Marriage Act* 1961 (Cth); *Family Law Act* 1975 (Cth).

39 Australian Law Reform Commission, *Choice of Law*, Report No 58 (1992).

parliaments enact a uniform Choice of Law Act, which specifies choice of law rules in the more problematic areas of the conflict of laws.

Against the background of the substantial similarity of procedural and choice of law rules in all Australian jurisdictions, it is easy to understand the exasperation expressed on the subject of forum shopping by several dissenting judges in recent High Court cases. The Court's decisions to characterise limitation periods[40] and statutory caps on damages[41] as matters of procedure rather than substance enhance the potential for forum shopping within Australia by relegating those questions to the law of the forum. Instead of amplifying the existing prospect of decisional harmony within Australia by adopting a substance — procedure distinction that gives a minimal role to forum law, the majority's decisions "[go] a long way towards converting the Australian legal system into a national market in which forum shoppers are encouraged to select between competing laws imposing different legal consequences in respect of a single occurrence".[42] It is regrettable that the High Court has rendered two decisions that are not only difficult to support in terms of the narrower questions involved in the cases, but that detract from the goal of decisional harmony and the rule of law. When set against the marked trend toward decisional harmony in Australia, the High Court's decisions risk turning Australian states and territories into a good place for plaintiffs to shop.

4. *Furthering the Ends of Material Justice*

I have argued above that the rule of law and the associated principle of decisional harmony are important values for a legal system to possess. However, they are by no means the only values. It is easy to imagine a legal system that is meticulous in its adherence to the rule of law, but whose laws are harsh, repressive, discriminatory and undemocratic. In short, the rule of law is not necessarily the rule of good law.[43] In Raz's words:

> Since the rule of law is just one of the virtues the law should possess, it is to be expected that it possesses no more than prima facie force. It has always to be balanced against competing claims of other values. ... Conformity to the rule of law is a matter of degree, and though, other things being equal, the greater the conformity the better — other things are rarely equal. A lesser degree of conformity is often to be preferred precisely because it helps realization of other goals.[44]

It is in this light that Juenger claims that preoccupation with predictability of outcome distracts attention from the question of the extent to which conflicts rules further the ends of material justice. Forum shopping is desirable, he claims, because it is a means by which plaintiffs can circumvent the appli-

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40 *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1.

41 *Stevens v Head* (1993) 176 CLR 433.

42 Id at 462, per Deane J.

43 Above n10 at 211. As Raz explains (at 225), the fact that conformity to the rule of law also enables the law to serve bad purposes does not show that conformity is not a virtue, just as the fact that a knife may be used to do harm does not show that sharpness is not a good quality for a knife to possess.

44 Id at 228.

cation of substandard foreign laws that unreasonably bar or curtail recovery. It thus serves the "important substantive policy of affording the victims of interstate torts a fairer measure of redress". In the longer term, forum shopping may also further the ends of material justice by exposing to scrutiny the odious laws of the avoided forum, and so acting as a catalyst for law reform.

I agree with Juenger that the choice of law process ought to have regard to the substantive outcomes that it produces. For this reason, the "jurisdiction-selecting" approach[45] to choice of law issues in Australia is not only old-fashioned, but potentially productive of injustice. However, I depart from his analysis in so far as it appears to assume that substantive justice is achieved by a system of law that has the plaintiff's interests as its chief or only concern. To label foreign limitations on recovery as "substandard", "arbitrary" or "unreasonable", or as "a drag on the coattails of civilization",[46] suggests that the demands of justice are met whenever a plaintiff can find a forum in which full recovery is permitted, notwithstanding that his or her connection with the chosen forum is slight. A system of law that maximises the plaintiff's recovery is not necessarily a just system of law. As the House of Lords has remarked in a slightly different context, courts should be concerned to try cases in "the interests of all the parties and the ends of justice",[47] and not in the interests of the plaintiff alone. Not only will advantages to the plaintiff usually constitute corresponding disadvantages to the defendant, but the forum itself may have interests that deserve to be taken into account in ascertaining the applicable law.

