NEILSON..... APPELLANT;
PLAINTIFF,

AND

OVERSEAS PROJECTS CORPORATION OF VICTORIA LTD AND ANOTHER.. ..... RESPONDENTS.
DEFENDANTS,

[2005] HCA 54

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA

HC of A
2005

April 6, 7;
Sept 29
2005

Gleeson CJ,
McHugh,
Gummow,
Kirby,
Hayne,
Callinan and
Heydon JJ

Private International Law — Choice of law — Tort — Negligence — Scope of lex loci delicti — Where lex loci delicti permits nationality or domicile to determine applicable law — Renvoi — Whether infinite regression of reference.

An Australian living in the People's Republic of China was injured in a fall in an apartment provided by an Australian company. The apartment was provided to her under arrangements made in Australia. More than five years after the accident, she sued the company for negligence in the Supreme Court of Western Australia. Her statement of claim did not refer to Chinese law. Relying upon an English translation of the General Principles of Civil Law of the People's Republic of China and expert evidence concerning the meaning and effect of certain provisions of those Principles, in particular Art 136, the company contended that the claim was statute-barred after one year. Article 146 of the General Principles, as translated, provided: "With regard to compensation for damages resulting from an infringement of rights, the law of the place in which the infringement occurred shall be applied. If both parties are nationals of the same country or domiciled in the same country, the law of their own country or of their place of domicile may also be applied."

The trial judge held that Art 146 should apply and that the second sentence permitted him to choose to apply the law of Australia. Applying the relevant Australian limitation periods and principles of negligence, he held that the plaintiff was entitled to recover damages assessed in accordance with Australian principles. The decision was reversed on appeal on the ground that *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 and *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 were inconsistent with the application of the renvoi doctrine to international torts. The Full Court held that the judge had been required to apply Chinese domestic law, excluding the reference to the law of the parties' nationality or place of domicile contained in Art 146, so that the claim was barred by Art 136.

Held, (1) that Australian choice of law rules required the application of Chinese law as the lex loci delicti.

Regie Nationale des Usines Renault SA v Zhang (2002) 210 CLR 491, applied.

(2) By Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ, McHugh J dissenting, that at least where the choice of law rules of the lex loci delicti depended upon a connecting factor other than place, such as nationality or domicile, the lex loci delicti was the whole of the law of the foreign jurisdiction. In this case, the lex loci delicti included Art 146.

Regie Nationale des Usines Renault SA v Zhang (2002) 210 CLR 491, applied.

John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503, distinguished.

(3) By Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ, McHugh and Kirby JJ dissenting, that, by applying the second sentence of Art 146 of the General Principles, in the circumstances the trial judge had been bound to conclude that Chinese law, when applied to the facts, would look to Australian law, including Australian limitation periods, to determine the parties' rights and obligations.

Regie Nationale des Usines Renault SA v Zhang (2002) 210 CLR 491, applied.

Jabbour v Custodian of Israeli Absentee Property [1954] 1 WLR 139; [1954] 1 All ER 145, referred to.

Per Gleeson CJ, Gummow and Hayne JJ. It was not contended, and there was no evidence, that Art 146 permitted or required a Chinese court to have regard to Australian choice of law rules.

Per Kirby, Callinan and Heydon JJ. An application of Australian law under Art 146 would not apply any part of that law which might result in recourse back to China as the lex loci delicti.

Casdagli v Casdagli [1918] P 89 and *Casdagli v Casdagli* [1919] AC 145, considered.

(4) That the trial judge had erred in holding that Art 146 permitted him to exercise "a right" to choose to apply the law of Australia. An Australian court applying the common law choice of law rules applied Australian law but derived the content of the parties' rights and obligations by reference to the chosen foreign law. The proper question was how a Chinese court would exercise the power or discretion given by Art 146.

John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503, applied.

Decision of the Supreme Court of Western Australia (Full Court): *Overseas Projects Corporation of Victoria Ltd v Neilson* (2004) 28 WAR 206, reversed.

APPEAL from the Supreme Court of Western Australia.

Barbara Neilson was a resident of Western Australia and the wife of an employee of the Overseas Projects Corporation of Victoria Ltd (OPC). OPC had its registered office and principal place of business in Victoria. Mrs Neilson's husband was employed as a consultant on a two-year contract to work in Wuhan in the People's Republic of China. Before accompanying her husband to Wuhan, Mrs Neilson agreed to do some work as personal assistant to the director of the programme being undertaken by OPC in Wuhan. Her husband was required to live in an apartment provided by OPC, which they both did. On 6 October

1991, Mrs Neilson fell down stairs in the double-storey apartment and suffered head and back injuries. The fall was found to have been causally related to the lack of a balustrade, about which Mrs Neilson and her husband had complained. On 29 June 1997, Mrs Neilson commenced proceedings against OPC in tort and contract in the Supreme Court of Western Australia. No reference to Chinese tort law was included in the statement of claim. At the trial counsel for OPC contended that General Principles of Civil Law of the People's Republic of China 1986 applied as the lex loci delicti and that Art 136 provided for a limitation period of one year. Hence the claim in negligence was statute barred. OPC tendered an English translation of the General Principles and called an expert witness who had Chinese and Australian law degrees.

The trial judge (McKechnie J) dismissed the contract claim. Applying *John Pfeiffer Pty Ltd v Rogerson* (1) and *Regie Nationale des Usines Renault SA v Zhang* (2), he held that Chinese law, being the lex loci delicti, was the proper law to be applied. Having determined that Art 106 of the General Principles imposed liability on OPC, he then applied Art 142, which stated that the application of the statute to civil relations involving foreigners should be determined by Ch VIII of the General Principles, of which Art 142 was a part. Chapter VIII also included Art 146. In evidence, the expert witness accepted that, if Mrs Neilson had sued in China, she could have asked the Chinese court to apply Australian law. He further accepted that, in such circumstances, the Chinese court would determine the issue according to its own ideas of fairness and the justice of the case. Relying on the translation of Art 146 and the expert evidence, the judge held that Art 146 allowed him to choose to apply Australian law, which he did, awarding an agreed sum of $300,000. He further held that OPC was entitled to be indemnified by its insurer. The insurer appealed to the Full Court (McLure and Johnson JJ and Wallwork A-J) which held that the judge had erred by invoking Art 146 and by that means, in applying Australian common law (3). Gleeson CJ and McHugh J granted special leave to the plaintiff to appeal to the High Court from the judgment of the Full Court.

B W Walker SC (with him *A S Bell* and *P Kulevski*), for the appellant. The main issue concerns the meaning of lex in the context of the lex loci delicti in the Australian common law choice of law rule for foreign torts and, in particular, whether it means all of the law of the place of the wrong or some lesser part, the "domestic" or "internal" law, excluding conflict of law rules. If the former, what is the consequence when the law of the place of the wrong refers the matter back to the law of the forum state? In addressing the issue, it should

(1) (2000) 203 CLR 503.
(2) (2002) 210 CLR 491.
(3) *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206.

not be presumed that the answer will or should be uniform irrespective of the choice of law rule under consideration. The answer should also seek to further the general aspiration of private international law, uniformity of result irrespective of forum. The resolution of the Full Court was wrong. First, a choice of law's reference to a foreign law should not be circumscribed by an artificial distinction between "internal law" and "private international" or "conflict of laws" rules. Lord Atkinson said in *Casdagli v Casdagli* (4) that a fallacy lurks in the phrase municipal law. Once the applicable foreign law has been identified by a choice of law rule, its application may involve questions of construction and interpretation. So long as the content of the foreign law is pleaded and proved, its interpretation may be the subject of separate proof (5). [HAYNE J. Is this Court entitled to take the text of the foreign law and construe it?] We are not dealing with actual Chinese law, but with that trace or indication or sketch of it which starts as a translation from Mandarin to English: an English translation which has no status apart from that lent by the parties' consent or the judge's decision in relation to its evidentiary deployment. Nevertheless, a court must conduct at least some interpretation or construction of that translation because private international law at common law requires courts to make a decision by applying rules or standards gathered from another legal system as a matter of fact. On its proper construction, Art 146's generic reference to the "law of their own country or place of domicile" is to the internal law of the state from which the two nationals come. That is the purpose of its implicit derogation from the application of what we would call the lex loci delicti rule as the substantive rule to be applied in the particular case of litigation between two nationals from the same country or domicile. If the applicable foreign law supplies no direct answer but refers the determination of the case to a foreign legal system, there are two possibilities: that reference on, or "renvoi", is only to the internal law of the referred state (single or partial renvoi) or it is to the "whole" of the law of the referred state (total renvoi). Where the referred state is the forum state, a case of remission as opposed to transmission to a third state, and the reference on is to the whole of the law of the referred state, there are another two possibilities: the referred state accepts the reference back but sends the matter back again to the referring state or it accepts the reference back but disapplies its choice of law rules at that stage on the principled basis that their work is spent, having already identified the applicable law, that of the referring state. The latter approach produces a practical and commonsense outcome. If the latter approach is taken, there will be little practical difference between single or partial renvoi and total renvoi. *Regie*

(4) [1919] AC 145 at 192-193.
(5) *Allstate Life Assurance Co v Australian and New Zealand Banking Group Ltd [No 6]* (1996) 64 FCR 79.

Nationale des Usines Renault SA v Zhang (6) requires the law of the place of the wrong to be applied to determine a claim in respect of a foreign tort. The thrust of *Zhang* and *John Pfeiffer Pty Ltd v Rogerson* (7), including the purposively constrained view of matters procedural, was to ensure that the legal result in any case would accord with what would have obtained if the case had been tried where the tort was committed. The Full Court's approach distorted and undermined that goal and resulted in the disapplication or attenuated application of Chinese law, specifically Art 146, rather than a faithful or accurate application of it, as the choice of law rule. The Full Court's decision failed to appreciate the reasoning which led to the certain and predictable results in both *Pfeiffer* and *Zhang* and, in adopting the "no renvoi solution", undermined those decisions by promoting the possibility of different outcomes dependant upon the arbitrary choice of forum. In favouring an approach which it acknowledged would have the consequence that "the Australian forum court would apply foreign domestic law when a court of the foreign country would or may not", the Full Court turned *Pfeiffer* and *Zhang* on their head. Its decision yields a perverse result by which an Australian court, purporting to apply "domestic" law, might reach a different conclusion on the same facts from that which a Chinese court applying Art 146 would reach, not because of the manner in which the discretion under Art 146 might have been exercised but because of the mechanical application of a "no renvoi" in tort approach. Article 146 is no less a part of the law of China because in terms it applies to a case involving two foreign nationals. A common law rule cannot sensibly be devised that distinguishes between foreign systems which merely permit or leave open a possibility of another choice of law rule apart from their primary one and those that do not. One takes either the whole or none of the foreign system and if the whole is taken there is taken with it the possibilities it contains concerning the choice of law. [MCHUGH J. Surely we must talk about policy because the problem of circularity arises.] It makes no sense to interpret Art 146 as contemplating a second application of Australian choice of law rules. In such circumstances the choice of law exercise has been performed and it is irrational to interpret the generic reference in Art 146 to "the law of their own country" as being to a part of that law that would simply refer the matter back to China as opposed to the corpus of law which would determine the parties' respective rights and obligations. [GUMMOW J referred to Scoles, Hay, Borchers and Symeonides, *Conflict of Laws* (2000).] The natural and purposive interpretation of Art 146 coincides with a single renvoi approach and with what may be described as the modified total renvoi approach of Scrutton LJ in *Casdagli v Casdagli* (8). [MCHUGH J. The expectation of the parties

(6) (2002) 210 CLR 491.
(7) (2000) 203 CLR 50.
(8) [1918] P 89 at 111.

might be that an accident that happened in China should be dealt with according to the substantive law of China.] The substantive law of China says that when an Australian is in China for a contract made with an Australian corporation in Australia, Australian law may be applied. It follows that the claim was not statute barred by Art 136 of the General Principles. [CALLINAN J. Assuming there was no evidence on the way Art 146 would be construed in China, why should we not fall back on the presumption that the Chinese law of construction is the same as the Australian law of statutory construction and apply the latter?] We would only rely on that presumption in the alternative and say that where the party with the capacity to re-examine does nothing to touch the evidence, one can proceed on the basis that the approach in China to statutory interpretation is not different from the approach in Western Australia. [He also referred to *Simmons v Simmons* (9); *Jaber Elias Kotia v Katr Bint Jiryes Nahas* (10); *M'Elroy v M'Allister* (11); *Haumschild v Continental Casualty Co* (12); *Jabbour v Custodian of Israeli Absentee Property* (13); *Richards v United States* (14); *Pfau v Trent Aluminium Co* (15); *Spiliada Maritime Corporation v Cansulex Ltd* (16); *National Mutual Holdings Pty Ltd v Sentry Corporation* (17); *Voth v Manildra Flour Mills Pty Ltd* (18); and *Sosa v Alvarez-Machain* (19).]

G Griffith QC (with him *L G De Ferrari* and *A B Lu*), for the respondents. The issue is tabula rasa and the answer to the renvoi question depends on the choice of law rule under consideration, here the Australian common law rule for torts. Three options are open in respect of renvoi. First, to reject the renvoi by applying the domestic law of the foreign law area. Secondly, to adopt a single renvoi approach by applying the foreign choice of law rules and, if they reflect back, accepting a remission to the forum law. The forum court would then apply the lex fori. The single renvoi approach requires proof of the choice of law rules of the foreign law area, but not the foreign law area's rules on renvoi. Thirdly, to adopt a total (or double) renvoi approach by which the forum court resolves the dispute according to the approach which would have been taken by the foreign court exercising jurisdiction over the same case. That requires proof of both the choice of law rules of the foreign area, and proof of the

(9) (1917) 17 SR (NSW) 419.
(10) [1941] AC 402.
(11) [1949] SC 110.
(12) (1959) NW 2d 814.
(13) [1954] 1 WLR 139; [1954] 1 All ER 145.
(14) (1962) 369 US 1.
(15) (1970) 263 A 2d 129.
(16) [1987] AC 460.
(17) (1989) 22 FCR 209.
(18) (1990) 171 CLR 538.
(19) (2004) 124 S Ct 2739.

foreign law area's rules on renvoi. Following *Zhang* (20), "no renvoi" is the correct rule. In substance, the appellant is contending either for a pure single renvoi or for the hybrid form of renvoi – effectively, single renvoi – adopted by the trial judge and, further, for the application of Art 146. In the Full Court, the appellant lost on "no renvoi". The appellant also loses on the total renvoi approach because she did not plead and prove Chinese law on renvoi at the trial. Her modified form of total renvoi is in essence merely a form of single renvoi. To succeed she must establish error in the Full Court's application of *Zhang*. She must also overcome, first, the fact that there is no support at common law in Australia or elsewhere for single renvoi in any area of law; secondly, dicta that cumulatively suggest that it would be undesirable to extend total renvoi beyond areas such as succession and legitimation by subsequent marriage (21); thirdly, the sustained criticism of the notion of "renvoi" and total renvoi as lacking coherence; and, finally, the fact that no renvoi in tort is selected as the preferred approach by the *Australian Law Reform Commission* (Report No 58, p 30); the *Private International Law (Miscellaneous Provisions) Act 1995* (UK), s 9(5); the United States *Restatement (2d) of Conflict of Laws 1971*, and the approach towards which Member States of the European Union are moving. In each respect the appellant fails. *Zhang* applied to international torts the reasoning and consideration that had led to the selection of lex loci delicti in *Pfeiffer* (22) and eliminated the uncertainty of the double actionability rule. In promulgating a universal choice of law rule for foreign torts litigated in Australia, the Court placed a premium on certainty and predictability. It is implicit in *Zhang* that any reference to another country's "law" is to the domestic or municipal law, excluding choice of law rules (23). The Court rejected any notion of flexible exceptions. It does not matter that the United Kingdom statute embraces a role for flexible exceptions to the lex loci delicti rule, having also chosen no renvoi. Unless and until a Parliament within Australia legislates to the contrary, the choice of lex loci delicti with no flexible exception has been made for all Australia jurisdictions. The appellant had a good cause of action under Chinese law that she could have commenced proceedings in China or Australia within the applicable limitation period, here determined by the law of China. She lost merely because she was out of time under the applicable limitation period. Article 146 is merely a discretionary provision. And it is a choice of law provision. It would have applied if the proceedings had been instituted within time in China. And if the proceedings had been instituted in China, the Chinese court might have thought it more appropriate to apply Chinese law. Single renvoi is the approach least likely to achieve "uniformity of result irrespective of

(20) (2002) 210 CLR 491.
(21) *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 at 437-438.
(22) (2000) 203 CLR 503.
(23) *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 520, 535.

forum". In other circumstances, the Chinese limitation period might have been longer than under an Australian limitation law. The trial judge applied the lex fori in a result-selective fashion, in much the same way as United States courts have applied the lex fori by characterising a foreign rule as procedural (24) or classifying a tort cause of action as contractual (25). It is an evasive tactic. A false deference to the choice of law rules of the foreign jurisdiction, here driven to provide a remedy, would be onerous and, if the foreign rule were total renvoi, logically unworkable. It would also undo the certainty established by *Zhang* and constitute no more than the ad hoc re-introduction of flexible exceptions, whether the Australian rule was said to be single or total renvoi. To apply renvoi to reflect back to the lex fori, in this case by means of the second sentence of Art 146, is inconsistent with the choice of law rule of *Zhang*. [CALLINAN J. What do you say about a presumption of identity between foreign and domestic rules of statutory construction where there is no evidence of the foreign rules? (26).] That principle would undermine *Zhang*. [He also referred to *Richards v United States* (27); *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* (28); *Macmillan Inc v Bishopsgate Investment Trust Plc [No 3]* (29); and *Sosa v Alvarez-Machain* (30).]

B W Walker SC, in reply.

Cur adv vult

29 September 2005

The following written judgments were delivered: —

1 GLEESON CJ. The issues in this appeal are narrower than those raised at trial. Furthermore, the issues at trial were narrower than those that might have been raised. It was for the parties to define the issues, and adduce such evidence as they chose. The case involved foreign law. It is possible, perhaps even likely, that the evidence of foreign law was incomplete. Nevertheless, it was necessary for the trial judge to decide the issues raised by the parties on the evidence which they presented. This is adversarial litigation, and the outcome of such litigation is commonly influenced by the way in which the parties have chosen to conduct their respective cases. Decisions about such conduct may have been based on tactical and other considerations which are unknown to a trial judge or an appellate court.

2 This appeal is concerned only with the claim made by the appellant against Overseas Projects Corporation of Victoria Ltd (OPC) for

(24) eg, *Grant v McAuliffe* (1953) 264 P 2d 944 (Con).
(25) *Levy v Daniel's U-Drive Auto Renting Co* (1928) 143 A 163 (Con).
(26) *Jabbour v Custodian of Israeli Absentee Property* [1954] 1 WLR 139; [1954] 1 All ER 145.
(27) (1962) 369 US 1.
(28) [1984] AC 50.
(29) [1995] 3 All ER 747.
(30) (2004) 124 S Ct 2739.

damages for personal injuries suffered as a result of OPC's negligence. The appellant's husband was engaged by OPC to work on a project in Wuhan, in the People's Republic of China (PRC). His family went there with him. They were accommodated in a flat provided by OPC. The appellant fell down the stairs. She claimed that the stairs were dangerous, and that OPC, which owed her a duty to take reasonable care for her safety, was in breach of that duty. That claim was framed in conventional common law terms based on occupier's liability. The questions of duty, breach and damage were resolved in the appellant's favour, and are not presently in issue.

3 The action was brought in the Supreme Court of Western Australia. Counsel for the appellant informed the trial judge (McKechnie J), in his opening, that he would lead no evidence of PRC law, and intended to say as little about that topic as possible. His opponent, however, relied on PRC law and, in the course of the defence case, tendered English translations of the General Principles of Civil Law of the PRC (the General Principles) and of the Code of Civil Procedure of the PRC, and an opinion of the Supreme People's Court (in Mandarin) on the implementation of the General Principles. He also called a Chinese lawyer, Mr Liu, who had law degrees from Shanghai University and from an Australian university. Mr Liu referred to, and translated portions of, the Supreme People's Court opinion. Following his cross-examination of Mr Liu, counsel for the appellant tendered a law journal article on PRC personal injury law.

4 Counsel for the first respondent argued that the substantive law to be applied by McKechnie J was the law of the PRC; that, according to that law (for reasons that are not material to this appeal), OPC did not assume any civil liability to the appellant; and that, if it did, such liability was extinguished under Art 136 of the General Principles, which specified a limitation period of one year for demands for compensation for bodily harm. Although McKechnie J decided the case by applying Australian law, relying in that regard on Art 146, he also dealt with those arguments and decided them against OPC. In particular, he dealt with the limitation point on the basis that Art 137 allowed a court, "under special circumstances", to extend the limitation period. He found that there were special circumstances. The Full Court disagreed with his reasoning on that question, but the issue does not arise if McKechnie J's decision based on Art 146 is upheld. The case has been argued at all levels on the assumption (which may or may not be correct) that, if the second sentence of Art 146 applied, Arts 136 and 137 were irrelevant.

5 The Full Court of the Supreme Court of Western Australia held that McKechnie J was wrong to invoke Art 146 and apply Australian law. That has been the focus of the present appeal.

6 The case has been conducted on the assumption that the General Principles, and in particular Art 106, which imposes civil liability either on the basis of fault or pursuant to legal stipulation, applied, or potentially applied, to the relations between the appellant and OPC

and, further, that both the appellant and OPC were nationals of Australia within the meaning of Art 146 and, therefore, foreigners within the meaning of Art 142. Those may not be surprising assumptions, but they were not the subject of evidence and it is necessary, therefore, to note that they were not in dispute. Furthermore, no issue was raised concerning any complexities that might result from Australia's federal system. Article 146 of the General Principles seems to rise above questions of federalism, and the parties did not raise such questions in their evidence or arguments.