The statutory caps on damages that the High Court considered in *Stevens v Head*[48] provide a good illustration of the difficult balance that must be struck between competing interests of plaintiffs, defendants, and the public at large. In 1988 the New South Wales government introduced legislation, the *Motor Accidents Act* 1988, that limited the right of recovery at common law in respect of motor vehicle accidents in New South Wales.[49] In introducing financial caps on damages in conjunction with a system of compulsory private motor vehicle insurance, the Act shares the loss arising from motor accidents

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45 A leading Australian text describes the orthodox approach to choice of law questions in Australia in the following terms: "[T]he traditional methodology is not initially concerned with the content of any potentially applicable laws but merely with the selection of the jurisdiction whose laws govern. The content of those laws is not directly relevant to their selection but merely to the resolution of the case after the governing jurisdiction has been discovered." See Sykes, E I and Pryles, M C, *Australian Private International Law* (3rd edn, 1991) at 13.

46 *Clark v Clark* 222 A2d 205 (1966) at 209, per Kenison CJ.

47 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 476, adopting Lord Kinnear's formulation in *Sim v Robinow* (1892) 19 R 665 at 668.

48 Above n23.

49 The 1988 Act was the second attempt at a statutory scheme for compensating victims of motor vehicle accidents. The first scheme, implemented by the *Transport Accidents Compensation Act* 1987 (NSW), abolished the right of action at common law for damage arising from a transport accident and replaced it with a fault-based statutory compensation scheme. The 1987 scheme largely followed the 1984 recommendations of the New South Wales Law Reform Commission (*Report on a Transport Accidents Scheme for New South Wales*, (1984) No 43). In one important respect, however, the 1987 scheme departed from the Commission's recommendations. The Commission had recommended a statutory right to compensation without proof of fault but, for reasons of cost, the requirement of fault was retained.

between the accident victims and the wider community, through the insurance system. The legislation purported to fulfil a commitment of the Liberal government to permit recovery of damages pursuant to common law principles, albeit modified in a way that ensured the scheme was affordable. The caps on damages were thought necessary to contain insurance claims, and hence premiums, within levels that could be afforded by the motoring community.[50] The scheme thus represents a considered balance between the interests of motor accident victims, insurance companies and the premium-paying public, and although it is a balance that may not find the agreement of all, it was one hammered out through democratic processes in the state legislature.

It will be recalled that in *Stevens v Head* the principal question was whether the limitations on damages imposed by the New South Wales legislation were applicable to an action commenced in Queensland in respect of a motor vehicle accident that occurred in New South Wales. A majority of the High Court held that the Queensland court was not bound to apply the statutory caps because they were procedural in character, and so applicable only in proceedings commenced in New South Wales. The practical effect of the decision was that a New Zealand plaintiff, with no enduring contacts with New South Wales or Queensland, was able to recover full common law damages in respect of her injuries from the Queensland defendant and his insurer. This is an outcome with which Juenger would evidently agree, for although he parenthetically condemns the characterisation as unconvincing,[51] the plaintiff's forum shopping produced the happy outcome of maximising recovery in respect of her injuries. In this way, we are lead to believe that the material ends of justice are well-served.

I take issue with this conclusion. The Court's decision does not necessarily further the ends of material justice, either in the particular circumstances of the case or in its longer term effects. In the case at bar, no material injustice would have been done had the High Court applied the statutory caps of the *lex loci delicti*. First, the principal limitation in the New South Wales legislation was only in respect of recovery of damages for non-economic loss. There was no doubt that Mrs Stevens was entitled to recover damages for economic loss, subject to certain restrictions in respect of home care services provided by family members. As a matter of substantive justice to the plaintiff, this case stands in marked contrast to American "guest statute" cases, in which recovery was generally barred completely. Secondly, even in respect of non-economic loss, the New South Wales Act did not bar recovery but merely reduced the amount recoverable under this head by $15,000. Had the Act been applied to Mrs Stevens' claim, her damages for non-economic loss, such as pain and suffering, would have been reduced from $18,000 to $3,000.