7 The General Principles are divided into nine Chapters. Chapter I is headed: "Fundamental Principles." It includes Art 8, which provides that, unless otherwise stipulated, the laws of the PRC apply to civil activities carried out within the PRC, and the provisions of the General Principles with regard to citizens apply to foreign nationals within the territory of the PRC. Chapters II and III deal with the status of "natural persons" and "legal persons", the former being citizens, and the latter being organisations possessing legal capacity. Chapters IV and V are not relevant. Chapter VI deals with civil liability, and includes Art 106 which has been summarised above. Chapter VII deals with limitation of actions, and includes Arts 136 and 137 to which reference has already been made. Chapter VIII is headed: "Application of the Law to Civil Relations involving Foreigners." It commences with Art 142, which states that the application of the law to civil relations involving foreigners shall be determined by the provisions of Ch VIII. It includes Art 146.

8 Not much was said in evidence about Art 146. The first sentence provides that, in a claim for compensation for damages resulting from an infringement of rights, the law of the place where the infringement occurred shall be applied: in the case of a fault-based claim such as the present, the lex loci delicti. Since Art 146, according to Art 142, applies to civil relations involving foreigners, the first sentence has general application to foreigners. Whether the first sentence of Art 146 would apply to a dispute between two citizens of China arising out of personal injury caused by one to the other in, say, Japan was not considered in evidence. The second sentence deals with a more particular case of civil relations involving foreigners. It applies only where the parties are nationals of the same country, or domiciled in the same country. It would have no application in the present case if, for example, OPC had been a Delaware corporation. (In argument it was assumed that the appellant, a Western Australian resident, and OPC, a Victorian corporation, were nationals of the same country. What would have happened if the laws of Victoria and Western Australia had been materially different was not considered.) Where both parties are nationals of the same country (relevantly, Australia), Art 146 says that the law of their own country *may* be applied.

9 McLure J, who gave the reasons of the Full Court, reasoned that this raised a question of renvoi; that Art 146 was a choice of law rule; that Australian law directed the Western Australian court to apply the law

of the PRC as the lex loci delicti (31); that the law of the PRC for that purpose did not include its choice of law rules; and that Art 146 was irrelevant. Her reasoning, which was supported by a body of learned opinion on the subject of renvoi, would have been exactly the same if the second sentence of Art 146 had been mandatory rather than permissive.

10 Subject to one qualification, there was no evidence as to any other laws of the PRC which affect the operation of the second sentence in Art 146. It was not shown that the Supreme People's Court had given any guidance on the matter. Perhaps the second sentence is what a common lawyer might call a flexible exception to the general principle stated in the first sentence (32). If it is, the evidence did not cast much light upon the considerations that would bring the exception into play. The qualification is that, at one stage in the course of his cross-examination, Mr Liu assented rather hesitantly to the proposition that, if it appeared just and reasonable, a court in Wuhan might treat Australian (presumably meaning Western Australian) law as applicable to the appellant's claim for damages against OPC. His primary position was that Art 146 was irrelevant. His reason for that was unclear, but it may have been that, like the Full Court, he regarded Chinese choice of law rules as irrelevant. If that were his reason, then it was a proposition of Australian law, upon which his opinion, whether right or wrong, was immaterial.

11 The rule of Australian law which directed McKechnie J to the lex loci delicti, the law of the PRC, did not require him to ignore the fact that the law of the PRC made special provision for claims for damages resulting from infringement of rights where both parties to the claim were foreigners and were also nationals of the same country. That the law of the PRC makes provision for such a case is not surprising. In a developing legal system and economy, where foreigners are brought into the country temporarily for special purposes, a decision that their civil relations might be governed by their own laws reflects an understandable policy. The Chinese authorities evidently consider that if, say, an Australian corporation, with Australian staff, is carrying out a construction project in China, it may be reasonable to decide the respective rights and obligations of the corporation, its staff, and their families, by reference to Australian law, assuming there is Australian law which is capable of application. (As it happens, in the present case McKechnie J ultimately decided that, apart from the limitation of actions question, there was no material difference between Western Australian law and the law of the PRC in their application to the facts. That aspect of his decision is not the subject of this appeal.)

12 There was no evidence to suggest that, as a matter of interpretation of Art 146, application of the second sentence would set up some sort

(31) *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.
(32) cf *Chaplin v Boys* [1971] AC 356; *Red Sea Insurance v Bouygues SA* [1995] 1 AC 190.

of infinite regression by requiring a Chinese court which invoked that sentence to accept, as it were, a reference back from Australia. The word "applied", in both the first and the second sentences of Art 146, appears to refer to the norms of conduct, the obligations and liabilities, which will be determinative of the claim. Furthermore, it was not suggested in evidence that Art 136, the limitation provision, would anticipate and therefore defeat the application of Art 146. Mr Liu said that Art 136 was a matter of substantive law (subject to whatever might be the effect of Art 137), and the argument proceeded on the basis that if the law of the PRC applied, it included Art 136, but that if the law of Western Australia applied it was the Western Australian limitation period (which did not present a problem for the appellant) that was relevant.

13 The argument that the decision of this Court in *Regie Nationale des Usines Renault SA v Zhang* (33) directed McKechnie J to the General Principles excluding Ch VIII, that is to say, that the relevant law of the PRC should be taken to exclude the special provisions made with respect to foreigners in the PRC, was said to have the merit of certainty, and consistency with principle. This may be doubted. If it be accepted that one object of a choice of law rule is to avoid difference in outcomes according to selection of forum, then the objective ought to be to have an Australian court decide the present case in the same way as it would be decided in China. Directing the Western Australian court to the General Principles, but requiring it to ignore Ch VIII, if the appellant's argument about Art 146 is otherwise correct, would appear to ensure difference of outcome. As has been noted, McLure J's reasoning did not turn on the permissive aspect of Art 146. The reasoning would have been the same if Art 146 had clearly directed that, in a case between two foreigners of the same nationality, their law was to be applied. In that event, it would have been clear beyond argument that a Chinese court would apply Western Australian law, but, on the approach that a Western Australian court must ignore Ch VIII, a Western Australian court would apply the purely domestic law of the PRC. Why Australia's choice of law rule should seek such a result is difficult to see. I am unable to accept that conclusion.

14 There are, however, two further questions, both of which arise from the permissive nature of the second sentence of Art 146.

15 First, is the second sentence of Art 146 a legal rule of a kind that is capable of being picked up by an Australian choice of law rule that directs a Western Australian court to the law of the PRC? Australian law required the Western Australian court to consider the rights and obligations between the appellant and OPC by looking to the law of the PRC. When it looked, the Western Australian court found that, in a court in China, the law of Western Australia "may … be applied". (The case was argued in the Supreme Court of Western Australia and in this

(33) (2002) 210 CLR 491.

Court, and the reasoning of the judges in the Supreme Court of Western Australia proceeded, on the assumption that "may also be applied" means "may be applied in place of PRC law".) The law of the PRC, in Ch VIII, makes special provisions concerning "civil relations involving foreigners". One such provision is that if both parties to a claim for damages resulting from an infringement of rights are nationals of the same country, the law of their own country may be applied by a Chinese court to decide that claim. It says nothing further to explain the word "may". The substratum of fact upon which the appellant's claim was based remained constant, and existed independently of the laws of either jurisdiction. Let it be assumed (contrary to the view of McKechnie J) that the legal incidents of the relations arising out of those facts according to the law of Western Australia were materially different from the legal incidents of the relations that would have existed had the parties been PRC nationals, or even nationals of two different foreign countries. Even so, the parties were both nationals of Australia, and the law of the PRC provided that, in such a circumstance, a Chinese court was empowered to resolve their dispute by the application of Western Australian law. The Western Australian court would then be faced with a question whether a Chinese court would exercise that power. That, for the Western Australian court, would be a question of fact. If the Western Australian court decided that question in the affirmative, then according to Australian choice of law rules it should apply the law of Western Australia as governing the legal incidents of the relations between the parties.

16 That raises the second question. Was the Western Australian court entitled to decide that question of fact in the affirmative? I find no assistance in a general presumption that, in the absence of evidence to the contrary, foreign law is the same as Australian law. That might be a rational and practical aid to decision-making in many cases, but, whatever its precise extent, the principle seems to me to be devoid of content in this case. The question is not sufficiently described, in abstract terms, as a question of the construction of Art 146. The question is one as to the considerations that are relevant to a decision to invoke the second sentence of Art 146 of the General Principles. There is no Australian law on that subject. In particular, Australian law does not accept a flexible exception to its rule that the lex loci delicti governs foreign torts. The first sentence of Art 146 accords with Australian choice of law rules. The second sentence does not. The principles governing its operation cannot be assumed to be the same as some corresponding Australian principle. The evidentiary presumption is only of assistance in a case where it can be given practical content. This, in my view, is not such a case.

17 The appellant, then, is thrown back on the evidence of Mr Liu. It was barely sufficient, but it is just enough to support McKechnie J's conclusion. It is not inherently implausible that Art 146 calls for a consideration of what is just and reasonable in the circumstances of the

case. Furthermore, the present is a case where the relations between the parties were established in Australia (which must be what McKechnie J meant when he said the duty of care was assumed here), the Chinese authorities are totally unaffected by the outcome of the litigation, no Chinese interests are involved, and there appears to be no reason of policy for a Chinese court to resist the proposition that the rights and obligations of the parties should be determined according to the law of Western Australia, assuming the court were sufficiently informed of the law. No one has suggested that Art 150 would apply.

18 The appeal should be allowed. I agree with the further orders proposed by Gummow and Hayne JJ.

19 McHUGH J. The question presented in this case is whether the doctrine of renvoi is a part of the Australian choice of law rule in cases of tort. Specifically, it requires the Court to determine what law an Australian court should apply where: the lex fori's choice of law rules select a foreign law to resolve a particular legal question that is relevant to a dispute; the foreign law would choose not to answer the question by its own law; and the foreign law would answer the question by reference to the lex fori or the law of another legal system.

Statement of the case

20 In June 1997, the appellant, Mrs Barbara Neilson, sued the first respondent, Overseas Projects Corporation of Victoria Ltd (OPC), in the Supreme Court of Western Australia, in respect of injury she sustained while living in China. Mrs Neilson was born in the United Kingdom but is ordinarily resident in Western Australia. OPC is a company that is owned by the State of Victoria. Its registered office and principal place of business are in Victoria. The second respondent, Mercantile Mutual Insurance (Australia) Ltd (Mercantile), was OPC's public liability insurer. OPC joined Mercantile as a third party in the action, claiming that Mercantile was bound to indemnify it against any liability owed by OPC to Mrs Neilson.

21 In the action, Mrs Neilson alleged that she suffered injury as a result of OPC's breach of a contract and breach of a common law duty of care that it owed to her. In para 30(b)(1) of its defence, OPC pleaded that the law that was applicable to resolve the claim was "the law of Wuhan, China". The trial judge rejected this contention of OPC. He also rejected the claim in contract but found that Mrs Neilson had been injured by reason of OPC's negligence. His Honour awarded her damages of $300,000, an amount on which the parties had agreed, and costs. His Honour also held that Mercantile was bound to indemnify OPC in respect of this judgment. The Full Court of the Supreme Court allowed the appeal, brought by Mercantile, in part on the ground that

"the trial judge erred in applying Australian domestic law to Mrs Neilson's tort claim" (34).

The material facts and findings

22 In October 1991, Mrs Neilson suffered severe injury when she fell down a flight of stairs in a double storey unit in the People's Republic of China. At the time, she lived in China with her husband. OPC employed Mrs Neilson's husband for a two-year term as a consultant under a contract, made in Victoria, which required him to live and work in Wuhan, China. Under the contract, OPC agreed to provide accommodation for Mr Neilson. The contract also expressly provided that Mrs Neilson could accompany her husband to Wuhan. Mr and Mrs Neilson were living in a unit provided by OPC when Mrs Neilson fell down the stairs and injured herself. The People's Republic of China assumed responsibility for building and maintaining the units.

23 About 4 am on the day she was injured, Mrs Neilson fell over the edge of stairs while going to get a drink. The stairs had no balustrade. She suffered injuries to her head and back. She was in hospital for about eighteen days.

The pleadings and evidence of foreign law

24 In its defence, OPC gave three reasons why Mrs Neilson's claim was "not actionable" under Chinese law. First, under Arts 122 and 126 of the General Principles of Civil Law of the People's Republic of China (the General Principles), only the "owner, controller or manager of the building" is liable for "injuries sustained in relation to buildings". Secondly, under Art 135 of the General Principles, the limitation period for "protection of civil rights is two years from the date of the injuries being sustained". But under Art 136 of the General Principles, the limitation period for "personal injuries is one year from the date of the injuries being sustained." Article 136 declares: "In the following cases, the period of limitation of actions shall be one year: (i) demand for compensation for bodily harm." Thirdly, Arts 119, 143, 144, 145 and 146 limited the "maximum damages" that Mrs Neilson could recover for past and future economic loss.

25 At the trial, OPC tendered an English translation of the General Principles. Chapter VIII of the General Principles is headed "Application of the Law to Civil Relations involving Foreigners" and Art 142 states that "[t]he application of the law to civil relations involving foreigners shall be determined by the provisions of this Chapter." Article 146 of the General Principles declares:

> "With regard to compensation for damages resulting from an infringement of rights, the law of the place in which the infringement occurred shall be applied. If both parties are nationals

(34) *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206 at 216 [48].

of the same country or domiciled in the same country, the law of their own country or of their place of domicile may also be applied."

26 Article 150 of the General Principles contains a caveat to Art 146. It states:

"Where this Chapter provides for the application of the law of a foreign country or of international practice, this must not be contrary to the public interest of the People's Republic of China."

27 OPC also led evidence from an expert witness, Mr Hongliang Liu, as to Chinese law.

Decision of trial judge

28 The trial judge, McKechnie J, referred to the choice of law rule that this Court articulated in *John Pfeiffer Pty Ltd v Rogerson* (35) and applied to international torts in *Regie Nationale des Usines Renault SA v Zhang* (36). His Honour held that it required him to apply the lex loci delicti to "all questions of substance to be determined in a proceeding arising from [a] … tort" (37). McKechnie J found that Wuhan was the place of the tort, and Chinese law the applicable law, because:

"although a duty of care arose in Australia, breach of that duty of care did not give rise to any cause for complaint until 6 October 1991 when Mrs Neilson fell down the stairs in Wuhan. That was when the wrong crystallised by the infliction of damage."

29 His Honour found that the General Principles applied to foreign nationals. He held that, under Art 106 of the General Principles, OPC assumed liability for "allowing Mr and Mrs Neilson to continue to live in the apartment which had this inherent danger". The danger arose from the lack of a balustrade at the top of the stairwell. He found that Mrs Neilson was not guilty of contributory negligence and awarded her the agreed damages of $300,000.

30 McKechnie J found that, under Art 137, the limitation periods enumerated in Arts 135 and 136 of the General Principles should be extended. However, at the end of this analysis, his Honour also found that Art 146 "gives me a right to choose to apply the law of Australia because both parties are nationals of Australia." McKechnie J then applied principles of Australian negligence law and found that OPC breached the duty of care that it owed Mrs Neilson as landlord and that Mrs Neilson was entitled to judgment in the sum of $300,000.

Decision of the Full Court of the Supreme Court

31 The Full Court allowed the appeal of the second respondent in part on the ground that "the trial judge erred in applying Australian domestic law to Mrs Neilson's tort claim" (38). This conclusion was reached on the basis that "the reasoning of the High Court in *Pfeiffer*

(35) (2000) 203 CLR 503.
(36) (2002) 210 CLR 491.
(37) (2000) 203 CLR 503 at 544 [102].
(38) *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206 at 216 [48].

and *Zhang* is inconsistent with the application of the renvoi doctrine to international torts" (39) and because "[t]he application of the double renvoi doctrine to international torts would not promote certainty and predictability" given that (40): "[i]t would require identification of Australia's choice of law rules, the foreign country's choice of law rules and its attitude to renvoi, from which a conclusion can then be reached as to the domestic law of which country applies."

32 Applying Chinese law, the Court dismissed Mrs Neilson's claim against OPC on the ground that Mrs Neilson's claim was "time barred". The Court held "there were no special circumstances within the meaning of Art 137 that warranted the extension of the one year time limitation imposed by Art 136 of the General Principles" (41).

The issue

33 The issue for determination is whether it is the law of Australia or China that sets the limitation period for the bringing of Mrs Neilson's claim in tort. If Australian law applies, then Mrs Neilson's claim was brought within time and the trial judge's order that OPC pay Mrs Neilson the sum of $300,000 should be restored. If Chinese law applies, then Mrs Neilson's claim is statute barred. Article 137 of the General Principles states that "special circumstances … [may] extend the period of limitation of actions". However, there is no ground on which to challenge the Full Court's finding that "there were no special circumstances within the meaning of Art 137" (42). The Full Court held that "the trial judge erred in rejecting the evidence of Mr Liu on the interpretation of Art 137 of the General Principles" (43). Mrs Neilson submitted to this Court that "it is not clear whether [the circumstances that Mr Liu outlined] were exhaustive of the possible special circumstances or merely a paradigm case" (44). But the burden of making clear whether there were additional "possible special circumstances" fell on Mrs Neilson. In failing to discharge that burden at trial, she cannot now rely on Art 137 of the General Principles.

34 Mrs Neilson argues that Australian law applies. This argument entails two propositions: one of fact and one of law. First, as to the proposition of fact, Mrs Neilson contends that Art 146 of the General Principles is a choice of law rule that chooses "the law of … [the parties'] place of domicile" as the law that is applicable to this dispute. On its face, Art 146 is undoubtedly a choice of law rule. But it is a

(39) *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206 at 216 [48].
(40) *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206 at 216 [47].
(41) *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206 at 220 [64].
(42) *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206 at 220 [64].
(43) *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206 at 220 [64].
(44) [2005] HCATrans 192 at l 455.

choice of law rule with a flexible exception. Article 146 mandates that the law that "*shall* be applied" is "the law of the place in which the infringement occurred". However, Art 146 also states that, "[i]f both parties are nationals of the same country or domiciled in the same country, the law of [the parties'] own country or of their place of domicile *may* also be applied". This discretionary aspect makes China's choice of law rule different from the choice of law rules that apply in Australia. In *Zhang* (45), this Court rejected the argument that our choice of law rules in international tort cases should be subject to a flexible exception.

35 The evidence is unclear as to how the Chinese courts would exercise the flexible exception that is entailed in the word "may". There are no findings of fact from the trial judge as to whether the Chinese courts would exercise the flexible exception in this particular set of circumstances. This gap in the evidence means that Mrs Neilson failed to discharge the burden that rested on her, *as the party seeking to make Australian law applicable* (46), to prove that the Chinese choice of law rule, in this case, would choose Australian law as the applicable law. That "the law of … [the parties'] place of domicile *may* also be applied" does not establish, on the balance of probabilities, that that law *would* be applied. Without any additional evidence as to the manner in which this flexible exception is exercised by Chinese courts, Mrs Neilson has failed to discharge the persuasive burden of proof.

36 In their judgment, Gummow and Hayne JJ seek to overcome this deficiency of evidence by holding that, in the absence of evidence, a presumption exists that a Chinese court would exercise the discretion in the same way that an Australian court would exercise a discretion under a statute. But that approach divorces the discretion from its context. It treats the exercise of the discretion as an abstract question divorced from its context in a choice of law rule. Article 146 is a choice of law rule with a flexible exception. It has no counterpart in Australian law. Its tender negated any presumption that the legal content of Art 146 is the same as the Australian law on that subject. The discretion contained in Art 146 concerns how a choice of law rule should be applied. It constitutes a flexible exception to the choice of law rule otherwise applicable. Hence, the discretionary aspect of the Article is part of the content of the choice of law rule, not an abstract jurisprudential concept. It is part and parcel of a rule of law that has no counterpart in Australian law. It surely cannot be right to hold that there is a presumption that Australian courts would exercise a

(45) (2002) 210 CLR 491.

(46) (2002) 210 CLR 491 at 518 [70]; *Standard Bank of Canada v Wildey* (1919) 19 SR (NSW) 384 at 390-391; *BP Exploration Co (Libya) Ltd v Hunt* [1980] 1 NSWLR 496 at 503 [24]; *Walker v WA Pickles Pty Ltd* [1980] 2 NSWLR 281 at 285 [5]; *Spain (King of) v Machado* (1827) 4 Russ 225 at 239 [38 ER 790 at 795]; *Lloyd v Guibert* (1865) LR 1 QB 115 at 129; *Szechter v Szechter* [1971] P 286 at 296; *Cross on Evidence* (looseleaf service), vol 1, para [41005].

discretion in accordance with Australian law in respect of a foreign rule of law that is contrary to the Australian rule on the subject. Moreover, for the reasons that Kirby J gives in his reasons for judgment, I am far from convinced that a Chinese court would apply the discretion in Mrs Neilson's favour.

37 Independently of the considerations in the last paragraph, Mrs Neilson cannot rely on the evidential presumption that Chinese law is the same as the lex fori to fill this gap in the evidence for two reasons. First, the evidential presumption is "said to operate against, not in favour, of the party whose obligation it is to prove foreign law" (47). Secondly, by tendering Art 146 of the General Principles in evidence, Mrs Neilson satisfied the evidential – even if not the persuasive – burden of proof as to whether the Chinese court would, or would not, exercise the flexible exception in favour of Mrs Neilson. That is, Mrs Neilson "adduc[ed] evidence sufficient to justify consideration of [the] particular issue" (48) as to the law that the Chinese courts would apply to this case. If the evidential burden of proof as to foreign law is satisfied, then the forum trial court is in a position to make factual findings as to the content of the foreign law. If the party on whom the burden rests fails to satisfy the persuasive burden of proving that a foreign choice of law rule is applicable to the party's case, it may be that the evidence that has been tendered is sufficient to satisfy the trial court that, in accordance with the contentions of the opposing party, another choice of law rule is applicable. In this case, the following parts of Art 146 of the General Principles prove, on the balance of probabilities, that a Chinese court would apply to this case, not Australian law, but Chinese law:

- The declaration that "the law of the place in which the infringement occurred *shall* be applied" persuasively indicates that generally this is the applicable choice of law rather than the exception that "the law of … [the parties'] place of domicile *may* also be applied". Article 146 is found in Ch VIII of the General Principles. That Chapter is headed "Application of the Law to Civil Relations involving Foreigners". The opening words of Art 146, therefore, state the general rule that is applicable to cases involving foreigners.
- The terms of Art 146 of the General Principles indicate that the law of the parties' domicile is not applied *instead of* the law of the place of the infringement. Rather, that "the law of … [the parties'] place of domicile *may also* be applied" indicates that the lex domicil is applicable only to a case where the laws of the place of the infringement and the parties' domicile may be applied cumulatively. In the context of Art 146, the adverb "also" indicates addition not

(47) *Cross on Evidence* (looseleaf service), vol 1, para [41005].
(48) *Cross and Tapper on Evidence*, 10th ed (2004), p 166.

substitution. Where, for example, the law of domicile provides the plaintiff with a number of causes of action *alternative* to those available under the law of the place of infringement, Art 146 permits the law of the parties' domicile to be applied. Similarly, it permits the law of domicile to be applied where that law provides the defendant with defences alternative to those available under the law of the place of infringement. But in both cases, the law of domicile is applied in addition to the law of the place of infringement. Where the laws specify different limitation periods, however, the laws are not alternatives. Consequently, it is not possible for the law of the parties' domicile to "also be applied". In such cases – and this is one of them – the law of the place in which the infringement occurred "shall be applied" to the exclusion of the law of the parties' domicile.

38 Let it be assumed in Mrs Neilson's favour, however, that the discretion in Art 146 would be exercised in this set of circumstances to make Australian law applicable, then a further issue arises. Mrs Neilson's second submission is that the lex loci delicti comprises the foreign law's choice of law rule, ie Art 146 of the General Principles, so that an application of the lex loci delicti entails an application of "the law of … [the parties'] place of domicile". She contends that an application of Australian law as the law of Mrs Neilson's and OPC's "place of domicile" does not entail a re-application of Australian choice of law rules for two alternate reasons. First, after having selected the Chinese law as the lex loci delicti, the choice of law rules were "spent" and "had no work to do". Secondly, for reasons of pragmatism, the doctrine of renvoi should be limited to single renvoi. The respondents submit that Chinese law applies because the doctrine of renvoi does not apply to international torts.

39 The issue that requires resolution is not whether choice of law rules form part of the lex loci delicti. That is a question of fact. On the evidence, there is no doubt that Art 146 of the General Principles is as much a part of Chinese law as Arts 135 and 136, which fix limitation periods. The issue is whether choice of law rules form part of the category of the lex loci delicti's laws that the forum court makes applicable to the characterised issue of law. In my opinion, they do not. This conclusion follows from the following propositions:

(i) Except in cases where evidence is tendered to show that the lex causae rejects the doctrine of total renvoi, applying the "whole" of the lex causae inevitably produces an "infinite regression". (Under the total renvoi doctrine, the forum court's own choice of law rule entails the application of the entirety of the lex causae, which includes choice of law rules and the lex causae's approach to renvoi.)

(ii) The "infinite regression" can be interrupted only by accepting that the issue cannot be resolved by reference to the entirety of the foreign law and sacrificing logic to concerns of pragmatism.

(iii) The point at which that sacrifice is best made, and the foreign law categorised into "applicable" and "inapplicable" foreign law, is fixed by reference to the purpose of choice of law rules. That purpose is to determine which country's legal rules govern the substantive issues in the case. It is furthered by rejecting the doctrine of renvoi and not applying the single renvoi. (Under the single renvoi doctrine, the forum court regards its reference to the law of a foreign jurisdiction as a reference to the choice of law rules of that jurisdiction. It then treats the reference by the choice of law rules of that foreign jurisdiction as a reference to the substantive law of the legal system to which those choice of rules refer the case. This legal system may be that of the forum court or a third legal system.)

(i) The "infinite regression" of renvoi

40 The doctrine of renvoi is infamous for infinitely requiring the forum court to apply choice of law rules, but to no end. The problem of the "infinite regression" arises when: "(a) the choice of law rule of the lex fori makes the lex causae the applicable law; (b) the choice of law rule of the lex causae, as proved or presumed, makes the lex fori the applicable law (49); and (c) the lex fori has a doctrine of total renvoi."

41 When these circumstances arise, the forum's choice of law rule requires the forum court to apply the choice of law rules of the lex causae. And those choice of law rules of the lex causae require the forum court to apply the choice of law rules of the lex fori. And so "applicable law" goes back and forth on an endless journey. The result is that it is impossible to identify which law resolves the issue that is in dispute.

42 There is only one circumstance where, in proceedings in which choice of law is an issue, the forum's acceptance of the total renvoi doctrine with respect to a choice of law rule will not cause this "hall of mirrors". That circumstance is when a party tenders evidence that shows, to the requisite standard of proof (50), that the lex causae rejects the doctrine of renvoi, or has a doctrine of only single renvoi, with respect to the particular choice of law rule. In the first instance,

(49) If the lex causae chooses the law of a third place, then the "infinite regression" arises if the law of that place chooses the lex causae and both laws apply the doctrine of total renvoi.

(50) As already discussed, the onus rests on the party that contends that the foreign law's doctrine of renvoi differs from the lex fori's; *Zhang* (2002) 210 CLR 491 at 518 [70]; *Lloyd v Guibert* (1865) LR 1 QB 115 at 129; *Wright, Heaton & Co v Barrett* (1892) 13 LR (NSW) 206 at 210; *BP Exploration Co (Libya) Ltd v Hunt* [1980] 1 NSWLR 496 at 503 [24]; *Szechter v Szechter* [1971] P 286 at 296; *Cross on Evidence* (looseleaf service), vol 1, para [41005].

the forum court applies the choice of law rules of the lex causae so as to identify the lex fori as the applicable law and makes no reference to the lex fori's choice of law rules. Only the "substantive" law of the lex fori is applicable. In the latter instance, the forum court goes through the same process, but with one additional step. The court must apply the lex fori's choice of law rules for a second time, but this time ignore the lex causae's choice of law rules. Only the "substantive" law of the lex causae is applicable the second time around.

43 If a party tenders evidence that shows that the lex causae applies a doctrine of total renvoi to its choice of law rule, then the lex fori's own commitment to total renvoi will require the forum court to embark down the long road to nowhere. This is also the case when, as is most common and as occurred in the instant case, the parties tender no evidence as to the applicability of renvoi to the lex causae's choice of law rule. This is because, in the absence of evidence as to foreign law, the forum court "presumes" that foreign law is the same as the lex fori (51). Thus, the forum court must presume that the lex causae, like the lex fori, applies a doctrine of total renvoi to its choice of law rule.

44 In their joint judgment, Gummow and Hayne JJ hold that "Art 146 is not to be understood as permitting, let alone requiring, a Chinese court to have regard to Australian choice of law rules" because "[i]t was not contended, and *there was no evidence*, that Art 146 was to be understood as having that effect" (52). With great respect, that conclusion does not sit easily with their Honours' conclusion that "the lex loci delicti is the whole of the law of that place" (53), on the one hand, and their Honours' application of the evidential presumption as to the state of foreign law on the other. The reason for the uneasiness is that no evidence was tendered before McKechnie J, and McKechnie J made no findings of fact, as to the operation of renvoi with respect to the Chinese choice of law rule in tort. The General Principles provide no foundation for concluding that the reference in Art 146 to "the law of their own country or of their place of domicile" is a reference only to that law's "substantive" law and not to its choice of law rules. At all events, the text and context of the General Principles do not establish it clearly enough to satisfy the evidential or persuasive burden of proving foreign law.

(51) *Wright, Heaton & Co v Barrett* (1892) 13 LR (NSW) 206 at 210; *Bowden Bros & Co v Imperial Marine & Transport Insurance Co* (1905) 5 SR (NSW) 614 at 616; *BP Exploration Co (Libya) Ltd v Hunt* [1980] 1 NSWLR 496 at 503 [24]; *Broken Hill Pty Co Ltd v Federal Commissioner of Taxation* (1999) 99 ATC 5193 at 5,214 [85]; *Lloyd v Guibert* (1865) LR 1 QB 115 at 129; *Bumper Development Corporation v Commissioner of Police of the Metropolis* [1991] 1 WLR 1362 at 1368; [1991] 4 All ER 638 at 644; *Mount Cook (Northland) Ltd v Swedish Motors Ltd* [1986] 1 NZLR 720 at 726-727; *Cross on Evidence*, 7th Aust ed (2004), pp 1358-1360 [41005].

(52) Reasons of Gummow and Hayne JJ at 373-374 [131] (emphasis added).

(53) Reasons of Gummow and Hayne JJ at 367 [102].

45 In the absence of evidence, this Court would ordinarily assume that Chinese law is identical to Australian law. On that hypothesis and for the purposes of resolving this appeal, the Court would presume that Chinese law concerning the applicability of renvoi to the choice of law rule in tort was the same as under Australian law. Hence, if the Australian choice of law in tort selects "the whole of the law of that place", then the Chinese choice of law in tort would be presumed to select also "the whole of the law" of its chosen country.

46 The end result in cases like this one is that this Court can only interrupt the "infinite regression" and reach a decision if the Court rejects the doctrine of total renvoi. Accordingly, the doctrine of total renvoi should be rejected, not only for cases such as the present, but for all other cases, including those in which the foreign law's approach to renvoi is provable.

47 The remaining options, then, are either to apply a doctrine of single renvoi or reject the entire doctrine of renvoi.

(ii) The logical impossibility of applying the entirety of the lex loci delicti

48 Regardless of whether this Court rejects the entire doctrine of renvoi or adopts a doctrine of single renvoi, the Court can resolve the appeal only by applying less than the entirety of (what the evidence and the evidential presumptions demonstrate is) Chinese law. I cannot accept, therefore, that this Court can fully "take account of what the foreign jurisdiction would do if the matter were to be litigated there" (54).

49 Mrs Neilson contends that the Australian choice of law rule in tort requires the forum court to apply all laws of the lex loci delicti, except for laws that the forum court classifies as renvoi laws; ie laws that define the scope of the lex causae's choice of law rules. She relies on a dictum of Scrutton LJ in *Casdagli v Casdagli* (55). His Lordship said that, where the choice of law rules of the lex causae require the application of the lex fori, the lex fori:

> "may well apply its own law as to the subject matter of dispute, being that which the country of domicil [the lex causae] would apply, but not that part of it which would remit the matter to the law of domicil, which part would have spent its operation in the first remittance."

50 This reasoning applies the doctrine of single renvoi. It requires the forum court to apply the lex causae's choice of law rules. But it does so without regard to whether the lex causae would also require the application of the whole of its chosen law. It is not a modified doctrine of total renvoi because it is not the lex causae, but the lex fori, that considers the choice of law rules of the lex fori to have "spent its operation".

(54) Reasons of Gummow and Hayne JJ at 368 [107].
(55) [1918] P 89 at 111.

51 OPC rejects the doctrine of renvoi and classifies Chinese law differently. OPC submits that the Australian choice of law rule in tort requires the forum court to apply all laws of the lex loci delicti. The only exception is laws that the forum court classifies as choice of law rules; ie laws that identify the circumstances in which the rest of its laws are inapplicable and the laws of another place are applicable.

52 Given that, to reach a decision in this case, the Court must categorise Chinese law and apply something less than its whole, the question to be answered is: how should Chinese law be categorised? That is, which Chinese laws should this Court exclude from the bundle of laws that apply to the resolution of this appeal?

(iii) Rejecting renvoi or adopting single renvoi?

53 Where the forum's choice of law rules make foreign law applicable to a case, it seems logical to conclude that those choice of law rules should be applied in the way that causes the foreign law to be applied most fully. Thus, to ascertain whether a doctrine of renvoi should be rejected, or a doctrine of single renvoi should be applied, the scope of the foreign law that each approach makes applicable to the contentious issue needs to be compared.

54 Foreign law is applied during the choice of law process in two different spheres. First, it is applied during the "discourse" between the legal systems. That is, it is applied in the process through which the forum court refers to the foreign law in order to identify the law that is determinative of the issue. Secondly, the lex causae is applied to determine the issue. A doctrine of no renvoi and a doctrine of single renvoi differ in that the latter doctrine causes the foreign law to be more fully applicable during the "discourse", but the former doctrine causes the foreign law to be more fully applicable to determine the issue.

(a) No renvoi

55 If the doctrine of renvoi is made inapplicable to the choice of law rule in tort, then none of the lex loci delicti is applied during the discourse. This is because the forum court ignores the choice of law rules of the lex loci delicti. However, the end result of this choice of law discourse is that the forum court applies the laws that the lex loci delicti would have applied to a set of facts that is identical to the instant case in all respects. There is one exception and that is where the parties or the events of the case were connected to another legal system. In this case, the forum court's rejection of renvoi would cause it to apply Art 136 of the General Principles to fix the period of limitations in which Mrs Neilson needed to have brought her claim. On Mrs Neilson's submission as to the meaning of Art 146 of the General Principles, the Chinese courts would also have applied Art 136 to a case like hers, as long as the plaintiff and defendant were not domiciled in or nationals of the same country. Thus, if the doctrine of renvoi is rejected, the result is that the forum court applies the law that the lex

loci delicti would apply to a set of facts that are analogous to, but not congruous with, the facts of the instant case.

(b) Single renvoi

56 If the doctrine of single renvoi is applied to the choice of law rule in tort, then the forum court applies all the laws that the lex loci delicti would apply to the set of facts in the instant case during the choice of law discourse. Again there is an exception: it is the law with respect to renvoi. But the end result of this choice of law process is that the forum court applies the laws that the lex loci delicti would not have applied to these facts or to any other set of facts if the lex loci delicti had, in fact, been the lex fori. This is because the doctrine of single renvoi precludes the forum court from taking notice of the lex loci delicti's approach to renvoi and from applying the law that that approach would select.

57 If, in this case, the forum court is an Australian court, then the forum court's application of a doctrine of single renvoi would select Australian law (without its conflict laws) to determine the issue. This is because the doctrine of single renvoi requires the Australian court to apply the Chinese law's (ie the lex loci delicti's) choice of law rules, which select, under Mrs Neilson's construction of Art 146 of the General Principles, Australian law as "the law of [the parties'] own country or … domicile". However, the Australian court cannot have regard to whether Chinese law would also require the application of the whole of the law of the parties' country or domicile.

58 The problem with this result is that there is no factual circumstance in which a Chinese court would apply Australian law to determine the issue *if a Chinese court was the forum court*. If the plaintiff and defendant were domiciled in or nationals of the same country, then Art 146 of the General Principles states that "the law of their own country or of their place of domicile may also be applied". In this case, the absence of evidence as to the way that Chinese law defines the reference in Art 146 to "the *law* of their own country or of their place of domicile" means that the Chinese courts must be presumed to have the same approach to renvoi in tort as the Australian courts; ie adopt a doctrine of single renvoi. Under this doctrine, the Chinese forum court would take notice of the lex domicil's (ie Australian law's) choice of law rules. As the Australian choice of law rules select Chinese law, the result would be that Chinese law (without its conflicts laws) would be applicable to determine the result. Thus, an application by the Australian courts of a doctrine of single renvoi results in the Australian courts applying a set of laws that is entirely different from the set of laws that (an Australian court presumes) would be applied if the action were heard in China. This result is clearly contrary to the aim of Australian conflicts laws, which is to take account of what the foreign jurisdiction would do.

59 In contrast, rejecting the renvoi doctrine enables the forum court to apply the law of the lex loci delicti as fully as possible. Accordingly, it

is the preferable approach given the reasoning in our decisions in *Pfeiffer* (56) and *Zhang* (57). The choice of law rule in tort that was articulated in *Pfeiffer* (58) and applied to international torts in *Zhang* (59) requires the forum court to apply the law of the lex loci delicti, but not those laws that merely "direct[] which law is applicable to a given set of facts" (60). The result is that, in this case, Art 146 of the General Principles – which is a law that permits "the law of the place in which the infringement occurred" or "the law of [the parties'] own country or of their place of domicile" to be applied – is not applied by the forum court. Article 146 then cannot be invoked to resolve the issue as to the period of limitations in which the appellant needed to have brought her claim. Article 136 of the General Principles had to be applied by the forum court – the Supreme Court of Western Australia – with the result that Mrs Neilson's claim was statute barred. It follows that the decision of the Full Court must be upheld.

60 On the view that the majority in this Court take of the construction of Art 146, my conclusion has the result that Mrs Neilson loses an action that, on the majority's construction of Art 146, would have succeeded if the case had been commenced and heard in China. But that result is achieved by placing a construction on Art 146 that, with great respect, I think is unjustified. As I have indicated, it is reached only by concluding that "the law of their own country or of their place of domicile" in that Article means the substantive law and not the whole law of the parties' country or place of domicile. There is no evidence to support that construction of Chinese law – which after all is a question of fact – and it runs counter to the presumption, in the absence of evidence, that the Chinese choice of law rules are the same as the Australian choice of law rules. And, as I have indicated, even if the construction that the majority have placed on Art 146 is accepted, I am far from convinced that Mrs Neilson has established that a Chinese court would have applied the substantive law of Australia to resolve the dispute.

Order

61 The appeal must be dismissed with costs.

62 GUMMOW AND HAYNE JJ. When a tort or delict is committed in a place outside the area over which a court has jurisdiction, what legal significance is the common law to give to the fact of it having been committed in a foreign place? For many years, the common law attached only limited significance to that fact. It applied the "double

(56) (2000) 203 CLR 503.
(57) (2002) 210 CLR 491.
(58) (2000) 203 CLR 503.
(59) (2002) 210 CLR 491.
(60) Mann, "Statutes and the Conflict of Laws", *British Year Book of International Law*, vol 46 (1973) 117, at p 118.

actionability" rule. That rule, established in 1870 (61), was that an act done in a foreign country was a tort, actionable as such, only if it was both actionable as a tort according to the law of the forum and "not justifiable" by the law of the place where it was done. If those tests were met, the rights and duties of the parties were to be determined according to the law of the forum (62).

63 In 2000, in *John Pfeiffer Pty Ltd v Rogerson* (63), this Court restated the common law choice of law rule to be applied in Australian torts involving an interstate element. The Court held that, in *intranational* torts, the law governing all questions of substance was the law of the place of commission of the tort (the lex loci delicti). In 2002, in *Regie Nationale des Usines Renault SA v Zhang* (64), this Court held that the substantive law for the determination of rights and liabilities in respect of *foreign* torts was also the lex loci delicti.

64 The double actionability rule now has no application in Australia to intranational (65) or foreign (66) torts. No exception, flexible or otherwise, is recognised (67) to the rule that the lex loci delicti is to be applied to determine substantive questions in both intranational torts and foreign torts.

65 The particular issues which must be examined in this appeal concern a foreign tort. They stem from one fundamental question. What is meant by the lex loci delicti? In particular, what is to be done when the law of the place of commission of the tort would apply the law of a different place because it attaches significance to a particular feature of the factual circumstances such as the nationality or domicile of one or more of the parties? That is, what is to be done when Australian law chooses the place where the tort is committed as the relevant connecting factor, but the law of that place treats another connecting factor, such as nationality or domicile, as determining the applicable law?

66 The parties to the appeal proffered different answers to these questions. They agreed, however, upon two points. First, there is no determinative judicial authority. Secondly, the answers to the questions that have been identified are to be provided by considerations of basic principle, not by simply pointing to the fact that Australian law chooses the law of the place of commission of the tort. Noting that Australian law makes that choice does no more than pose the questions; it does

(61) *Phillips v Eyre* (1870) LR 6 QB 1 at 28-29.
(62) *Koop v Bebb* (1951) 84 CLR 629.
(63) (2000) 203 CLR 503.
(64) (2002) 210 CLR 491.
(65) *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 542 [96] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; at 546-547 [109]-[113] per Kirby J.
(66) *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 515 [60] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; at 534-535 [121] per Kirby J.
(67) cf *Chaplin v Boys* [1971] AC 356.

not answer them. As will appear, the answers to be given to the questions require the appeal to be allowed.

The essential facts

67 The appellant, a long-term resident of Western Australia, was the wife of an employee of the first respondent (OPC), a company owned by the State of Victoria and having its registered office and principal place of business in that State. The appellant's husband was employed to work in Wuhan, in the People's Republic of China. The husband was required to live in an apartment provided to him by OPC. The appellant accompanied her husband to Wuhan. Before leaving for Wuhan the appellant agreed to do some work as personal assistant to the director of the programme being undertaken by OPC in Wuhan. In Wuhan, the appellant and her husband lived in the apartment provided by OPC.

68 In October 1991, the appellant fell down stairs in the apartment and was injured. More than five years after the accident, in June 1997, the appellant and her husband sued OPC in the Supreme Court of Western Australia. The appellant claimed damages for the personal injuries she had suffered. Her statement of claim made no reference to the law of China. She alleged several causes of action, including breach of contract and negligence, but these reasons need deal only with her claim in negligence. The other claims made against OPC failed at trial and are not pursued further in this Court.

69 The second respondent to the appeal, Mercantile Mutual Insurance (Australia) Ltd (the insurer), was OPC's public liability insurer. It was originally joined as a third party to the proceedings. In this Court, OPC and the insurer were named as respondents and were jointly represented. It is not necessary to make any further separate reference to the position of the insurer.

70 In its defence, OPC alleged that the appellant's claim was not actionable under the law of China. It asserted that, by Chinese law, the claims the appellant made were statute barred after one year. It asserted that, in any event, by Chinese law the damages that might be awarded were limited to past and future economic loss.

71 OPC's defence referred to a number of provisions of the General Principles of Civil Law of the People's Republic of China. The pleading described these General Principles as having been adopted at the Fourth Conference of the Third National People's Congress on 12 April 1986 with effect from 1 January 1987. In evidence they were described as having been adopted on 12 April 1986 by the Fourth Session of the Sixth National People's Congress. Nothing turns on this difference. It is convenient to refer to them as the "General Principles". An English translation of the General Principles was tendered in evidence. This showed the General Principles to be divided into Chs I-IX. Chapter I (Arts 1-8) was headed "FUNDAMENTAL PRINCIPLES" and Art 8 read:

"*Unless otherwise stipulated by law*, the laws of the People's

Republic of China shall apply to civil activities carried out within the territory of the People's Republic of China.