In the longer term, the decision has the potential to upset the balance struck by the legislature between the competing interests of the parties and the community. Newspaper reports have foreshadowed a substantial rise in car insurance premiums in New South Wales to offset the possibility of large damages

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50 *Parliamentary Debates, New South Wales, House of Assembly*, 29 November 1988 at 3827-3830.

51 For a further critique of the majority's reasoning see Opeskin, B R, "Statutory Caps on Damages in Australian Conflict of Laws" (1993) 109 *LQR* 533.

awards to persons who are injured in New South Wales but sue interstate.[52] When the interests of all relevant parties are taken into account, it is difficult to label the New South Wales statutory scheme as "substandard", "arbitrary" or "unreasonable" in the recovery it allows a motor accident victim. Notwithstanding one's natural sympathy for a plaintiff who seeks full compensation for his or her injuries, no material injustice would have been done by applying the statutory caps to the plaintiff's claim, when a broader view is taken of the interests involved.

Finally, it may be observed that if forum shopping does act as a catalyst for reforming the law — and so furthers the ends of material justice in the long term — so much the better. By way of example, Juenger indicates that forum shopping may have hastened the demise of "guest statutes" in the United States, which barred an injured passenger from suing a negligent driver of a motor vehicle. It cannot be assumed, however, that reform will always favour the interests of accident victims. A recent Australian example is the legislative response to the High Court's decision in *McKain v R W Miller & Co (SA) Pty Ltd.* That decision fostered forum shopping in Australia by characterising many foreign limitation statutes as procedural, thus making them inapplicable to proceedings in the plaintiff's chosen forum. As a result of an agreement between state and territory Attorneys-General, legislation has been or soon will be introduced in all Australian jurisdictions to characterise limitation laws of other states and territories as substantive laws.[53] The legislation will restrict the ability of a plaintiff to recover damages in respect of an injury where the cause of action is time-barred by the applicable law. Such a reform favours the interests of defendants in being free from the uncertainty that stale claims may be brought against them.[54] No doubt this salutary reform furthers the ends of material justice, but it clearly does so at the plaintiff's expense.

5. *The Defendant's Role in Resisting Forum Shopping*

Juenger suggests that forum shopping does not merit censure because the ultimate forum for litigation does not depend solely on the plaintiff's unilateral choice. There are several methods of redress[55] for a defendant "seriously inconvenienced by [the plaintiff's] reprehensible machinations". A defendant may:

(i) contest the forum's jurisdiction;

(ii) seek a stay of proceedings on the ground of *forum non conveniens*;

(iii) seek an injunction in another jurisdiction to restrain the plaintiff from proceeding in the plaintiff's chosen forum (an "anti-suit injunction" in American parlance); or

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52 Shanahan, D, "High Court Bypasses Car Smash Payout Limit", *The Weekend Australian*, 24-25 April 1993 at 4; Morris, L, "Green Slips to Cost More", Sydney Morning Herald, 31 January 1994 at 1.

53 For New South Wales legislation, see above n37.

54 *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 24, per Mason CJ.

55 See, for example, Bell, A S, "The Why and Wherefore of Transnational Forum Shopping" (1993) unpublished manuscript.

(iv) seek a declaration of non-liability in a jurisdiction of his or her own choice.

By alerting us to the defensive or pre-emptive possibilities open to a defendant, Juenger hopes to palliate the disquiet we may have about embracing the practice of forum shopping.