Unless otherwise stipulated by law, the provisions of this Law with regard to citizens apply to foreign nationals and stateless persons within the territory of the People's Republic of China."

(Emphasis added.)

72 OPC's contention that, under Chinese law, the appellant's claim was statute barred relied upon Arts 135 and 136 of the General Principles. Chapter VII (Arts 135-141) of the General Principles was headed "LIMITATION OF ACTIONS". Articles 135 and 136 were translated as providing:

"*Article 135.* The period of limitation of actions on a request to the People's Court for the protection of civil rights is two years, unless otherwise stipulated by the law.

Article 136. In the following cases, the period of limitation of actions shall be one year:

(i) demand for compensation for bodily harm …"

73 The appellant did not file a reply to OPC's defence. As a result, there was a simple joinder of issue on the matters raised by OPC's defence. It appears, however, that the pleadings were not treated by the parties as confining the issues that were to be debated at trial. In particular, although not mentioned anywhere in either side's pleadings, the appellant relied upon Art 146 of the General Principles as an answer to OPC's contentions about the law of China.

74 Chapter VIII (Arts 142-150) of the General Principles was translated with the heading "APPLICATION OF THE LAW TO CIVIL RELATIONS INVOLVING FOREIGNERS". This invites attention back to the reference to other legal stipulation in the general provision made in Art 8 set out above.

75 Article 146 was translated as providing that:

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

Acts which occur outside the territory of the People's Republic of China and which the law of the People's Republic of China does not recognise as acts of infringement of rights shall not be dealt with as such."

The appellant placed chief emphasis in argument in this Court, and in the courts below, upon the second sentence of that provision, namely, that "[i]f both parties are nationals of the same country or domiciled in the same country, the law of their own country or of their place of domicile may also be applied". The appellant contended that her claim in negligence against OPC was to be determined by Australian law because Chinese law (by Art 146) would have applied Australian law.

The primary judge

76 In accordance with what had been decided in *Zhang*, the primary judge (McKechnie J) concluded (68) that "the proper law to be applied in this case [to the appellant's claim in negligence, was] the law of the People's Republic of China".

77 At the trial only one witness was called to give expert evidence about Chinese law. That witness (Mr Hongliang Liu) was called by OPC. The primary judge found Mr Liu to be an honest and impartial witness and accepted and "rel[ied] in general" on his opinion as to Chinese law (69). His Honour concluded that the General Principles applied to foreign nationals within the territory of China and thus covered the claim by the appellant against OPC (70). His Honour further concluded that, under Art 106 of the General Principles, if the acts or omissions of the first respondent caused harm to the appellant, the first respondent "would assume civil liability" (71). The correctness of these conclusions is not in issue in the appeal to this Court.

78 Although the primary judge went on to consider how the limitation provisions of the General Principles applied in the matter, it is convenient to pass by this aspect of his Honour's reasons. That is because the primary judge concluded (72) that he should apply Art 146 of the General Principles. The primary judge described the consequence of his resort to Art 146 as being the exercise *by him* (73) of "a right to choose to apply the law of Australia" (74). It will be necessary to return to consider whether it was correct to treat what, on its face, is a power or discretion given by Art 146 to *Chinese* courts as if it were a power or discretion to be exercised by an *Australian* court.

79 Applying Australian common law principles of negligence (75), the primary judge held that the appellant should recover damages, assessed in accordance with Australian principles, and entered judgment accordingly.

(68) *Neilson v Overseas Projects Corporation of Victoria Ltd* [2002] WASC 231 at [123].
(69) [2002] WASC 231 at [126].
(70) [2002] WASC 231 at [128].
(71) [2002] WASC 231 at [144]. Article 106 is found in Section 1 (Arts 106-110), headed "General Provisions", of Ch VI, titled "CIVIL LIABILITY", in the translation. Article 106 states: "A citizen or legal person who violates a contract or fails to fulfil other obligations shall assume civil liability. A citizen or legal person who through his own fault infringes upon State or collective property or upon another person, or who harms another person, shall assume civil liability. If he is not at fault but the law stipulates that he shall assume civil liability, he shall assume such liability."
(72) [2002] WASC 231 at [204].
(73) [2002] WASC 231 at [208].
(74) [2002] WASC 231 at [204].
(75) [2002] WASC 231 at [209]-[221].

The Full Court

80 The insurer appealed to the Full Court of the Supreme Court of Western Australia. That Court (McLure and Johnson JJ, Wallwork A-J) allowed the appeal in part (76) and set aside the judgment obtained by the appellant. The principal reasons of the Court were given by McLure J, the other members of the Court agreeing with her Honour's reasons. McLure J considered (77) the central issue in the appeal was "whether the private international law doctrine of renvoi applies to international tort claims". Her Honour held (78) that the primary judge had erred in applying Australian common law, and that the primary judge "should have applied Chinese domestic law and held that the claim was statute barred". Her Honour concluded (79) that to apply "the double renvoi doctrine to international torts would not promote certainty and predictability". This was said (80) to follow from the need to identify "Australia's choice of law rules, the foreign country's choice of law rules and its attitude to renvoi, from which a conclusion can then be reached as to the domestic law of which country applies".

81 By special leave the appellant appeals to this Court.

The particular questions in this Court

82 The particular questions raised in the appeal to this Court may be identified as being:

1. When applying the lex loci delicti to determine substantive questions arising in the appellant's tortious claim against OPC, was Art 146 of the General Principles a relevant part of that law?
2. If Art 146 was a relevant part of the lex loci delicti, how, if at all, was that provision to be applied in the present case?

This second question will require consideration of two subsidiary questions:

(a) What evidence was given at trial about s 146?

and

(b) What consequences follow from any gap in or deficiency of that evidence?

and may require consideration of two further consequential questions:

(c) What is the possibility of "infinite regression of reference" from any identification by Art 146 of the law of Australia as the applicable law in this case?

and

(d) What are the consequences of the reference in Art 146 to the law of the country of nationality when Australia is a federation?

(76) *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206.
(77) (2004) 28 WAR 206 at 208 [1].
(78) (2004) 28 WAR 206 at 220 [65].
(79) (2004) 28 WAR 206 at 216 [47].
(80) (2004) 28 WAR 206 at 216 [47].

83 The particular questions which arise in this appeal are best examined after some more general underlying principles are identified.

General principles

84 Legal scholars have devoted much attention and effort to suggesting what is to be done when the law of the forum, deciding the rights and obligations of parties to a dispute which has some connection with a foreign legal system, looks to that foreign legal system only to find that it would decide the parties' rights and obligations by reference to either the law of the forum or the law of another legal system. To put the question another way, if the law of the forum chooses one connecting factor as determining the choice of law, but the law chosen by the forum treats some other connecting factor as determinative, to which system does the forum look in deciding the rights and obligations of the parties?

85 In some early cases where this problem was recognised and examined, the foreign law chosen by the forum as the governing law (the lex causae) would have applied the law of the forum (81). That came about because the law of the forum chose the place of occurrence of events as the relevant connecting factor, whereas the foreign law chose as the connecting factor a status of the parties – nationality or domicile.

86 It is in this context that, some years later, metaphorical references to renvoi ("return" or "reference back") entered the English legal lexicon (82) as the description to be applied to the problem and its solution. That is, the problem was presented as if some dialogue occurred between jurisdictions. Would a foreign jurisdiction to whose law the forum had referred, "refer" the issue back to the forum and say that forum law should be applied? Would the forum "accept" the reference back? Could there be an infinite regression of reference, followed by reference back?

87 An immense amount of scholarly literature has been produced. Subsets of the problem have been identified as cases of single renvoi or double renvoi. Scholars have asserted that there was not (83) or there was (84) a fundamental logical fallacy underlying what was happening. One leading scholar has said (85) of the literature that it is "extensive and partly of very high quality" and that, as a result, "[i]t is

(81) *Collier v Rivaz* (1841) 163 ER 608; Kahn-Freund, *General Problems of Private International Law* (1976) (Kahn-Freund), p 286 referring to the *Forgo Case*, Cass civ 24.6.1878, DP 1879.1.156; S 1878.1.429, and the *Soulier Case*, Cass req 9.3.1910, DP 1912.1.262.

(82) See the Note at *Law Quarterly Review*, vol 14 (1898) 231; Griswold, "Renvoi Revisited", *Harvard Law Review*, vol 51 (1938) 1165.

(83) Cowan, "Renvoi Does Not Involve a Logical Fallacy", *University of Pennsylvania Law Review*, vol 87 (1938) 34.

(84) Griswold, "In Reply to Mr Cowan's Views on Renvoi", *University of Pennsylvania Law Review*, vol 87 (1939) 257.

(85) Kahn-Freund, p 285.

difficult to believe that anyone could produce any argument which has not already been advanced". But the scholarly debate has focused more upon theoretical explanations for the method of solution than upon the principal and essentially practical concern of the courts, which is to decide the controversies that are tendered by the parties for decision.

88 Against this background it is necessary to begin consideration of the problems presented in this appeal by stating some premises from which the examination proceeds. Three premises are identified. They can be referred to as "No advantage"; "Certainty and simplicity"; and "The significance of theories of renvoi".

No advantage

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

90 Once Australian choice of law rules direct attention to the law of a foreign jurisdiction, basic considerations of justice require that, as far as possible, the rights and obligations of the parties should be the same whether the dispute is litigated in the courts of that foreign jurisdiction or is determined in the Australian forum. This is not a consideration which seeks uniformity for the sake of the aesthetic value of symmetry. Nor is it a precept founded in notions of international politeness or comity (86). As has been said (87), comity is "either meaningless or misleading"; it is "a matter for sovereigns, not for judges required to decide a case according to the rights of the parties".

91 Rather, adopting a rule that seeks to provide identical outcomes is neither more nor less than an inevitable consequence of adopting a choice of law rule to which there is no exception. To apply that choice of law rule in a way that would permit a party to gain some advantage by litigating in the courts of the forum, rather than the courts of the jurisdiction whose law provides the governing law, would constitute a considerable qualification to that choice of law rule. A party could gain an advantage by litigating in the courts of the forum rather than the courts of the foreign jurisdiction only if the forum were to choose to apply only some of the law of that foreign jurisdiction. And to do that would make a significant inroad upon what on its face is stated to be an unqualified choice of the law which is to govern the rights and obligations of the parties: the lex loci delicti.

(86) Kahn-Freund, p 318.

(87) North (ed), *Cheshire's Private International Law*, 9th ed (1974), p 4; cf North and Fawcett (eds), *Cheshire and North's Private International Law*, 13th ed (1999), p 5.

Certainty and simplicity

92 The second premise for consideration of the problem is that certainty and simplicity are desirable characteristics, not only when stating the applicable rule, but also when a court comes to apply the rule. Perhaps they are ideals that can never be attained. But as Kahn-Freund pointed out (88), the intellectual challenge presented by questions of conflict of laws is its main curse. Whenever reasonably possible, certainty and simplicity are to be preferred to complexity and difficulty.

93 Certainty and simplicity are important consequences of adopting (89) the rule that the lex loci delicti governs questions of substance in tort and rejecting (90) exceptions or qualifications, flexible or otherwise, to that rule. What have come to be known as "flexible exceptions" to choice of law rules are necessarily uncertain (91). That is the inevitable consequence of their flexibility. Experience reveals that such rules generate a wilderness of single instances. Especially is that so if the application of the exception depends upon giving content to qualitative expressions like "more significant relationship … to the occurrence and the parties" (92). And experience also dictates that these difficulties are not removed by reference to considerations such as State interests (93).

94 To take no account of what a foreign court would do when faced with the facts of this case does not assist the pursuit of certainty and simplicity. It does not assist the pursuit of certainty and simplicity because it requires the law of the forum to divide the rules of the foreign legal system between those rules that are to be applied by the forum and those that are not. This requires the forum to impose on a foreign legal system, which must be assumed is intended to constitute an integrated system of interdependent rules, a division which that system may not make at all. And to make that division, the forum must consider hypothetical circumstances which are not identical to those of the case under consideration. Neither dividing the rules of the foreign legal system nor the manner of effecting that division assists the pursuit of certainty and simplicity.

(88) Kahn-Freund, p 320.

(89) *Pfeiffer* (2000) 203 CLR 503 at 539-540 [83]-[86] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; *Zhang* (2002) 210 CLR 491 at 517 [66] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

(90) *Pfeiffer* (2000) 203 CLR 503 at 538 [79]-[80] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

(91) *Pfeiffer* (2000) 203 CLR 503 at 538 [79] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; cf *Babcock v Jackson* (1963) 191 NE 2d 279 and subsequent decisions about guest passenger liability.

(92) *Restatement of Conflict of Laws*, 2d, vol 1, Ch 7, Topic 1, Title B, "Particular Torts" (1971), §146.

(93) *Alaska Packers Association v Industrial Accident Commission of California* (1935) 294 US 532; *Allstate Insurance Co v Hague* (1981) 449 US 302; *Phillips Petroleum Co v Shutts* (1985) 472 US 797; *Franchise Tax Board of California v Hyatt* (2003) 538 US 488.

95 An example may illustrate the point. A foreign legal system may make separate provision for the kinds of loss sustained by a person as a result of a traffic accident, recoverable from the party whose negligence caused that loss, according to whether the negligent party was a national of, or domiciled in, that foreign country. The differences may reflect not only different insurance arrangements for "local" drivers from those applying to others but also different social security and health arrangements. That is, the foreign legal system may also make provision in its social security and health legislation for giving larger benefits to those who are nationals of, or domiciled in, the country than the benefits allowed to others. If the Australian choice of law rules look only to the "domestic" law of that country, what account is to be taken of these different social security and health provisions in deciding the extent of the liability to an Australian citizen of the Australian employer of a negligent "local" driver sued in an Australian court? Is reference to be made only to the foreign law that deals with recovery of damages? Is reference to be made to the social security and health provisions? Any division that is made is necessarily an incomplete and incoherent reflection of the law of that place.

The significance of theories of renvoi

96 Thirdly, as may be apparent from what has already been said, scholarly analyses of renvoi by the metaphors of "reference", "reference back" and "acceptance" do not provide a sure footing upon which to construct applicable rules. The metaphors of reference, reference back and acceptance suggest, wrongly, the existence of some dialogue between legal systems. They therefore mask the nature of the task being undertaken. That task is to determine, here as an element of the common law of Australia, the source and content of rules governing the rights and obligations of parties to a particular controversy.

97 No less importantly, such theories depend upon the underlying assumption, referred to in connection with considerations of certainty and simplicity, that it is useful, apparently as an exercise in characterisation by the law of the forum, to attempt to divide foreign legal systems between rules of "domestic law" and choice of law rules. That this assumption underpins much of the scholarly analysis of renvoi is apparent from the treatment of that subject in the work of Dicey and his later editors (94). There, the problem of renvoi is dealt with by definition. The "law of a country" is defined (95), when applied to a foreign country, as "usually the domestic law of that country, sometimes any domestic law which the courts of that country would apply to the decision of the case".

(94) See, eg, Dicey, *The Conflict of Laws* (1896), p 75; *Dicey and Morris on the Conflict of Laws*, 13th ed (2000), vol 1, p 65.

(95) *Dicey and Morris on the Conflict of Laws*, 13th ed (2000), vol 1, p 65.

98 As mentioned earlier, the distinction between the domestic law of the foreign jurisdiction and its conflict of laws rules may not be easy to draw. To draw such a distinction invites difficulties of the same kind as have so long attended the distinction between procedural and substantive questions (96). But even if those difficulties could be overcome, why should a choice of law rule which provides that the rights and obligations of the parties to a proceeding are to be resolved according to the law of a foreign jurisdiction refer to some but not all of that foreign law in deciding those rights and obligations? Why should choice of law be premised upon the results of imposing on a foreign legal system a division which that foreign system may not make?

99 Those questions are not to be answered by choosing one theory of renvoi as the premise from which subsequent arguments proceed. Choosing a single overarching theory of renvoi as informing 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. But questions of personal status like marriage or divorce, questions of succession to immovable property, questions of delictual responsibility and questions of contractual obligation differ in important respects. Party autonomy may be given much more emphasis in questions of contract than in questions of title to land. Choice of governing law may be important in creating private obligations by contract but less important when the question is one of legal status. Choosing one theory of renvoi as applicable to all cases where a choice of law must be made would submerge these differences. No doubt that is why Kahn-Freund urged (97) that in this field dogmatism must yield to pragmatism.

100 Where, as in the present case, the focus falls upon choice of law in tort, attention must be paid to the reasons that underpin reference to the lex loci delicti as the law governing questions of substance that arise in cases of *that* kind. As the joint reasons in *Zhang* explain (98), the bases upon which the law of the forum was once given a controlling role in relation to delictual liability, because of connections perceived between the law of civil delict and the criminal law of the forum, are now seen as infirm. Rather, as those joint reasons demonstrate (99), adopting the lex loci delicti accommodates requirements of certainty with the modern phenomenon of the "movement of people, wealth and skills across state lines" (100). As one North American scholar has put it (101), "[i]n an age of high personal and professional mobility, the

(96) *Pfeiffer* (2000) 203 CLR 503 at 542-543 [97] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.
(97) Kahn-Freund, p 290.
(98) (2002) 210 CLR 491 at 509-515 [43]-[60].
(99) (2002) 210 CLR 491 at 515-517 [61]-[65].
(100) *Tolofson v Jensen* [1994] 3 SCR 1022 at 1047 per La Forest J.
(101) Walsh, "Territoriality and Choice of Law in the Supreme Court of Canada:

significance attached to the concept of the personal law is in decline; activity-related connections are increasingly thought to offer a more stable and predictable criterion for choice of law".

101 In applying the lex loci delicti, was Art 146 of the General Principles relevant, or was it to be discarded from consideration as not being a part of what an Australian court classifies as the "domestic" law of China? OPC submits that Art 146 was to be discarded for that reason. The appellant contends to the contrary.

Was Art 146 relevant?

102 The premises earlier described require the conclusion that choosing the lex loci delicti as the law to govern questions of substance where a claim is made for a foreign tort is not to be confined to reference to what the forum classifies as the domestic law of that jurisdiction: the law that that foreign jurisdiction would apply in a case having no element foreign to it but otherwise identical with the facts under consideration. At least where the choice of law rules of the lex loci delicti depend upon a connecting factor other than place, such as nationality or domicile, the lex loci delicti is the whole of the law of that place.

103 There are some consequences entailed by that conclusion that should be noticed. Two are obvious. First, if the foreign jurisdiction would choose to apply the law of the forum, and not the law of the place where the wrong was committed, the forum should apply its own law. Secondly, if the law of the place where the wrong was committed would look to a third jurisdiction to provide the relevant law governing the resolution of substantive questions, the forum should look to and apply the law of that third jurisdiction.

104 Some other consequences that might be said to follow from the conclusion that account is to be taken of a foreign jurisdiction's choice of law rules in tort are less obvious but should also be noticed. They should be noticed because they may be said to reveal that, despite the first two consequences being acceptable, other consequences entailed by a conclusion that reference should be made to the whole of the law of the place of commission of the tort would arguably be less readily acceptable.

105 The same kinds of question about choice of law may be presented not only where, as the appellant contended to be the case here, the law of the forum and the law of the place choose different connecting factors to determine the applicable law. They may be presented in at least three other kinds of case. Thus, they may be presented where the law of the forum and the law of the place use the same connecting factor but apply it differently. They may be presented where the two

(cont)
Applications in Products Liability Claims", *Canadian Bar Review*, vol 76 (1997) 91, at p 110.

jurisdictions would characterise the problem differently (102). They may be presented if the law of the place applies no single connecting factor but seeks to identify the so-called proper law of the tort (103).

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

107 In all of these cases, the question would arise: is the law of the forum to take account of what the foreign jurisdiction would do if the matter were to be litigated there? The reasons which favour applying the whole of the law of the place of commission of the tort, where that law adopts a connecting factor other than place of occurrence, are no less applicable to the cases identified. Once the step is taken of giving effect to what the foreign law would do when applying its choice of law rules, there is no reason to shrink from doing that in any of the cases identified.

108 Until the abandonment of rules that used the law of the forum as the governing law in tort, no question of renvoi could arise in tort. The double actionability rule established in *Phillips v Eyre* gave only limited significance to the law of the place where the tort was committed. But now that the rights and obligations of parties are to be determined by reference to the lex loci delicti, it is necessary to confront directly the problem of what is meant by that. For the reasons given earlier, in a case like the present, reference to only part of that law would not give proper effect to the reasons that underpin reference to the law of the place where the tort was committed – the lex loci delicti.

109 It may be said that the result reached in these reasons, of understanding reference to the lex loci delicti in this particular case as reference to the whole of the law of China, represents a sharp departure from what hitherto has been understood to be a dominant view in Anglo-Australian conflict of laws. In that regard, it must be recognised that some leading scholars, particularly Dr J H C Morris and his successors as editors of Dicey, later Dicey and Morris, on *The Conflict of Laws*, have exhibited a marked antipathy to renvoi. Other scholars have taken a different view (104). Morris and his successors have

(102) Harris, "Does Choice of Law Make Any Sense?", *Current Legal Problems*, vol 57 (2004) 305, at pp 312-313.

(103) See, eg, *Base Metal Trading Ltd v Shamurin* [2005] 1 WLR 1157; [2005] 1 All ER (Comm) 17.

(104) See, eg, Briggs, "In Praise and Defence of Renvoi", *International and Comparative Law Quarterly*, vol 47 (1998) 877; Rimmel, "The Place of Renvoi in Transnational Litigation – A Pragmatic Approach to An Impractical Doctrine",

said (105) that "in all but exceptional cases the theoretical and practical difficulties involved in applying the doctrine outweigh any supposed advantages it may possess".