A close examination reveals, however, that the options available to a defendant are rather blunt swords with which to challenge a plaintiff's initial selection of forum. Plaintiffs and defendants are far from evenly matched in their ability to influence the forum for litigation. First, the grounds on which a defendant may challenge the plaintiff's choice of forum for want of jurisdiction are becoming increasingly limited as the bases of exorbitant jurisdiction expand. In international litigation commenced in Australia this is apparent in the operation of both common law and statutory rules with respect to jurisdiction. As to the former, Australia follows the common law principle that no greater connection with the forum is required than the defendant's temporary presence in the forum at the time of service.[56] Where the defendant is absent from the jurisdiction, Rules of Court allow service of originating process on a foreign defendant in an increasing variety of circumstances. For example, the New South Wales Supreme Court Rules now allow service of process on an absent defendant where the plaintiff has suffered damage in the State caused by a tortious act or omission wherever occurring.[57] Accordingly, defendants with little or no connection with an Australian forum may be haled into court to answer the plaintiff's allegations. In intra-Australian litigation the situation is even starker. Recent federal legislation allows initiating process of one state or territory to be served in another state or territory without the need to show any nexus between the forum and the subject matter of the action.[58] The expansion of jurisdiction of Australian courts over interstate and overseas defendants clearly limits a defendant's opportunity to establish that the plaintiff's chosen court lacks jurisdiction.

Secondly, the basis on which a defendant may seek a stay of Australian proceedings on the ground of *forum non conveniens* in international litigation is quite illiberal. Following the High Court's decision in *Voth v Manildra Flour Mills Pty Ltd*,[59] local proceedings may be stayed only if that forum is "clearly inappropriate" for the trial of the action. As the High Court has acknowledged, this test favours the plaintiff to a greater degree than the test laid down by the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd*,[60] which requires only that there be a "more appropriate" forum in which the case can be tried more suitably for the interests of all the parties and the ends of justice. Moreover, according to *Voth* and *Spiliada*, when proceedings have

56 *Laurie v Carroll* (1958) 98 CLR 310; *Evers v Firth* (1986) 10 NSWLR 22; *Perrett v Robinson* [1985] 1 Qd R 83. A similar principle has recently been confirmed in the United States as a matter of constitutional law in *Burnham v Superior Court of California* 110 S Ct 2105 (1990).

57 New South Wales Supreme Court Rules, Part 10.1A, Rule 1(1)(e). "Damage" is not confined to the physical act causing injury, but has been interpreted as extending to all detriment which the plaintiff suffers as a result of the tortious conduct of the defendant, be it physical, financial or social: *Flaherty v Girgis* (1985) 4 NSWLR 248 at 266, per McHugh JA.

58 *Service and Execution of Process Act* 1992 (Cth), s15.

59 (1990) 171 CLR 538.

60 [1987] AC 460.

been regularly commenced (for example by service of originating process on the defendant in the forum), the onus is on the defendant to show that the local action should be stayed. Thus, both the stringency of the *Voth* test and the onus of proof favour the plaintiff's initial choice of forum. In intra-Australian litigation, a defendant has an easier task in seeking a stay or transfer of proceedings, in line with the "nuts and bolts"[61] approach that is now taken to determining the most appropriate court to hear and adjudicate the substantive dispute.[62]

Thirdly, the prospect of a defendant obtaining an injunction to restrain a plaintiff from proceeding in his or her chosen forum is even more remote. In intra-Australian cases, the possibility of anti-suit injunctions is outlawed by statute.[63] In international cases, the party seeking the injunction must satisfy the Australian court that continuation of the foreign proceedings by the plaintiff would be "vexatious or oppressive".[64] This rigid test rejects the notion that anti-suit injunctions are merely one aspect of the broader question of determining the appropriate venue for trial, since oppression requires more than a showing that the foreign jurisdiction is not the natural forum for the trial of the action. Given the judicial reluctance to grant an injunction that has the indirect effect of interfering with the conduct of foreign proceedings, defendants face a difficult task in thwarting the plaintiff's initial choice of forum by means of an anti-suit injunction.

Fourthly, Anglo-Australian courts have been hostile to applications by one party for a negative declaration as to their liability or the liability of another party.[65] As Bell has remarked,[66] judicial hostility to this remedy seems to be founded on the notion that there is a natural order for litigation, which the "natural defendant" ought not to upset by "improper attempts at forum shopping".[67] If pre-emptive negative declarations were granted more freely, defendants would have greater control over the forum in which their disputes were litigated. Not only would such declarations prevent the subsequent enforcement of a contrary foreign judgment in the jurisdiction granting the declaration, but courts of the fo-

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61 *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711 at 714, per Street CJ.