110 In so far as those authors spoke of practical difficulties the proposition is not self-evidently true, but its validity need not be examined in this case. For present purposes, it is enough to notice that those authors go on to accept (106) that the doctrine should be invoked if it is plain that the object of the relevant choice of law rule, in referring to a foreign law, will on balance be better served by construing the reference to foreign law as including the conflict rules of that law.

111 A choice of law rule for foreign torts which requires reference to and application of the lex loci delicti, without exception, is such a case. And whatever may be the consequent difficulties in articulating a single coherent and overarching doctrine of renvoi for the whole field of conflict of laws, adopting this rule need present no great practical difficulty. Indeed, to refer to the *whole* of the law of the place of commission of a tort runs less risk of incoherence than does reference to only part of that law. And as these reasons will later show, such difficulties as exist in the present case stem not from choosing to apply the whole of Chinese law but from the nature of the evidence that was given at trial about that law.

112 In the present case, then, the primary judge was right to have regard to Art 146. But how was it to be applied?

The application of Art 146

113 At the outset it should be said that the primary judge was wrong to hold that Art 146 of the General Principles somehow permitted *him* to exercise "a right to choose to apply the law of Australia" (107). As *Pfeiffer* demonstrated, an Australian court applying the common law rules of choice of law applies Australian law, but it derives the content of the rights and obligations of the parties by reference to the chosen foreign law. That process is radically different from treating the foreign law as giving to Australian courts powers or discretion under that foreign law which then fall to be exercised by the Australian court according to Australian principles. Yet in essence that appears to be what the primary judge did. Rather, the question presented in this case about Art 146 was how, if at all, would a *Chinese* court exercise the power or discretion given by that Article? What answer did the evidence permit to be given to that question?

114 Examination of that question must again begin from a consideration of basic principles.

(cont)
Holdsworth Law Review, vol 19 (1998) 55.

(105) See, eg, *Dicey and Morris on the Conflict of Laws*, 13th ed (2000), vol 1, pp 73-74 (footnote omitted).

(106) *Dicey and Morris on the Conflict of Laws*, 13th ed (2000), vol 1, pp 74-76.

(107) [2002] WASC 231 at [204].

Australian courts know no foreign law

115 The courts of Australia are not presumed to have any knowledge of foreign law. Decisions about the content of foreign law create no precedent. That is why foreign law is a question of fact to be proved by expert evidence (108). And it is why care must be exercised in using material produced by expert witnesses about foreign law. In particular, an English translation of the text of foreign written law is not necessarily to be construed as if it were an Australian statute. Not only is there the difficulty presented by translation of the original text, different rules of construction may be used in that jurisdiction.

116 It will be necessary to return to consider how these precautionary admonitions intersect with the well-known rule that, absent proof of, or agreement about, foreign law, the law of the forum is to be applied (109). In addition, it will be necessary to consider what evidence a suitably qualified expert can give about the way in which a provision, like Art 146, apparently conferring a power or giving a discretion to a foreign court, would be applied in that foreign jurisdiction, either generally or in the particular case. First, however, it is necessary to consider the evidence that was given about Art 146.

The evidence about Art 146

117 The expert evidence of Mr Liu about Art 146 was brief. Neither in his written opinion, nor in his evidence-in-chief, did he refer to that Article. In cross-examination he denied that Art 146 was relevant to this case, but it seems that this denial was founded in his understanding of *Australian* choice of law rules. He understood Australian choice of law rules as requiring, and permitting, reference to Chinese domestic law only, not Chinese choice of law rules. He accepted that had the appellant sued in China she could have asked a Chinese court "for an order applying Australian law" and he accepted the suggestion, put to him, that in such a case the court in China would determine that question according to its own ideas of fairness and the justice of the case. What was meant by this was not explored, and counsel for OPC did not re-examine Mr Liu on this or any other aspect of Art 146.

118 It is, of course, pointless to speculate about why evidence took this course. The court does not, and should not, know what material counsel for either side had available when deciding what questions would be asked of this witness or deciding whether some competing evidence should be called. It is for the parties and their advisers to decide the ground upon which their battle is to be fought (110). The trial is not an inquisition into the content of relevant foreign law any more than it is an inquisition into other factual issues that the parties tender for decision by the court.

(108) *Di Sora v Phillipps* (1863) 10 HL Cas 624 [11 ER 1168]; *National Mutual Holdings Pty Ltd v Sentry Corporation* (1989) 22 FCR 209.

(109) *Lloyd v Guibert* (1865) LR 1 QB 115 at 122-123.

(110) cf *Ratten v The Queen* (1974) 131 CLR 510 at 517 per Barwick CJ.

119 Expert evidence about foreign law, like any other form of expert evidence, presents questions about what limits there are to the evidence that may be adduced from an expert witness. The *Evidence Act 1995* (Cth), and equivalent statutes, provide in s 80 that evidence of an opinion is not inadmissible only because it is about a fact in issue or an ultimate issue. No provision of that kind applied at the trial of this matter. It follows that in this case, where a provision like Art 146 was in issue, there may have been some question about what evidence an expert might give to elucidate how a Chinese court would apply that provision.

120 It has been held (111) that expert evidence about foreign law can be divided into evidence about the content of the law and evidence about its application to the facts of the particular case. The former is said (112) to be admissible; the latter not. But as *National Mutual Holdings Pty Ltd v Sentry Corporation* (113) reveals, a distinction between content and application evidence is not to be understood as precluding an expert from examining in evidence how a power or discretion would be exercised by a foreign court.

121 An overly abstract articulation by an expert of a foreign court's approach to the exercise of a power or discretion will be of little assistance to the tribunal of fact. Yet the closer the examination comes to the particular set of facts under consideration in the instant case, the closer the expert may be said to come to offering an opinion about how a foreign court, confronted by those facts, would decide the case. But in doing that, does the expert give evidence that is inadmissible?

122 In the *National Mutual Case*, it was decided (114) that "[w]here the relevant rules and principles of foreign law are so framed as to confer discretions upon the courts which administer them … evidence is receivable as to the manner in which those discretions are exercised, with reference to any pattern or course of decision". Evidence of that kind was held not to trespass upon the function of the court of the forum to decide the effect of the application of the rules and principles of the law of the foreign jurisdiction to the particular facts and circumstances of the instant case.

123 In the present case, then, it was open to the parties to adduce evidence of how Art 146 is administered in the courts of China. But this they did not do, whether by describing the matters which a Chinese court would consider relevant to that question or by pointing to any particular examples of its consideration.

124 Having in evidence no more than the translated text of Art 146 and the expert's assent to the proposition that the power given by the

(111) *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd [No 6]* (1996) 64 FCR 79.
(112) (1996) 64 FCR 79 at 82; see also *United States Trust Co of New York v Australia & New Zealand Banking Group Ltd* (1995) 37 NSWLR 131 at 146.
(113) (1989) 22 FCR 209.
(114) (1989) 22 FCR 209 at 226.

Article was to be exercised according to fairness and the justice of the case, the trial judge was bound to conclude that Chinese law, when applied to the facts of this case, would look to the law of the nationality or domicile of the parties. For the reasons that follow, the trial judge was bound to reach that conclusion no matter whether the analysis of the evidence that was given proceeds from the premise that there was some want of or deficiency in the evidence, or proceeds from the premise that all that could be said about the content and application of Art 146 had been said in evidence.

125 If there is thought to be some deficiency in the evidence, the "presumption" that foreign law is the same as the law of the forum comes into play (115). That would then require an Australian court to approach the task of construing Art 146 as it would approach the construction of an Australian statute (116). Neither the absence of pleading the relevant content of foreign law (117) nor the absence of proof (118) would be fatal to the case of the party relying on the relevant provision of foreign law. If the presumption was applied it would follow that the relevant power or discretion would be exercised, as it would by an Australian court under an Australian statute, having regard to its scope and the objects for which it was conferred (119).

126 By contrast, if the evidence given at the trial were to be treated as if it was a complete account of all principles relevant to the application of Art 146, fairness and the justice of the case would require the conclusion that Australian law should apply. It may be said that the hypothesis that the evidence given at trial was a complete account of principles relevant to the application of Art 146 should be rejected as improbable. It is, however, not necessary to decide that point.

127 Whether regard is had to the scope and objects of the power or discretion, or regard is had, on the hypothesis identified, to fairness and the justice of the case, the conclusion available on the limited evidence led at trial is the same. All parties to the dispute were Australian. The only connection between the dispute and China was the place of occurrence of the tort. Although locating the place of commission depended upon the location of the apartment, and it was the condition of the apartment in China (which had presumably been built according to the locally applicable laws and standards) that lay at the heart of the appellant's claim in negligence, there was no evidence that suggested that either of those considerations was relevant to the application of Art 146. Rather, all that was shown to be relevant to what fairness and

(115) *Cross on Evidence*, 7th Aust ed (2004), pp 1358-1360 [41005].
(116) cf *Jabbour v Custodian of Israeli Absentee Property* [1954] 1 WLR 139 at 147-148; [1954] 1 All ER 145 at 153.
(117) *Zhang* (2002) 210 CLR 491 at 518-519 [69]-[72].
(118) cf Fentiman, *Foreign Law in English Courts* (1998), pp 142-158.
(119) *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473 per Dixon CJ; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1178 [69]; 198 ALR 59 at 75-76 per McHugh and Gummow JJ.

the justice of the case required when applying that Article were the considerations mentioned in the Article itself – the place of the tort and the nationality or domicile of the parties. That being so, the conclusion that Art 146 required the application of the law of the country of nationality or domicile of the parties was inevitable.

128 There remains what earlier in the reasons was identified as two consequential questions which might require consideration. As will now appear, no concluded answer to either of them is called for on this occasion.

129 What is meant when it is said that the law of the place where the tort was committed would apply the law of the country of nationality or domicile? There are two aspects to that question. The first is like the question "what is meant by the lex loci delicti?" When the foreign law refers to the law of the country of nationality or domicile, does that reference include the conflict of laws rules of that country? Secondly, what is to be done when the country of nationality or domicile is a federal state? The first aspect of this question conjures up the spectre, mentioned earlier in these reasons, of the infinite regression (120) of reference followed by reference back. The second suggests an inexactness of reference and consequent difficulty in working out what the lex loci delicti requires.

Infinite regression?

130 The possibility of an infinite regression of reference was a principal reason underpinning the Full Court's conclusion (121) in this case that to apply "the double renvoi doctrine to international torts would not promote certainty and predictability". This was said (122) to be because of the need to identify not only Australia's choice of law rules but also "the foreign country's choice of law rules and *its attitude to renvoi*" (emphasis added).

131 In this particular case, however, Art 146 is not to be understood as permitting, let alone requiring, a Chinese court to have regard to Australian choice of law rules. It was not contended, and there was no evidence, that Art 146 was to be understood as having that effect. Moreover, there is no basis in the context, provided particularly by Art 8 of the General Principles and the heading to Ch VIII, that would warrant that conclusion. Rather, both text and context point to Art 146 being understood as providing for a once for all reference of the problem *out of* Chinese law and into the law of the country of nationality or domicile. That may, perhaps, leave open the possibility in *Chinese* law that a Chinese court would recognise the consequences

(120) The expression "infinite regression" is taken from the debate between Professors Cowan and Griswold: Cowan, "Renvoi Does Not Involve a Logical Fallacy", *University of Pennsylvania Law Review*, vol 87 (1938) 34 and Griswold, "In Reply to Mr Cowan's Views on Renvoi", *University of Pennsylvania Law Review*, vol 87 (1939) 257.

(121) (2004) 28 WAR 206 at 216 [47].

(122) (2004) 28 WAR 206 at 216 [47].

of a reference by the law of the country of nationality or domicile to a *third* legal system, but that is a question that does not arise here. What is clear is that Art 146 is intended to achieve the result that the rights and obligations of those who are nationals of, or domiciled in, another country are to be determined by a law *other than* the law of China.

132 It must nonetheless be recognised that there may be cases where the law of the place where a tort is committed would determine the rights and duties of the relevant parties by referring to all of the law of Australia, including Australian common law choice of law rules. That is, there may be cases where Australia would look to the whole of the law of that country only to find that country looking to the whole of the law of Australia. It may be asked, where and how would such a circle of reference be broken? But this approach to the matter is apt to introduce those notions of dialogue between legal systems which have been disfavoured earlier in these reasons. The task is to consider the content of the Australian choice of law rule which has fixed upon the lex loci delicti (123).

133 In *Casdagli v Casdagli* (124), Scrutton LJ adverted to this issue in connection with the law of a person's domicile. What was to be done if the relevant law of the foreign domicile of an English national applied the law of the nationality? He suggested (125) that one possible solution to the conundrum thus presented was to regard the reference to the law of the domicile as requiring reference back to the law of the forum "but not that part of [the law of the forum] which would remit the matter to the law of domicil, *which part would have spent its operation in the first remittance*" (emphasis added).

134 It is not necessary to explore whether this solution should be adopted. For the moment, it is enough to recognise the existence of the problem and to conclude that its existence does not warrant departing from the conclusion, earlier expressed, that reference to the lex loci delicti is to be understood as reference to the whole of that law. The Australian choice of law rule will not yield disagreeable uncertainty and complexity if it is interpreted as giving full effect to its selection as the lex causae of the whole of the foreign law, even where what is classified as the foreign choice of law rule and which is thereby adopted prefers Australian law as dispositive of the case. In such circumstances, to say that the reference back to the law of the forum is "accepted" would be to do no more than abide the consequences of the initial selection of the lex loci delicti. That choice of law would not have miscarried where, by reason of the content of the lex loci delicti, the outcome in the forum was the same as if there had been no initial choice of a foreign law.

(123) Harris, "Does Choice of Law Make Any Sense?", *Current Legal Problems*, vol 57 (2004) 305, at p 346.

(124) [1918] P 89. Scrutton LJ was in dissent but an appeal to the House of Lords was allowed: [1919] AC 145.

(125) [1918] P 89 at 111.

Reference to the law of the country of nationality in a federation

135 At trial no separate consideration was given to what consequences, if any, followed from the reference to the law of the country of nationality rather than to the law of a particular State or Territory. And although the appellant's statement of claim alleged that she was domiciled in Western Australia nothing was said at trial or subsequently to turn on this fact. The course taken at trial may be supported on the basis that the relevant claim was to be identified as a claim in negligence brought in accordance with the common law of Australia (126) and raising no question about the application of a (State) limitation provision. No contrary contention was advanced on appeal to the Full Court or on appeal to this Court. The point must be noted but need not be examined further.

Conclusion and order

136 For these reasons, the appellant was entitled to the verdict she obtained at trial. Her appeal to this Court should be allowed with costs. The following consequential orders should be made:

(a) set aside so much of the orders of the Full Court of the Supreme Court of Western Australia made on 3 May 2004 as set aside the judgment entered at trial in favour of the appellant in this Court and the order made at trial for her costs;

(b) in their place, order that the appeal to that Court against that judgment and order is dismissed with costs.

137 KIRBY J. This appeal from a judgment of the Full Court of the Supreme Court of Western Australia (127) originated in a decision of McKechnie J (the primary judge) (128). His Honour upheld a claim in negligence brought by Mrs Barbara Neilson (the appellant). That claim arose out of a civil wrong alleged to have occurred in Wuhan, in the Province of Hubei in the People's Republic of China (China).

138 The defendants to the proceedings were Overseas Projects Corporation of Victoria Ltd (OPC), a company owned by the State of Victoria with its registered office in that State and Mercantile Mutual Insurance Australia Ltd (MMI), OPC's public liability insurer, also an Australian company with its registered office in New South Wales (129). Instead of bringing her claim, as it was narrowed at trial (130), in China – correctly found to be the place of the wrong (131) (and ostensibly a "clearly more appropriate forum" for the litigation) (132) – the appellant, an Australian national whose ordinary

(126) *Lipohar v The Queen* (1999) 200 CLR 485.
(127) *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206.
(128) *Neilson v Overseas Projects Corporation of Victoria Ltd* [2002] WASC 231.
(129) [2002] WASC 231 at [2].
(130) Following the rejection by the primary judge of claims based in contract and under Australian legislation.
(131) [2002] WASC 231 at [123]. See reasons of Callinan J at 404 [230].
(132) cf *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 at 477-478. But

residence was in Western Australia, prosecuted her claim in the Supreme Court of that State.

139 Two issues of private international law arise from that action. The first is whether the limitation law applicable to the appellant's proceeding was that of China (in which event she was well out of time unless "special circumstances" were applicable to her case under Chinese law) (133) or that of Australia, specifically Western Australia (in which event the claim was within time) (134).

140 Anterior to the resolution of the limitation issue was a further question arising under Chinese law (135). This was whether, by an express provision allegedly applicable to the appellant's proceedings, the primary judge was bound, or permitted, to resolve the limitation issue and other questions as to the law to be applied at trial by reference to the law of the nationality or domicile of the parties.

141 The primary judge resolved the two issues in favour of the appellant (136). The appellant therefore succeeded in recovering damages. However, the Full Court (137) set aside that judgment. It decided the second question contrary to the appellant's arguments. It also set aside the primary judge's purported extension of the limitation period "under Chinese law" (138). The Full Court concluded that, under Chinese law, the appellant's claim was time-barred (139), obliging entry of judgment in favour of the respondents. Now, by special leave, the appellant appeals to this Court.

The facts and legal developments

142 *The facts*: The appellant sustained injuries on 6 October 1991 when she fell at night on a staircase in a dwelling in Wuhan in which she was living with her husband. The fall was found to have been causally related to the lack of a balustrade about which the appellant and her husband had complained. Living in the dwelling was an incident of the employment contract between OPC and the husband. The dwelling existed in an "Australian compound". It was supplied by China as one

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see *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

(133) China, General Principles of Civil Law (GPCL), Arts 135, 136, 137. See [2002] WASC 231 at [185].

(134) The *Limitation Act 1935* (WA), s 38(1)(c)(vi) provided for the commencement of proceedings within six years. At the applicable time, when the appellant's proceedings were commenced, the *Limitation of Actions Act 1958* (Vic), s 5 provided the same time bar. The latter Act was amended by the *Limitation of Actions (Amendment) Act 2002* (Vic), s 3(2) to substitute a three year limitation period in respect of such proceedings but only if commenced thereafter.

(135) GPCL, Art 146.

(136) [2002] WASC 231 at [198], [208].

(137) McLure J (Johnson J and Wallwork A-J concurring).

(138) [2002] WASC 231 at [191].

(139) (2004) 28 WAR 206 at 222 [73].

of a number of buildings serving participants in a managerial skills course provided by OPC for the Wuhan Iron and Steel University (140).

143 How the appellant fell, why her fall gave rise to recovery in tort and how various other claims brought by the appellant (and defences raised by the respondents) were resolved are matters adequately explained in the reasons of other members of this Court (141). There was no dispute about these facts. I will not repeat any of this detail.

144 The appellant did not commence her proceedings in the Supreme Court of Western Australia until 20 June 1997. She brought no proceedings in any court in China. Her statement of claim in the Supreme Court of Western Australia did not plead, as a fact, the content of the Chinese law applicable to the events out of which the claim arose. Nor did it plead, as a fact, the manner in which a Chinese court, or Chinese law, would determine the appellant's claim. Instead, as the appellant's counsel made clear at the beginning of the trial, the appellant intended to say as little as possible about the law of China. Counsel said "we're endeavouring to keep well away from the China law as we can [sic]" (142). The primary judge expressed anxiety about this approach. In words that were to prove prescient, he said (143):

> "Wouldn't that be an onus that would fall on you in any event? If the defendant satisfied me that the applicable law was the Chinese law so that I was then sitting as a Chinese judge, then wouldn't the onus be on you …?"

145 So far as the statement of claim was concerned, on its face it appeared to assert (or assume) that the law applicable to the appellant's action (lex causae) was the law of Western Australia (lex fori). In particular, the pleading assumed that the applicable limitation period was an Australian one, not the period that would have applied had the proceedings been brought in China (144).

146 *Relevant legal developments*: The assumption by the appellant's advisers that the law of the forum applied to the case can be understood more readily when it is remembered that (although the position was not entirely clear), in June 1997 when the proceedings were commenced, an Australian court would ordinarily have applied to such a case the principle stated in *Phillips v Eyre* (145). Subject to

(140) [2002] WASC 231 at [13]-[14].

(141) Reasons of Gleeson CJ at 338-339 [2]; reasons of McHugh J at 345 [22]-[23]; reasons of Gummow and Hayne JJ at 358-359 [67]-[75]; reasons of Callinan J at 402-406 [223]-[234].

(142) Transcript of the trial, Supreme Court of WA, No 1686/97, 9 September 2002 at 126. See reasons of Gleeson CJ at 339 [3].

(143) Transcript of the trial, Supreme Court of WA, No 1686/97, 9 September 2002 at 126 per McKechnie J.

(144) Specifically, no reference was made in the pleading to "special circumstances" in GPCL, Art 137 or to the facts said to constitute such "special circumstances", considerations that only emerged later.

(145) (1870) LR 6 QB 1 at 28-29. See *The Halley* (1868) LR 2 PC 193.

considerations of jurisdiction over the parties and questions as to inappropriate forum, the Australian court would have applied the "double actionability rule" (146). In actions of tort this approach gave the predominant role to the law of the forum (147). Preference for the law of the forum was not without its supporters, both in common law countries and in countries of the civil law (148).

147 However, after the commencement of the appellant's proceedings, and before the trial, two events of legal significance occurred. The first, pointing the way, was the decision of this Court in *John Pfeiffer Pty Ltd v Rogerson* (149). That decision adopted, for intra-national torts outside federal jurisdiction, the law of the place of the wrong (lex loci delicti) as the law governing all questions of substantive law. Secondly, in *Regie Nationale des Usines Renault SA v Zhang* (150), this Court decided that the substantive law for the determination of rights and liabilities of parties in respect of international or foreign torts was also the law of the place of the wrong. The Court concluded that the "double actionability rule" expressed in *Phillips v Eyre* had no application in Australia to international torts.

148 In *Zhang*, the joint reasons concluded that the "flexible exception" to the basic rule for the choice of law, as expressed in *Chaplin v Boys* (151), should not be adopted by Australian law. I agreed in the foregoing restatements of Australian common law principle (152). I was inclined to reserve the question of whether a "flexible exception" should be recognised by Australian law (153). However, I did not press this preference to a dissent, given the recognition in the joint reasons that public policy considerations would sometimes make the enforcement of the law of the place of the wrong contrary to the public policy of the forum (154).

149 *Application of logic and analogy*: The foregoing developments do not solve the issues presented by this appeal. However, as the primary judge and the Full Court correctly concluded, no decision could be

(146) *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 506 [32], 523-524 [92].

(147) *Zhang* (2002) 210 CLR 491 at 506-507 [32]-[33], 531 [113].

(148) Savigny, the founder of the modern legal doctrine applicable to multilateral claims, followed this approach: Savigny, *System des heutigen roemischen Rechts* (1849), noted in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 536 [74]. See also *Zhang* (2002) 210 CLR 491 at 531-532 [114].

(149) (2000) 203 CLR 503.

(150) (2002) 210 CLR 491 at 520 [75], 539 [132]-[133].

(151) [1971] AC 356.

(152) In *Pfeiffer* (2000) 203 CLR 503 at 562-563 [156]-[157]. In *Zhang* (2002) 210 CLR 491 at 539 [132]-[133].

(153) *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 535 [122], referring to *Breavington v Godleman* (1988) 169 CLR 41 at 77, 147, 163. The rejection of flexible exceptions has been criticised: see Keyes, "The Doctrine of Renvoi in International Torts: *Mercantile Mutual Insurance v Neilson*", *Torts Law Journal*, vol 13 (2005), 1 at pp 13-14.

(154) (2002) 210 CLR 491 at 535 [123].

reached in the present case, consistent with *Pfeiffer* and more particularly *Zhang*, that applied the displaced law. Thus, it would not have been correct for the primary judge to decide the appellant's claim by simply applying the law of the forum (Western Australia). He could not ignore the fact that the tort had occurred in China. Consistently with *Zhang*, it was necessary for him to determine the substantive rights and liabilities of the parties by reference to the law of China. In deciding the consequential questions presented by the appellant's claim to the Supreme Court of Western Australia, the law was not expressly stated in the earlier authority. Yet, it was correct for the judges below to endeavour to find the answers to those questions by a process of analogical reasoning: seeking to derive from the ratio decidendi of *Zhang* any implications that helped resolve the new, different but related questions presented by these proceedings (155).

The Chinese law

150 *The Chinese legal system*: Exhibited in the trial was an article by Kui-Hua Wang and Dr Danuta Mendelson, "An Overview of Liability and Compensation for Personal Injury in China under the General Principles of Civil Law" (156). It provides a general description of the "long and difficult evolution over nearly 40 years" through which the Chinese law of civil obligations (tort) has moved. According to the authors, that body of law has shown a "remarkable blend of influences … a mixture of socialist objectives, capitalist pragmatism, and feudal doctrines combined with jurisprudential models taken from a range of western civil codes and, more recently, the common law" (157).

151 Traditionally, the Chinese legal system was based on notions of a cosmic order derived from the doctrines of Confucius (158). In this order, there were no professional judges. Important cases were decided by local governors in a system resembling the customary and baronial courts of medieval Europe. Following the 1840 Opium War, China was forced to open its ports to Western countries, resulting in the creation of enclaves ruled under systems of foreign law. The general legal system of China which then developed was influenced by the law of Japan, derived, in turn, from Germany and other civil law systems.

152 After the victory of the Chinese Communist Party in 1949, the old legal order was abolished. Soviet socialist law was adopted as a model. This, in turn, was influenced by the civil law systems of Germany, France and Switzerland (159). Thereafter, until recent times, there were still relatively few professional judges. As late as 1994, only 40,000 lawyers were admitted to practise in the whole of China.

(155) See *Blunden v The Commonwealth* (2003) 218 CLR 330 at 349 [59].
(156) *Torts Law Journal*, vol 4 (1996) 137 (Exhibit 34).
(157) *Torts Law Journal*, vol 4 (1996) 137, at p 137.
(158) See *Torts Law Journal*, vol 4 (1996) 137, at pp 137-139.
(159) *Torts Law Journal*, vol 4 (1996) 137, at p 139.

153 It was in the 1980s, with the shift towards an enterprise economy, that notions of tort law and other aspects of civil liability were introduced in China, effectively for the first time (160). Central to the adoption of a new regime was the acceptance by the National People's Congress in 1986 of the General Principles of Civil Law (GPCL) of China (161). In accordance with the traditions of the continental European judiciary, judges in China had no overt or acknowledged role to develop and elaborate the written law, including the GPCL. Generally speaking, they were expected to observe the "absolute primacy of statute as a source of law" (162). Remembering Napoleon's injunction to the judges of France, when the *Code Civil des Francais* was promulgated in 1804, Chinese judges are expected to be "the voice of the statute" and nothing more (163).

154 This notwithstanding, because the GPCL is stated in very general terms, the Judicial Committee of the Supreme People's Court of the People's Republic of China, so as to make the GPCL "more precise and comprehensive" (164), adopted an opinion (the Opinion) (165) that came into force on 26 January 1988. The Opinion was subsequently distributed as a circular to the People's Courts of China at all levels and to every special court in the country. In effect, according to Ms Wang and Dr Mendelson, the Opinion "created a new supplementary law" (166).

155 In the course of the trial of the appellant's claim, expert evidence was given referring to, and translating parts of, the Opinion. Whilst the Opinion "goes some way towards refining the general principles of compensation for tortious conduct contained in the GPCL", the commentators state what is in any case obvious: "further regulatory legislation is needed in order to strike a balance between the theoretical principle of the civil law which prohibits judges from formulating legal rules, and the customary law which gives them unfettered discretion to decide the issue of compensation by reference to the defendant's ability to pay damages." The authors conclude that "both GPCL and the Opinion pay scant attention to legal standards that govern the level and amount of compensation". These defects result in a lack of uniformity of decision-making that may offend Western legal notions

(160) *Torts Law Journal*, vol 4 (1996) 137, at p 142.
(161) See reasons of Gummow and Hayne JJ at 358-359 [71]-[75].
(162) *Torts Law Journal*, vol 4 (1996) 137, at p 138.
(163) See *Torts Law Journal*, vol 4 (1996) 137, at p 138, referring to van Caenegem, *An Historical Introduction to Private Law* (1992), p 130.
(164) See *Torts Law Journal*, vol 4 (1996) 137, at p 147; cf *Neilson v Overseas Projects Corporation of Victoria Ltd* [2002] WASC 231 at [146].
(165) Opinion (for Provisional Use) of the Supreme People's Court on Questions Concerning the Implementation of the General Principles of Civil Law of the People's Republic of China. The Opinion, in the Chinese language, was Exhibit 31 in the proceedings.
(166) *Torts Law Journal*, vol 4 (1996) 137, at p 147.

that "the law should conform to certain minimum standards of justice [and] that like should be treated alike" (167).

156 If the foregoing description of the Chinese legal system, taken from an article written by apparent experts, accepted in evidence and quoted by the primary judge, is even a partial portrait of the legal system in which the GPCL operates, it indicates the dangers of an Australian court applying the GPCL strictly according to its English language text, without informed assistance from expert evidence. In particular, it demonstrates the error of construing the GPCL as if it were an Australian statute. As the authors of the article stated in 1996, progress was being made in the development of a legal system in China. That progress included the GPCL and Opinion providing for compensation for injuries caused by the fault of others. However, "the jurisprudence of tortious liability in China is still at a very early stage of development" (168). These features need to be remembered in approaching the evidentiary problems presented by the present appeal.

157 *Particular Chinese laws*: The GPCL was the most important Chinese law referred to in these proceedings. It was treated by both parties as akin to legislation, although the Chinese approach to the construction of uncertain provisions of the GPCL was never fully established. In addition to the GPCL, reference was made during the trial to the Chinese Code of Civil Procedure (CCP). An English language translation of that code was also exhibited in the proceedings (169). By Art 2 of the CCP, its purpose is stated:

> "(2) The tasks of the [CCP] shall be to protect the right of parties to engage in legal action, ensure that the people's courts ascertain the facts, distinguish right from wrong, apply the law correctly, try civil cases promptly, determine civil rights and obligations, apply sanctions against civil offences, protect the legal rights and interests of parties concerned, educate citizens to voluntarily abide by the law, maintain social and economic order and ensure the smooth progress of socialist construction undertakings."

158 Articles 4 and 5 of the CCP provide:

> "(4) All parties to civil action cases conducted within the territory of the People's Republic of China must abide by this Law.
>
> (5) A foreign national … or foreign enterprise or organisation initiating or responding to legal action in a people's court shall have the same litigation rights and obligations as a citizen, legal person or other organisation of the People's Republic of China. If a court of a foreign country imposes restrictions on the civil

(167) *Torts Law Journal*, vol 4 (1996) 137, at p 149.
(168) *Torts Law Journal*, vol 4 (1996) 137, at p 172.
(169) Stated to have been adopted 9 April 1991 by the Fourth Session of the Standing Committee of the Seventh National People's Congress. This was Exhibit 30 in the proceedings.

> litigation rights of a citizen, enterprise or organisation of the People's Republic of China, the people's courts shall adopt the principle of reciprocity with regard to the civil litigation rights of a citizen, enterprise or organisation of that country."

159 Other relevant provisions of the foregoing laws, and the structure of those laws, are set out in the reasons of other members of this Court (170). Particularly important to the issues that need to be resolved are the terms of Art 106 GPCL (civil liability for fault); Arts 135-137 GPCL (limitation of actions) and Art 146 GPCL (choice of law). As these provisions are stated elsewhere, I shall not repeat them.

160 *Expert evidence on Chinese law*: The appellant did not plead, or tender evidence of, Chinese law, or of how a Chinese court, applying Chinese law, would have resolved the appellant's claim in practice. In particular, she did not show how, if at all, a Chinese court would have applied the choice of law provisions of Art 146 GPCL. However, the respondents called expert evidence which, to some extent, addressed those questions. This was the evidence of Mr Liu Hongliang.

161 Mr Liu is a graduate in law both of Shanghai University in China and Macquarie University in Australia. He is admitted to practise law in China. He has consulted, in China, with an Australian law firm. His evidence included a written witness statement, treated as an exhibit in the trial (171), as well as oral evidence. Some of the latter is referred to, or extracted, in other reasons.

162 The primary judge accepted Mr Liu as an honest and impartial witness whose evidence (with one notable exception) could be relied on (172). The exception, to which I shall return, concerns the testimony that Mr Liu gave that limitation periods are "substantive" under Chinese law. According to such testimony, such limitation periods operate to extinguish the cause of action, as that concept is understood under Australian law (173). The primary judge did not accept Mr Liu's evidence in this respect, although he did not explain why he felt entitled to give effect to the opposite conclusion (174).

163 The view is taken by other members of this Court (175) that the limitation period issue does not arise, or may be passed by, if the relevant provisions of Chinese law, applicable to the proof of the appellant's claim in Western Australia, included Art 146 GPCL, specifically the entirety of that article. In my opinion, there are many

(170) Reasons of Gleeson CJ at 339-340 [6]-[7]; reasons of Gummow and Hayne JJ at 358-359 [71]-[75]; reasons of Callinan J at 404-406 [231]-[232]; reasons of Heydon J at 417-418 [268].
(171) Exhibit G in the proceedings.
(172) [2002] WASC 231 at [126].
(173) [2002] WASC 231 at [186].
(174) [2002] WASC 231 at [186].
(175) See, eg, reasons of Gleeson CJ at 339 [4] and reasons of Gummow and Hayne JJ at 373-374 [131].

difficulties in adopting that approach. I shall explain those difficulties in these reasons. Ultimately, those difficulties lead me to a different result.

The issues

164 The following issues arise for decision:

(1) *The application of foreign law issue*: Were the primary judge and the Full Court correct to conclude that the substantive law for the determination of the rights and liabilities of the parties, in respect of the appellant's action in tort in Western Australia, was the law of the place of the wrong (lex loci delicti)? If so, was it correct to decide that such place was Wuhan, China, requiring that the substantive rights and liabilities of the parties to the appellant's proceedings be determined by the Supreme Court of Western Australia in accordance with the law of China at that time?

(2) *The Art 146/renvoi issue*: Having regard to the answer to (1), what was the content of the applicable Chinese law? Did it permit, or require, consideration to be had of Art 146 GPCL? If so, did it require the application only of the first sentence of that article, treating the case effectively as one within the domestic jurisdiction of a Chinese court? Or did it require effect to be given as well to the second sentence of Art 146, in effect occasioning a renvoi (from the French "return" or "reference back") by the law of China to the law of Australia, as the law of the "own country" or "place of domicile" of the parties to the proceedings? If, by way of Art 146 GPCL, the law to be applied in deciding the substantive rights of the parties was that of the "country" Australia, how is such law itself to be ascertained? Is the Australian law that is picked up the law of the forum chosen by the moving party, namely Western Australia? Would the Chinese court take note of the fact that, following this Court's decision in *Zhang*, the law of the forum in Australia now itself applies, to the determination of foreign or international claims in tort, the law of the place of the wrong (in this case China itself)? Would Art 146 require an unending series of returns (circulus inextricabilis (176)) to apply? Or at some stage (and if so when) would the application of the Chinese choice of law rule, or of the specific provisions of Art 146, be treated as "spent" (177), and if so with what consequences?

(176) *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 at 437.

(177) See *Casdagli v Casdagli* [1918] P 89 at 111; approved [1919] AC 145 at 175, 199; cf reasons of Gummow and Hayne JJ at 374 [133]; reasons of Callinan J at 414-415 [259]. See also Morris, "The Law of the Domicil", *British Year Book of International Law*, vol 18 (1937) 32, at p 34.

(3) *The consideration of foreign law issue*: In the light of the answers to the foregoing issues, if the substantive law for the determination of the rights and liabilities of the parties was that of China, did the primary judge err in deciding that this fact "gave him a right" to apply Chinese law in resolving the case? (178) Did Art 146, or any other part of established Chinese law, give the primary judge that right, as he considered, in the application of Arts 135, 136 and 137 GPCL? Specifically, was the primary judge entitled to reject the evidence of the expert in Chinese law that (in accordance with the GPCL) the extinguishment of the cause of action, after the period of limitation of one year applicable to the case, was part of the substantive law of China? (179) Did the proved Chinese law give the primary judge the right himself to "extend[] under Chinese law" the period of limitation of actions, on the ground of "special circumstances" in the case? (180) If so, was it open to the primary judge, on the evidence, to conclude (as he did) that "special circumstances" had been established?

(4) *The presumption of identity of laws issue*: In the absence of pleading or proof (or adequate proof) of the content of the applicable substantive Chinese law and practice, is it open to this Court to repair any omissions at trial by relying on a presumption of Australian law, that the Chinese law in question is the same as the law of Australia would be in such a case? If that presumption is available, should this Court rely upon it, effectively for the first time in a final appeal, to repair the pleading and evidentiary deficits at trial? In default of evidence as to the applicable Chinese law (and adequate evidence as to the practice of a Chinese court), would it be a proper exercise of this Court's powers, in deciding the appeal, to invoke that presumption?

(5) *The sufficiency of evidence issue*: If the foregoing presumption is not available to cure the deficits in the proof of the applicable Chinese law (and the practice in a Chinese court disposing of a claim such as the appellant's as Art 146 GPCL provides) is there sufficient evidence in the testimony of the expert witness to sustain a conclusion by this Court as to the meaning of Art 146 GPCL and as to the manner in which that article would be applied in China to a proceeding between "nationals of the same country or domiciled in the same country"? In particular, is there sufficient evidence as to how Art 146 would be applied to nationals of the same country where that country is, like Australia, a federation, involving domicile or residence of parties in different subnational

(178) [2002] WASC 231 at [186]-[190].
(179) [2002] WASC 231 at [186].
(180) As provided in GPCL, Art 137.

jurisdictions? And is there evidence, or sufficient evidence, to prove when and in what circumstances a Chinese court would apply such foreign law, in lieu of the law of China itself? Is there sufficient, or any, evidence to show how such law "may" *also* "be applied" within Art 146, inferentially in addition to the Chinese law stated in the GPCL, including the law on the limitation of actions (Arts 135-137 GPCL) and the elaborated provisions on the recovery of medical expenses, loss of income from work, loss of earning capacity and other entitlements in accordance with Arts 143, 144, 146 and 147 of the Opinion, if that Opinion is applicable and relevant to such a case? (181)

(6) *The choice of law: conclusion*: Based on the correct interpretation of Chinese law, was the primary judge correct in concluding that Art 146 GPCL applied? (182) Or was the Full Court correct in concluding that Art 146 did not authorise circumvention of the limitation periods in Arts 135-137 GPCL? Alternatively, in the state of the evidence as to the meaning of Chinese law (specifically Art 146) and as to the manner in which such law would be applied by a Chinese court deciding proceedings like those brought by the appellant, should this Court dismiss the appellant's claim on the ground that an essential ingredient of that claim was not proved? (183)

(7) *The limitation period: conclusion*: Having regard to the resolution of the foregoing issues, did the Chinese limitation period of one year in Art 136(i) GPCL apply to the appellant's proceedings as the expert deposed and the Full Court concluded? If so, did Art 137 apply to those proceedings when commenced in the Supreme Court of Western Australia? If it did, was it open to that Court to find "special circumstances" and thereunder to extend the period of the time bar? Upon the evidence was the primary judge entitled to "order" such an extension? Did the circumstances relied on by the primary judge amount, in any case, to "special circumstances"? Was his conclusion sustained by sufficient, or any, evidence on Chinese law and practice tendered at the trial? Or was the Full Court correct in concluding that the limitation period in Art 136 imposed a strict time bar on the appellant's claim under

(181) See GPCL, Art 119 and the Opinion noted in Wang and Mendelson, "An Overview of Liability and Compensation for Personal Injury in China under the General Principles of Civil Law", *Torts Law Journal*, vol 4 (1996) 137, at pp 149-152; cf [2002] WASC 231 at [157]-[167].

(182) [2002] WASC 231 at [204].

(183) Namely what was the relevant "law" in the "law of the place of the wrong" (that is, the lex of lex loci delicti) as required by *Zhang* (2002) 210 CLR 491.

Chinese law to which, in the absence of other evidence, the primary judge should have given effect? (184)

165 The variety and complexity of the foregoing issues, in an otherwise ordinary damages claim, illustrate once again why the rules of private international law have attracted damning epithets (185). In her reasons in the Full Court, McLure J (186) added to these descriptions the criticism of renvoi expressed by Professors Davies, Ricketson and Lindell (187). They said that renvoi "is a subject loved by academics, hated by students and ignored (when noticed) by practising lawyers (including judges). … To make matters worse, renvoi hardly ever arises in practice". This Court does not have the luxury of ignoring the issue. It must answer it, addressing at least some of the complexities. However, the complexities should not be exaggerated. Although, in the end, in the application of the basic principles to the evidence proved, I come to a result different from the majority of this Court (188), on the fundamental issues (189) I am in agreement with the conclusions of my colleagues. On those questions there is unanimity.

Chinese law determines the parties' substantive rights

166 The first issue may be quickly disposed of. The primary judge found that the law to be applied to the appellant's proceeding (lex causae) was that of China (190). This was notwithstanding the failure of the appellant to plead, or to attempt to prove, the content of that law.

167 The respondents argued that the primary judge was bound to apply Chinese law. They tendered relevant parts of that law and called Mr Liu, as an expert, to elaborate it (191). In this, the approach of the appellant was perilous. It meant that the appellant was forced to rely on the evidence elicited in the respondents' case or upon the presumption of identity of law belatedly invoked. Following the decision of this Court in *Zhang* (192), the approach of the respondents was correct. The primary judge and the Full Court were correct to so decide.

Article 146 GPCL can apply in its entirety

168 *Disposition of the issue below*: The primary judge concluded that Art 146, in its entirety, was applicable to the case and constituted part of the substantive law governing the rights and liabilities of the parties.

(184) (2004) 28 WAR 206 at 222 [73].
(185) (2002) 210 CLR 491 at 522 [86], citing Dean Prosser, Professor Cheshire and Chief Judge Cardozo.
(186) (2004) 28 WAR 206 at 211 [25].
(187) *Conflict of Laws: Commentary and Materials* (1997), p 379 [7.3.1].
(188) Gleeson CJ, Gummow and Hayne JJ, Callinan J and Heydon J.
(189) Notably on the foregoing issues 1 and 2 and part of issue 3. I also agree with Gleeson CJ and McHugh J on issue 4 that the presumption does not help the appellant. See reasons of Gleeson CJ at 343 [16]; reasons of McHugh J at 348-349 [36].
(190) [2002] WASC 231 at [123]. See reasons of Callinan J at 404 [230].
(191) Reasons of Gleeson CJ at 339 [3].
(192) (2002) 210 CLR 491.

He did so "because both parties are nationals of Australia" (193). The primary judge did not perceive the case as one presenting a problem of renvoi, as such. In part, this may have been because of the way the issues were presented at trial. In part, it seems to have followed from the view the primary judge took that he was obliged to apply the whole of the GPCL. That included Art 146. He detected no reason to ignore its provisions. In effect, this was a consequence of his rejection of Mr Liu's opinion that limitation periods were classified as "substantive" under Chinese law and that they took priority in extinguishing the appellant's proceedings at the threshold (194).

169 The Full Court drew an inference from what it took to have been the essential reason behind this Court's re-expression of the law in *Zhang*. It held that the law of the place of the wrong (lex loci delicti), applicable to cases of foreign or international torts such as the present, demanded the identification of a clear, simple and readily ascertainable statement of the substantive law. It therefore excluded the "extraordinarily complex, unwieldy, phantasmagorical journey" (195) inherent in the incorporation of choice of law rules, whether in Art 146 or otherwise, referring to the law of other jurisdictions to identify the law of the place of the wrong.