62 Under the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth), and equivalent state legislation, proceedings may be transferred between participating courts in accordance with the statutory formulae in section 5. Amongst non-participating courts, proceedings commenced in one court may be stayed if there is another court that is more appropriate to determine the issues, having regard to specified criteria: *Service and Execution of Process Act* 1992 (Cth), s20. Importantly, under the latter Act, no weight is to be given to the plaintiff's initial selection of forum: s20(4).

63 Where initiating process has been issued in one state, s21 of the *Service and Execution of Process Act* 1992 (Cth) prohibits a court of another state from restraining a party to the proceedings on the ground that the place of issue is not the appropriate forum for the proceeding.

64 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871; *National Mutual Holdings Pty Ltd v Sentry Corp* (1989) 87 ALR 539; *Re Siromath Pty Ltd (No 3)* (1991) 25 NSWLR 25.

65 *The "Volvox Hollandia"* [1988] 2 Lloyd's Rep 361; *First National Bank of Boston v Union Bank of Switzerland* [1990] 1 Lloyd's Rep 32; *The "Maciej Rataj"* [1991] 2 Lloyd's Rep 458.

66 Above n55 at 30.

67 The expression is that of Kerr LJ in *The "Volvox Hollandia"* [1988] 2 Lloyd's Rep 361 at 371. Kerr LJ also remarked at 364 that "these claims for negative declarations are a novel type of pre-emptive forum shopping with novel implications. They distort the settled law and practice governing the rights of shipowners to seek to limit their liability".

rum chosen by the plaintiff might recognise as conclusive the determination of liability made in the declaration.

From this brief review it is clear that the techniques available to a defendant are unequal to the task of countervailing the advantages that accrue to a plaintiff merely by virtue of his or her initial choice of forum. Although these techniques may, as Juenger claims, "offer redress to those seriously inconvenienced by reprehensible machinations", in less extreme cases a defendant is ill-equipped to affect the plaintiff's self-serving or capricious choice of forum. Far from ameliorating one's concern for forum shopping, the inferior options available to a defendant confirm the entrenched bias of jurisdictional rules in favour of the plaintiff. On grounds of procedural fairness, such a situation is difficult to defend.

6. *Conclusion*

In this critique I have argued that the rule of law and the correlative principle of decisional harmony are important qualities for a legal system to possess because they enable people to plan their lives knowing, with a reasonable degree of certainty, the legal consequences of their actions. Whatever the position in international or interstate American litigation, these goals are attainable in the Australian legal system because of the high degree of uniformity throughout the country in procedure, substantive law and conflicts rules. To the extent that legal rules facilitate forum shopping within Australia, the attainment of decisional harmony is jeopardised and the worth of our legal system is correspondingly diminished.

A legal system must also be concerned with producing just substantive outcomes, and conformity to the rule of law may have to be compromised to further the ends of material justice. However, it is not possible automatically to equate the practice of forum shopping with the advancement of material justice for the reason that forum shopping is principally concerned with the advancement of the plaintiff's interests alone. Substantive justice must also have regard to the interests of the defendant and the broader community.

As Juenger rightly indicates, it is unfortunate if the forum shopping metaphor is used to besmirch the efforts of legal advisers in advancing their clients' interests. Few would argue with the proposition that lawyers are ethically bound to advise their clients of the best forum in which to present their case. However, recent judicial disparagement of the practice of forum shopping has not been directed at forum shoppers themselves but at the fact that Australian shops have different goods to offer. In seeking the same outcome to litigation regardless of where in Australia proceedings are commenced, Australian judges, commentators and law reform bodies are upholding the laudable goal of enhancing conformity to the rule of law and increasing predictability of the legal consequences of human action, which lies at its foundation. Measured against this goal, forum shopping may exact too high a price.