170 This Court, in *Zhang*, did not specifically address issues of the kind that now arise in this appeal. The rejection in *Zhang* of a "flexible exception" to the rule established in that case, could be read as unsympathetic to the modification of the application, by the forum, of the law of the place where the wrong occurred. This was the conclusion that the Full Court drew (196). It inferred that this Court had "deliberately selected a rigid choice of law rule in tort to promote certainty and predictability". It was understandable reasoning.

171 *Application of all of the relevant law*: However, on the bases explained in other reasons, I agree that the conclusion in *Zhang* does not, in this case, require the exclusion of Art 146 GPCL from the applicable law of China. That article was part of the substantive law of China. It was part of the body of law which (as the parties eventually agreed) governed the outcome of this issue in the case. Indeed, the first sentence of Art 146 is rather similar to the principle stated by this Court in *Zhang*. To exclude the second sentence, in the application of a unified foreign code, would be to introduce an artificial home-made distinction. It is one that cannot be sustained when the purposes of adopting the law of the place of the wrong are understood.

172 It is true that those purposes included the attainment of a measure of certainty about the contents of the applicable law (197). It is also true

(193) [2002] WASC 231 at [204].
(194) [2002] WASC 231 at [186].
(195) Tilbury, Davis and Opeskin, *Conflict of Laws in Australia* (2002), p 1005, cited by McLure J: (2004) 28 WAR 206 at 216 [47].
(196) (2004) 28 WAR 206 at 216 [48].
(197) *Zhang* (2002) 210 CLR 491 at 517 [66]; see also reasons of Gummow and

that the rule in *Zhang* was designed to reduce the risk that a party could obtain advantages for itself by choosing to bring proceedings in one jurisdiction rather than another (forum shopping (198)). So far as torts are concerned, the rule in *Zhang* has "sure foundations in human psychology" (199). The ordinary expectation of most parties is that, in such cases, the law of the place of the wrong will govern their rights and duties. Such expectations are based on notions connected with the fact that the reach of law in such matters is normally territorial.

173 The law must be even-handed in its operation. It must be just to defendants as well as plaintiffs. Whilst the law of torts has a compensatory purpose, it also has purposes of promoting the prevention of wrongs and the distribution of costs within the community concerned where wrongs occur (200). This is a reason why a party should not normally be able to pick and choose the applicable law (and thus in many cases the outcome) according to the forum selected by that party for the commencement of proceedings.

174 If these considerations oblige reference by the court of the forum to the law of the place of the wrong, this suggests a reference to *all* of the law of that place that local courts would normally apply in deciding the proceedings, were such proceedings commenced there (201). The application of a foreign choice of law rule in such a case might be different where that rule is unwritten, obscure, contestable, or otherwise difficult to ascertain. However, in the present case, given that the applicable rule is found in the self-same law upon which the liability of the respondents concededly depended, to apply one sentence of Art 146, but to ignore another, would be unacceptably arbitrary.

175 *How a Chinese court would act*: I agree with Gummow and Hayne JJ (202) that, in resolving this appeal, it is unnecessary to postulate a single theory of renvoi to govern all proceedings in Australian courts requiring reference to foreign substantive law. I also agree with Heydon J that essentially what is required in this case is an understanding of the meaning of Art 146 GPCL, not, as such, a comprehensive dissertation on a principle of renvoi, of universal or general application (203).

(cont)
Hayne JJ at 364 [92]; reasons of Callinan J at 407-408 [237].

(198) Reasons of Gummow and Hayne JJ at 363 [89]; cf *Zhang* (2002) 210 CLR 491 at 533-534 [118].

(199) Carter, "Torts in English Private International Law", *British Year Book of International Law*, vol 52 (1981) 9, at p 16, noted in *Zhang* (2002) 210 CLR 491 at 537 [130].

(200) *Zhang* (2002) 210 CLR 491 at 538-539 [131].

(201) The Australian Law Reform Commission in its report *Choice of Law*, Report No 58 (1992), p 30 [4.11]-[4.12] recommended legislation for a general choice of law rule that did not include the law relating to choice of law. The recommendations of the Commission have not yet been implemented.

(202) Reasons of Gummow and Hayne JJ at 366 [99].

(203) Reasons of Heydon J at 420 [277]. In judicial practice renvoi is said to be rarely

176 It follows that the ultimate question which the rule in *Zhang* presents is: How would the court of the place of the wrong decide the proceedings brought there in respect of that wrong? Where the forum is an Australian court, that is the question which Australian law must answer (204). To provide an answer by referring to part only of the applicable foreign substantive law would frustrate the fulfilment of the purpose for which the rule in *Zhang* was devised (205).

177 The Full Court therefore erred in concluding that Art 146, in so far as it contained a choice of law rule akin to renvoi, had to be ignored in this case (206). This error was important for the steps in the reasoning which the Full Court then took concerning the application of the time bar otherwise applicable under the GPCL in respect of a "demand for compensation for bodily harm" in China (207). It follows that the judgment of the Full Court cannot stand. Prima facie, it must be set aside. Is it possible for this Court simply to restore the judgment entered in favour of the appellant by the primary judge? Or is the reasoning that sustains the judgment at first instance itself flawed in other respects and, if so, with what consequences for the disposition of this appeal?

Ascertainment of the operation of Chinese law

178 *Erroneous rejection of the expert*: Unfortunately the primary judge's reasoning was also flawed. I say this with respect to him because he decided a great many difficult issues. He dealt with most of them accurately and convincingly. Indeed, most of his findings are, at this stage, unchallenged. However, there are two errors.

179 The first error lay in the primary judge's treatment of the evidence of the only expert on Chinese law called in the case, Mr Liu. This is a part of the reasoning at trial that was closely examined by the Full Court. The Full Court's criticism of the primary judge's treatment of the expert's evidence about the Chinese limitation bar is compelling. It reveals an error which, if it remains relevant, is fatal to the conclusion of the primary judge on this issue. It is convenient to deal with it now.

180 In his witness statement, Mr Liu gave evidence of his awareness "of the distinction in Australian law between limitation periods that extinguish a cause of action and those which prevented a remedy from being sought" (208). According to Mr Liu, the limitation period expressed in Art 136 GPCL "acts to extinguish a cause of action, as

(cont)
used in China and People's Courts "tend to ignore it": see Kong and Minfei, "The Chinese Practice of Private International Law", *Melbourne Journal of International Law*, vol 3 (2002) 414, at p 425.

(204) In accordance with *Zhang* (2002) 210 CLR 491.

(205) cf reasons of Gummow and Hayne JJ at 368 [108].

(206) *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206 at 216 [48].

(207) GPCL, Art 136(i): see *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206 at 217 [55].

(208) Witness statement of Hongliang Liu (Exhibit G), para 29. This distinction is

that notion is understood in Australian law" (209). He explained this conclusion by reference to the fact that the GPCL deals with substantive rights. Procedural matters are addressed by another code, namely the CCP. If the "limitation period merely prevented a remedy, it would be dealt with in the [CCP]" (210).

181 This was the only part of Mr Liu's evidence about Chinese law that the primary judge did not accept (211). He referred to the facility, envisaged by Art 137 GPCL, of an extension of the limitation period and Mr Liu's evidence that such an extension was a "possibility". However, quoting the Opinion, Mr Liu insisted that this "possibility" was confined to circumstances that had prevented the bringing of proceedings to the Chinese court, such as "objective barriers during the legal time limitation period" (212).

182 Mr Liu elaborated what was meant by this expression, stating "only, for example, if there's some war which stopped a person, for example, [commencing the proceedings]". He said that application of Art 137 was "very difficult and they are very rare cases". Pressed on this, he was asked whether his researches had discovered *any* cases where Art 137 had been applied to extend time. He said "No, actually not". Notwithstanding this seemingly clear and unqualified evidence, from an expert witness accepted as honest and neutral, the primary judge rejected what he said in this respect.

183 For a number of reasons, similar to those explained by the Full Court (213), it is my view that the primary judge erred in rejecting Mr Liu's evidence on the interpretation of Art 137 GPCL. That evidence was uncontradicted and uncomplicated (214). It took into account considerations of "fairness and justice" to both parties, and not just to the appellant (215). As Callinan J points out (216), the primary judge's view as to what constituted prejudice was rather one-sided. It did not give any apparent weight to the prejudice to the respondents of depriving them of a time limitation available to them as part of

(cont)

explained in *John Pfeiffer* (2000) 203 CLR 503 at 543-544 [98]-[100], 553-554 [131]-[132].

(209) Witness statement of Hongliang Liu (Exhibit G), para 30.

(210) Witness statement of Hongliang Liu (Exhibit G), para 31.

(211) [2002] WASC 231 at [186].

(212) Opinion, Art 169, quoted by Mr Liu, transcript of the trial, Supreme Court of WA, No 1686/97, 11 September 2002, p 268. See reasons of Callinan J at 404-406 [231].

(213) (2004) 28 WAR 206 at 218-220 [57]-[65].

(214) (2004) 28 WAR 206 at 220 [63]. Commentaries on Chinese law, published in Australia, confirm that "time limitations … are characterised as substantive issues": see, eg, Kong and Minfei, "The Chinese Practice of Private International Law", *Melbourne Journal of International Law*, vol 3 (2002) 414, at p 424, fn 43, referring to Opinion, Art 195. These commentaries confirm the evidence of Mr Liu and help render the rejection of that evidence at trial the more puzzling and unacceptable.

(215) (2004) 28 WAR 206 at 220 [63].

(216) Reasons of Callinan J at 404-406 [231].

substantive law in China. Doing so subjected them, in respect of a claim that originated in a foreign country, to proceedings in Western Australia five years after the descent of the Chinese time bar extinguishing the claim.

184 There was nothing inherently unlikely in the evidence of Mr Liu on this point. English law (and that of Australia) has only recently moved away from the application of inflexible rules in matters of time limitations, as well as other areas of substantive and procedural law (217). It should occasion no surprise that the Chinese legal system, at this stage of its development, contains inflexible rules on such a subject, rarely if ever departed from (218).

185 Under Australian law, courts are not deemed to know the law of foreign nations (219). That is why the content of such law presents questions of fact, ordinarily to be pleaded by the party relying upon it and, unless agreed, proved by expert evidence. It is true that the court receiving such evidence is not bound to accept it, including where it is uncontradicted. However, as Diplock LJ observed in *Sharif v Azad* (220), a court should be reluctant to reject such evidence unless it is patently absurd or inconsistent (221). It will be rare indeed that an Australian trial judge, required to make findings about the content of foreign law, will prefer his or her own conclusions as to the state of that law to expert testimony of a competent witness with proved training and qualifications.

186 Applying these principles to the present case, I come to the same conclusion as the Full Court did on this issue. There was nothing patently absurd or inconsistent in the evidence of Mr Liu on the meaning and operation of Arts 135, 136 and 137 GPCL. The evidence was clear and apparently applicable. The trial judge erred in rejecting Mr Liu's interpretation and in substituting his own (222).

187 This is an important conclusion for the purposes of the Australian law binding on the primary judge. That law obliged him to decide the appellant's claim against the respondents by applying the substantive law of China for the determination of rights and liabilities in respect of her claim (223). The substantive law on time limitations was part of

(217) *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 at 167-172. See, eg, *Weldon v Neal* (1887) 19 QBD 394 and *Horton v Jones [No 2]* (1939) 39 SR (NSW) 305 at 315.

(218) Similar strict rules of time limitations commonly appear in the law of other countries and in international treaties. See, eg, Art 29 of the Warsaw Convention on Civil Aviation: *Milor Srl v British Airways Plc* [1996] QB 702 at 707; *Kahn v Trans World Airlines, Inc* (1981) 443 NYS 2d 79 at 87; *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 266-267 [45]-[47].

(219) cf reasons of Gummow and Hayne JJ at 370 [115].

(220) [1967] 1 QB 605 at 616.

(221) *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554 at 573 per Sheller JA, citing *A/S Tallinna Laevauhisus v Estonian State Steamship Line* (1946) 80 Ll L Rep 99 at 108.

(222) (2004) 28 WAR 206 at 220 [64]-[65].

(223) In accordance with *Zhang* (2002) 210 CLR 491.

that law. Such law was to be ascertained, not by reference to the (often artificial) classifications of Australian law as to what law is substantive or procedural. It was to be decided by reference to what the law of China treated as "substantive".

188 Subject to the arguments on Art 146 which follow, I would reach the same conclusion on this point as expressed by McLure J for the Full Court. Necessarily, that conclusion would be fatal to the appellant's claim because, according to Chinese law, the appellant's claim was time-barred. The primary judge's conclusion to the contrary would have to be set aside. The Full Court's conclusion would have to be affirmed, upon this basis.

189 *Erroneous assertion of discretion*: For the moment, however, I will assume that, for technical reasons of pleading (224), the foregoing errors in the rejection by the primary judge of the evidence of Mr Liu are not available to the respondents in this Court. Even so, error being shown in the reasoning of the Full Court, the judgment of the primary judge cannot simply be restored. There is a separate error in that reasoning. As to that error, this Court speaks with one voice.

190 The primary judge, whilst acknowledging his function as a "Western Australian Judge" and "not a People's Court" (225), on two occasions, critical to his conclusions, asserted that he was entitled, out of his own powers, to apply Chinese law as stated in the GPCL. He did this in concluding that "the limitation period should be extended under Chinese law [as provided for in Art 137 GPCL]" (226). He took the same course in asserting his entitlement "to apply Article 146" (227). He stated that that article "gives me a right to choose to apply the law of Australia because both parties are nationals of Australia" (228). This was a misunderstanding of what the primary judge was required, and entitled, by Australian law to do (229).

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

(224) For example because the respondents did not file a notice of contention in this Court seeking to sustain the Full Court's judgment upon the correctness of its conclusion on the evidence of Mr Liu concerning the time bar.

(225) [2002] WASC 231 at [190].

(226) [2002] WASC 231 at [191].

(227) [2002] WASC 231 at [204].

(228) [2002] WASC 231 at [204].

(229) See reasons of Gummow and Hayne JJ at 369 [113]. Arriving at a uniform result in a case irrespective of the chosen forum is the object that Savigny said was "the chief purpose of private international law": Rabel, *The Conflict of Laws: A Comparative Study*, 2nd ed (1958), vol 1, p 94. It has caused judges in many countries to accept the need to disregard the "fortuitous circumstances which often determine the forum": *Lauritzen v Larsen* (1953) 345 US 571 at 591 per Jackson J.

before it. The error of the primary judge in the approach that he took is accepted in the reasons of the majority of this Court (230). I agree with that conclusion.

192 This means that the approach of the primary judge to the application of Arts 137 and 146 GPCL cannot stand. For reasons explained, the Full Court concluded that Art 146, in its second sentence, did not apply and that Art 137 did, in accordance with the evidence of Mr Liu. Because this Court has accepted that Art 146 applies in its entirety, it remains to follow the logic of that conclusion to its correct outcome.

The presumption of identity of law is a fiction

193 *Bridging the gulf by evidence*: In disposing of this appeal, how should this Court resolve the application of Art 146 and (if it be necessary) Arts 135, 136 and 137 GPCL that miscarried at trial? If this Court does not remit such a question, to be determined by another court in accordance with principles of law identified by it (231), it is empowered to decide the question for itself, entering the judgment that should have been entered below (232). If this Court adopts the latter course, it must reach its own conclusions upon the evidence in, and inferences available from, the record, unembroidered by any additional evidence (233).

194 In their submissions, the respondents concentrated on the doctrine of renvoi about which "[t]he literature … is immense" (234). However, the appeal cannot be resolved at such a level of generality. This Court must reach a lawful outcome and make dispositive orders. In doing so, it cannot ignore the issues that arise because of demonstrated errors in the courts below. The parties, by their arguments, cannot impose on this Court, in discharging its constitutional function of deciding appeals, an obligation to decide an appeal otherwise than in accordance with law (235).

195 The starting point for analysis is a determination, once the whole of Art 146 GPCL is available, of whether, in accordance with that article, a Chinese court, deciding a case between the present parties commenced at the same time, would have done so by the application of Australian law and, if so, with what consequences. Would the Chinese court have:

- Ignored the complication of federation, in a country such as Australia, and treated the parties relevantly as "nationals of the same country" or "domiciled in the same country"?

(230) Reasons of Gleeson CJ at 342 [13]; reasons of Gummow and Hayne JJ at 369 [113]; reasons of Callinan J at 409-410 [244]; reasons of Heydon J at 420 [275].
(231) *Judiciary Act 1903* (Cth), s 37.
(232) *Judiciary Act 1903* (Cth), s 37.
(233) *Mickelberg v The Queen* (1989) 167 CLR 259; *Eastman v The Queen* (2000) 203 CLR 1.
(234) Dicey and Morris, *The Conflict of Laws*, 13th ed (2000), vol 1, p 65 fn 1.
(235) cf *Roberts v Bass* (2002) 212 CLR 1 at 54 [143].

- Resolved the content of the "law of their own country" in Art 146 GPCL in favour of Western Australia, treating it as a "country" when, in this case, the "country" was Australia but the appellant was domiciled in Western Australia and OPC was registered in Victoria and MMI in yet another State of Australia?

- "Also" applied the law of such "country", in addition to that of China and at the same time? When, and in accordance with what principles, would it have done this, given the general provisions of Art 106 GPCL imposing civil liability on a person who harms another person in China, without apparent differentiation as to foreign nationality or domicile (and having regard also to the terms of Arts 4 and 5 of the CCP (236))?

- Exercised the apparent discretion stated in Art 146 ("the law of their own country … *may* also be applied")? When, if ever, would this actually happen in China, upon the assumption of the commencement of the appellant's proceedings in a Chinese court?

196 None of the foregoing questions are matters in which this Court can provide answers from its own knowledge. To do so would involve this Court in making the same error as the primary judge, namely, assuming that it enjoys powers conferred by Chinese law upon Chinese courts. Our inquiry is about the state of curial facts for the exercise of the Australian judicial power. It is not one that seeks to derive judicial power from a foreign source.

197 This is why the presentation of evidence to prove the content and practice of Chinese law was vital in this case for the fulfilment of the requirements of *Zhang*. It explains why a deficit in the proof of the content of such law, and in the practice of its application, will sometimes be critical (even fatal) to the fulfilment of the premise of establishing what the foreign court would do. It is that search alone that fulfils the purpose of *Zhang* and deprives the party initiating the proceedings of the power to select a forum in a tort action in a place most advantageous to that party.

198 The foregoing analysis also explains why it is not possible, in this case, for this Court to guess, or presume for itself, the answers to the questions presented by applying to the Chinese law (principally the GPCL) rules of construction that accord with the way that we would construe an Australian statute (237). Quite apart from the nuances and difficulties that exist because of the need to translate the Chinese law into the English language, it would be an absurd fiction to pretend that the elaborate principles of statutory construction developed by, or

(236) These articles are set out earlier in these reasons at 381-382 [157]-[158].

(237) cf reasons of Callinan J at 412 [250]; reasons of Heydon J at 416-417 [267], 420 [275]; cf *Ruhani v Director of Police [No 2]* (2005) 222 CLR 489 at 521 [80].

applicable to, Australian courts have exact equivalents in the courts of China, given the divergent historical and jurisprudential traditions of the two legal systems.

199 If, then, the purpose of ascertaining, and applying, the law of the place of the wrong (lex loci delicti) is to ensure consistency of outcomes, to deny advantages of forum shopping and to fulfil ordinary human expectations, the only way this can be done, in a case such as the present, is according to evidence. Arguably, it might be different where the law of the foreign country is written in the English language; where it is simple, clear or agreed; where there is a shared tradition of legal history; where there are common principles of interpretation of written law; and where judge-made law is accepted and its content proved. But that is not this case. Here, the languages, traditions, institutions and history of China are quite different from Australia's. If the decision in these proceedings is to be based on evidence, there is a commensurate need for expert testimony to bridge the gulf that exists between the substantive law known to an Australian court and the law that would be observed in China, were the proceedings brought there.

200 *The presumption of identical law*: The unsatisfactory nature of the evidence available in the record concerning the manner in which a Chinese court would approach Art 146 GPCL is effectively acknowledged in other reasons (238). Indeed, it is self-evident. It probably originates in an erroneous assumption on the part of the appellant's advisers (evident in the pleadings) that it was sufficient for the appellant to rely on the substantive law of the Western Australian forum.

201 Callinan J has identified, in my view accurately, the silences in the evidence concerning the way Art 146 GPCL would be applied to the present parties by a Chinese court. His Honour correctly describes the expert evidence of Mr Liu concerning Art 146 as ultimately inconclusive (239). This appears to be so because Mr Liu's eventual opinion was that Art 146 was irrelevant to a claim such as the appellant's (240). His agreement to the proposition that principles of "fairness and justice" could allow a Chinese court, hearing such a claim, to decide it according to Australian law was distinctly hesitant (241). The most that Mr Liu would say was "That's a possibility". But it was a "possibility" put in his mouth by the cross-examiner. Mr Liu's written witness statement and other oral testimony made no reference to Art 146 GPCL at all. The article appears to have been introduced in the case by the application of

(238) See, eg, reasons of McHugh J at 348 [35]; reasons of Gummow and Hayne JJ at 370 [117].
(239) Reasons of Callinan J at 409-410 [244].
(240) cf reasons of Gleeson CJ at 341 [10].
(241) Reasons of Gleeson CJ at 341 [10].

Australian legal ingenuity rather than by Chinese legal experience as to the meaning of the article and how it is actually applied by Chinese courts.

202 The foregoing difficulties, presented by the record, for the ascertainment of the law and practice of China governing Art 146 GPCL, have caused a majority of this Court (242) to invoke a supposed presumption of the common law of evidence. This is to the effect that, in a case where the content of foreign law is significant for the resolution of the issues, and such law is not proved at all or adequately, an Australian court may presume that such law is the same as Australian law. It may decide the case accordingly.

203 Like Gleeson CJ and McHugh J, I derive no assistance from this supposed presumption, at least in a case such as the present (243). In this case, it involves an unrealistic fiction which has only to be stated for its flaw to be revealed. A presumption that a basic rule of the substantive law of England or some other common law country, in default of proof, is the same as the law of Australia is one that might be justified in a particular case. However, the notion that the law of a country so different, with a legal system so distinct, as China is the same as that of Australia, is completely unconvincing (244). As Richard Fentiman explains (245):

> "[T]he argument for relying upon such an unlikely fiction has always been insecure. To speak of such a presumption at all, rather than admitting that English law applies as the lex causae where no other is proved, may rest on a conceptual mistake. And the inappropriateness of deeming English and foreign law to be the same in all situations has long been recognised. Certainly there are cases in which the courts have declined to do so where this would strain credibility …
>
> It is unclear therefore that it is ever appropriate to speak of a presumption of similarity between English and foreign law. And even if we do so it is apparent that it has never been treated by the courts as a universal rule … One danger in applying the presumption … is that the mandatory introduction of foreign law might thus be subverted. A party who is required to introduce foreign law by a mandatory choice of law rule may attempt to employ the presumption to defeat that rule's obligatory character. Another risk is that a plaintiff who relies upon foreign law even when no such duty exists might oppress a defendant by requiring

(242) Reasons of Gummow and Hayne JJ at 372 [125]; reasons of Callinan J at 411 [249]; reasons of Heydon J at 420 [275].

(243) Reasons of Gleeson CJ at 343 [16]; reasons of McHugh J at 348-349 [36].

(244) *Guepratte v Young* (1851) 4 De G & Sm 217 at 224 [64 ER 804 at 808]. See also *Damberg v Damberg* (2001) 52 NSWLR 492 at 508 [129] per Heydon JA.

(245) Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (1998), pp 146-148 (footnote omitted). See also Dicey and Morris, *The Conflict of Laws*, 13th ed (2000), vol 1, p 232 [9-025].

the latter to disprove the presumption. Certainly, there is something potentially unfair not to say irrational, about requiring one party to disprove what the other has not sought to prove."

204 With all respect to the majority view, I regard it as straining even credulity to impose on an Australian court the fiction of presuming that the law of China (the place of the wrong), which is an essential element in this case, is the same as the law in Australia. Or that a written law of China would be interpreted *and applied* by a Chinese court in the same way as an Australian judge would do in construing a similar text.

205 *Facilitating proof of foreign law*: It is true that the expansion of the Internet has made written laws available, especially in the English language, to an extent that was earlier unthinkable (246). It is also true that the growth in the international movement of people, goods and capital has greatly expanded the potential applicability of foreign law in municipal decision-making. It is true that securing expert evidence (such as that of Mr Liu) will often be prohibitively expensive. I accept that means should be found by courts and our law to receive evidence about foreign law in a way that is economic, efficient and manageable (247).

206 However, in Australia, the foregoing needs must be met in a constitutional system of courts that are impartial as between the parties and that rely on evidence, not guesswork, speculation and inherently unlikely fictions. Where a party, bringing a claim in an Australian court in respect of a wrong that has occurred in a foreign country, fails to establish adequately the substantive law that would have been applicable to that claim in that country, the solution which our judicature offers is that the party has failed to prove its case. Pretending that the content of the applicable substantive *law* and, equally important, the *practice* by which that law is applied by courts in the place of the wrong is the same as it would be in Australia, involves an unconvincing exercise. Effectively, it shifts the burden of proving the foreign law to the defendant, who may (as here) contest its content. This course is similar to the fiction earlier adopted in English law that a foreign tort was to be treated as having occurred in England (248). Our law has abandoned that fiction. We should not adopt another that is equally incredible. Least of all should we do so given the purposes in *Zhang* of requiring the plaintiff, who invokes the

(246) Yezerski, "Renvoi rejected? The Meaning of 'the lex loci delicti' after Zhang", *Sydney Law Review*, vol 26 (2004) 273, at p 291. See also Keyes, "The Doctrine of Renvoi in International Torts: *Mercantile Mutual Insurance v Neilson*", *Torts Law Journal*, vol 13 (2005) 1, at p 12.

(247) The receipt into evidence, and use, of the descriptive article on the Chinese law of torts by Wang and Mendelson, "An Overview of Liability and Compensation for Personal Injury in China under the General Principles of Civil Law", *Torts Law Journal*, vol 4 (1996) 137, is an indication of what may be done.

(248) *The Halley* (1868) LR 2 PC 193 at 203. See *Zhang* (2002) 210 CLR 491 at 531 [113].

jurisdiction of the courts of the forum, to establish the acceptability and justice of having done so by submitting to the outcome as to the substantive law that would have applied, had the action been tried in the place of the wrong according to the law and practice of that place (249). If there is doubt or disagreement about the content of that law, the plaintiff must prove what the law is.

207 I therefore agree with Gleeson CJ and McHugh J that, in this case, the presumption invoked by the majority in this Court is unhelpful. However, I cannot agree with Gleeson CJ that there was "just enough" evidence given by Mr Liu to sustain the conclusion as to what Art 146 GPCL meant and how it would have been applied if the appellant's proceedings had been brought in China (250). The most that Mr Liu said in cross-examination was that it was "possible" that a Chinese court might have applied Australian law to such a claim between Australians. Possibilities are insufficient to fill the gap in the evidence. The appellant did not prove this aspect of her case. Indeed, she did not even try to do so.

208 *Conclusion: presumption rejected*: The presumption relied on by the majority in this Court to repair the defects in the appellant's case should be rejected as unavailable. This leaves the appellant's case silent on the way in which Art 146 would be applied in China. This Court does not have the knowledge to fill that gap. Any attempt on its part to do so would be sheer guesswork. We do not advance the orderly development of private international law by encouraging the defective presentation of cases and by adopting incredible fictions to cure such defects.

The correct application of the foreign law

209 *Application of Art 146 GPCL*: Once this Court has found error and proceeds, for itself, to decide the matter, it is essential that it do so accurately. In the present case, this means by correctly applying the evidence about the foreign law contained in the record. Because there is no suggestion, in the primary judge's findings, of defects of credibility of the expert witness, no complication of that kind intrudes (251). The proceedings can therefore be resolved on the transcript of Mr Liu's evidence.

210 It is true that, on its face, the English language translation of Art 146 GPCL suggests the possibility that a Chinese court might apply to proceedings like those of the appellant the substantive law derived from Australia. One can invent reasons of convenience for its doing so: to encourage tourism and investment and to avoid the possible injustice of applying to disputes between foreigners a disparate legal system

(249) cf Briggs, "In Praise and Defence of Renvoi", *International and Comparative Law Quarterly*, vol 47 (1998) 877, at p 881.

(250) Reasons of Gleeson CJ at 343-344 [17].

(251) *Fox v Percy* (2003) 214 CLR 118 at 127 [26].

with low entitlements to recovery (252). However, in a published comment knowledgeable authors state (253):

> "While private international law in China is becoming increasingly important, the sporadically released jurisprudence shows that the Chinese practice leaves much to be desired."

211 It is not true to say that "no Chinese interests are involved" and "no reason of policy" exists for a Chinese court to decline the determination of such a case according to the law of Western Australia (254). To the contrary, there are many such interests and policies at stake. They include (1) the self-respect of a newly emergent polity, building its own legal system which, according to the GPCL, ordinarily applies its own law to the disputes that foreigners have in China (255); (2) the lack of expertise of the Chinese court on foreign law; (3) the need in China (as much as Australia) to prove a foreign law where it is to be applied, and the practical availability and cost of that expertise; (4) the differing legal and cultural attitudes to strict time limitations and to the extinguishment of time-barred proceedings; (5) the avoidance of manifest dis-uniformity of outcomes in proceedings decided by the same municipal court; (6) the criticism, inherent in the appellant's claim, of the Chinese builders and providers of the allegedly defective dwelling; and (7) the risk of joinder of those State agencies in the proceedings, if the proceedings were brought in China (256).

212 These considerations, and doubtless other practical features, might present strong public interest and other reasons for the court doing what is normal in Chinese courts, namely applying Chinese law (257). After China's recent history of foreign occupation and subjection to foreign law, it is dangerous to leap to assumptions about the way Art 146 GPCL would be applied by a Chinese court. That question was one for evidence. Especially so because, even in the English language

(252) "In China … compensation for non-material injury has not been encouraged": see Wang and Mendelson, "An Overview of Liability and Compensation for Personal Injury in China under the General Principles of Civil Law", *Torts Law Journal*, vol 4 (1996) 137, at p 140. See also GPCL, Art 119.

(253) Kong and Minfei, "The Chinese Practice of Private International Law", *Melbourne Journal of International Law*, vol 3 (2002) 414, at p 435.

(254) Reasons of Gleeson CJ at 343-344 [17].

(255) A tendency of Chinese courts appears to be to apply Chinese law to a tort occurring in China even though there is a disparity of applicable laws: see Kong and Minfei, "The Chinese Practice of Private International Law", *Melbourne Journal of International Law*, vol 3 (2002) 414, at p 430, referring to *Hong Kong Meridian Success International Ltd v Aslan Transmarin Shipping Trading & Industry Co Ltd* (Guangzhou Maritime Court (1994)).

(256) Joinder appears to be available: GPCL, Art 122 and Opinion, Art 153(2); cf Wang and Mendelson, "An Overview of Liability and Compensation for Personal Injury in China under the General Principles of Civil Law", *Torts Law Journal*, vol 4 (1996) 137, at p 165.

(257) cf GPCL, Art 150.

version, the second sentence of Art 146 is ambiguous. At the most, it affords a discretion to the Chinese court.

213 There is no evidence whatever as to how Art 146 is interpreted or applied in practice in China. All that exists is an interpretation by judges of this Court of the English language translation of GPCL, understood according to Australian principles of interpretation or relying on a presumption that the application of the law would be the same as in Australia. By way of contrast, the accepted Chinese legal expert regarded Art 146 as immaterial. The highest that he would go in evidence was to concede that the application of foreign law was a "possibility". Such "possibility" was never elaborated by questioning. It is therefore guesswork for this Court to perform that elaboration where the appellant failed to provide relevant evidence or otherwise to perform that task.

214 Applying Art 146 GPCL in the correct way, I am left completely uncertain as to whether, and if so on what terms, a Chinese court would apply Australian law (of which State is undiscoverable) in proceedings brought for the appellant in China. A "possibility" is not enough. The burden was on the appellant, if she could, to elicit more than this.

215 The result is that the ingredient of the law (lex) in the law of the place of the wrong (lex loci delicti), required by *Zhang*, was not established. The appellant, by use of possibilities and presumptions, should not be allowed to turn the requirement of *Zhang* on its head. Otherwise, this Court permits a litigant, in effect, to choose the forum and there to impute an identity of law in the foreign country despite the large numbers of such countries and jurisdictions and the enormous variations in the contents of their laws to which Heydon J refers (258).

216 *Application of Arts 135-137 GPCL*: Once the applicability of Art 146 GPCL is rejected as unproved, this Court should return to the affirmative evidence of the expert. This was that Art 136, imposing a strict one year time limit, was applicable to the appellant's claim and was treated in China as part of its substantive law. The rejection of that expert evidence was arbitrary and unsustained. This Court, in disposing of this appeal, should not make the same mistake. The appellant urged the adoption of the whole of Art 146 GPCL on the stated basis that this was the substantive law that would be applied if the matter were adjudicated in a court exercising the judicial power of the country in which the wrong occurred. Yet, according to the evidence, so would be the limitation provisions of Art 136. Differentiation between the articles is unprincipled.

217 Even assuming that this Court may, without evidence as to the law and practice of China (and contrary to the testimony of Mr Liu), construe the GPCL as it would an Australian statute, it is not difficult to reconcile Arts 135-137 and Art 146. They appear together in the same

(258) Reasons of Heydon J at 421 [283].

law (the GPCL). Indeed, they are almost adjoining provisions. The special choice of law provisions for foreigners in the GPCL are not disjoined from the other provisions of the GPCL. On the face of things, they have to be applied together. If (as Mr Liu deposed) a time-barred action under Art 136 is extinguished as a matter of substantive law, such a claim could not thereafter enliven the special choice of law provisions in Ch VIII of the GPCL. Put simply, according to Chinese law, that claim was extinguished (259).

218 It is not so long ago that an identical approach to statutes of limitations was taken in our own law (260). In accordance with the evidence of Chinese law, it should now be given effect. No other approach conforms with the obligation stated in *Zhang*, that the substantive law of the place of the wrong applies to such a case. Here that is the law of China.

Conclusions and orders

219 The result is that, although for reasons different from those given, the Full Court reached the correct conclusion. The invocation of Art 146 GPCL fails as unproved by the evidence. Its suggested revival by a presumption of the identity of Chinese and Australian law should be rejected as an unconvincing fiction (261). Article 136 would have applied to the appellant's proceedings had she brought them in China, the place of the wrong. According to the evidence, the provisions in Art 137 for relief from the time bar do not apply to such a case. The judges below erred in their reasoning on these points.

220 This Court should determine the appeal and not remit the outstanding issues (262). Doing so, in accordance with *Zhang*, it should apply the law of China, as the place of the wrong. By that law the appellant's claim was time-barred. She could not improve her position, five years out of time, by bringing her proceedings in an Australian court. Least of all could she do so by invoking the jurisdiction of the Western Australian court and ignoring the necessity to prove the substantive law of the place of the wrong, namely China.

221 The appeal should be dismissed with costs.

(259) cf *Timeny v British Airways Plc* (1991) 56 SASR 287 at 301 per Bollen J, treating the claim as "extinguished, dead and gone forever".

(260) *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 553 per McHugh J.

(261) cf *Calverley v Green* (1984) 155 CLR 242 at 264 per Murphy J. Neither at trial nor in the Full Court was mention made of the supposed presumption of identity between Australian and Chinese law. Yet it is that presumption that is now critical for the conclusion of the majority in favour of the appellant. Only in this Court does the presumption appear as deus ex machina.

(262) *Judiciary Act 1903* (Cth), s 37.

CALLINAN J.

Issue

222 This is the third appeal (263) in recent times in which the Court has been called upon to resolve problems which arise when plaintiffs bring proceedings in jurisdictions different from those in which they claim to have been wronged. The particular problem here lies in the selection of the law to be applied to the appellant's claim.

Facts

223 On 6 October 1991, the appellant was injured when she fell from a landing at the top of a flight of stairs in an apartment in which she was living with her husband, in Wuhan, a city in the province of Hubei in the People's Republic of China (China). At the time, her husband was employed by the first respondent, a company owned by the State of Victoria and having its registered office and principal place of business there. The first respondent's presence in China should be explained. On 16 May 1989, the Commonwealth entered into a joint venture with the Chinese Government, by which it agreed to provide experts to conduct training courses at the China-Australia Iron and Steel Industry Training Centre (the Training Centre) located at the Wuhan Iron and Steel University. The Chinese Government agreed to provide Australians who were undertaking the training with accommodation in Wuhan. After the arrangements were made, the first respondent entered into an agreement with the Commonwealth to be the supplier on its behalf of the contractual services.

224 The appellant's husband was employed on a temporary contract as a consultant to prepare and teach a course on organisational behaviour at the Training Centre. He and the appellant resided in Wuhan with their family, in accordance with the husband's contract of employment with the first respondent. The accommodation in Wuhan was maintained by Chinese officials.

225 Before leaving for China with her husband, the appellant also accepted an offer of employment with the first respondent on a part-time basis as a personal assistant to the Australian Director of the Training Centre. The terms of her employment, including her remuneration, were settled orally in telephone conversations with the first respondent in Victoria. There was no written contract of employment.

226 The accident occurred in the early morning of 6 October 1991. At about 4am, the appellant awoke with a thirst. There was a refrigerator, with chilled water in it, in the kitchen downstairs. To avoid waking her husband, she did not turn on the bedroom light. In darkness, the appellant approached the stairs leading to the kitchen. There was no protective balustrade. Its absence had been the subject of complaint to

(263) *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.

the first respondent by both the appellant and her husband. The appellant attempted to avoid this part of the stairwell, and to turn on the stairwell light. She miscalculated and stepped over the edge of the stairs, falling heavily. She suffered injuries to her head and back. She was admitted to hospital where she stayed for three weeks. Following her discharge, and upon medical advice, she returned to Australia. It was agreed between the parties that if the appellant's damages were assessable according to Australian law, they would amount to $300,000.

The Supreme Court proceedings

227 The appellant (264) sued the first respondent in tort and contract in the Supreme Court of Western Australia more than a year after she fell and hurt herself. It was not argued by either party that if the proceedings could be brought in Australia they could not be brought in that State or should not be pursued there because that Court was an inappropriate forum. They were commenced by statement of claim filed on 20 June 1997. On 2 October 2002, following a trial before McKechnie J, the first respondent was held liable and judgment given for the agreed sum of $300,000.

The claims in contract

228 The appellant's causes of action in contract were dismissed. I mention some details of them and their fate to show that the resolution of the appellant's action required some consideration of the law of contract albeit that the appellant failed to make out the claims under that head. She had claimed, first that it was an express term of her contract of employment that the first respondent would provide her with accommodation in Wuhan; and that it was an implied term of the contract that the accommodation would be safe and satisfactory. The trial judge held that there was no express term in her contract that accommodation would be provided to her in Wuhan, and that there was no implied term as pleaded because a term of that kind was not necessary to give business efficacy to her contract. The appellant had also sought to rely upon a breach by the first respondent of her husband's contract of employment with it, pursuant to which the first respondent was expressly obliged to provide the appellant's husband with accommodation that was in a "reasonably fit condition for use as a residence". The trial judge dismissed this claim on the basis that the appellant was not a party to that contract. The claims in contract are not in issue in this appeal.

The claim in tort

229 The appellant pleaded that the first respondent was the occupier of the premises in which she and her husband resided in Wuhan, had the

(264) Although the appellant's husband was the second named plaintiff on the statement of claim, it will be convenient to refer solely to the appellant when referring to the claims made in the statement of claim.

immediate control of the premises, and accordingly the ability to have such repairs and modifications made as were necessary to make them safe and habitable.

230 The trial judge, after reviewing both *John Pfeiffer Pty Ltd v Rogerson* (265) and *Regie Nationale des Usines Renault SA v Zhang* (266), decided that he was bound to apply the lex loci delicti, that is, the law of China. His Honour said (267):

> "I find that although a duty of care arose in Australia, breach of that duty of care did not give rise to any cause for complaint until 6 October 1991 when [the appellant] fell down the stairs in Wuhan. That was when the wrong crystallised by the infliction of damage. Accordingly, I hold that in determining the choice of law to be applied in the resolution of [the appellant's] claim, the wrong or delicti substantially arose in Wuhan. Therefore the proper law to be applied in this case is the law of the People's Republic of China."

231 The applicable Chinese law is to be found in the General Principles of Civil Law of the People's Republic of China (the General Principles) which were based upon the civil codes of Europe, and which, in translation, were proved by the first respondent at the trial. Article 106 of the General Principles provided:

> "A citizen or legal person who violates a contract or fails to fulfil other obligations shall assume civil liability.
>
> A citizen or legal person who through his own fault infringes upon State or collective property or upon another person, or who harms another person, shall assume civil liability."

The trial judge found the first respondent liable to the appellant under Art 106. A further question that the trial judge was asked to resolve was whether the appellant's claim was statute barred under Chinese law. Articles 135 and 136 of the General Principles stated the relevant limitation provisions:

> "135. The period of limitation of actions on a request to the People's Court for the protection of civil rights is two years, unless otherwise stipulated by the law.
>
> 136. In the following cases, the period of limitation of actions shall be one year:
>
> (i) demand for compensation for bodily harm …"

The trial judge held that the People's Court in China might however exercise a discretion to extend a limitation period pursuant to Art 137 if special circumstances existed, and which provided as follows:

> "137. The period of limitation of actions shall be calculated from the time it was known, or should have been known, that a right was infringed upon. If more than twenty years have passed,

(265) *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

(266) *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.

(267) *Neilson v Overseas Projects Corporation of Victoria Ltd* [2002] WASC 231 at [123].

> however, since the date of the infringement of the right, the People's Court shall offer no protection. The People's Court may, under special circumstances, extend the period of limitation of actions."

His Honour was of the opinion that there were special circumstances that justified the extension of the limitation period in the appellant's case: that the parties were Australian nationals; that the appellant returned to Australia at the end of the term of her husband's contract; that the first respondent was aware from an early stage of the appellant's intention to take legal action; and that no prejudice would be suffered by the first respondent if the limitation period were extended. To hold the last was to overlook the prejudice caused by the denial to the first respondent of the defence of limitations itself. His Honour also seems to have overlooked the prejudice to the first respondent by reason of the fact that in China the damages that could be awarded to the appellant would be likely to be less than in Australia and less than the sum agreed (268). The outcome of the appeal is not, as will appear however, affected by those errors. In the result, the trial judge found that the appellant's claim was not statute barred under Chinese law. His Honour did this despite that the evidence before him by the only expert on Chinese law to give evidence said this of extensions in China of limitation periods:

> "[STAUDE, MR:] Can I ask you to refer to 137? --- Okay. So should I read out, or …
>
> We have got the document in front of us. Does that not provide, 'The People's Court may, under special circumstances, extend the period of limitation of actions'? --- That's a possibility. There are possibilities, so there is a way for the court to extend the limitation, but that's impractical. It's very difficult and they are very rare cases and in fact the opinion of Supreme Court has a relevant explanation in this article, in this particular article or sentence.
>
> What does the opinion say? We don't have a translation of that? --- I do have one by myself. The opinion at 169 says:
>
> > "(indistinct) force the meaning of article 137 of the General Principle of Civil Law, if the right holder cannot exercise his right of request due to the objective barriers during the legal time limitation period."
>
> So impractically this is very difficult use, only, for example, if there's some war which stopped a person, for example, going for overseas qualification or some (indistinct)
>
> Can I just ask you once again, so we get this right, we don't have it in writing in front of us, to read that part of the opinion again and any other part of the opinion that is directed towards article 137? --- In the opinions it's only 169 of the opinion refers to article 137 of

(268) Article 119 of the General Principles makes no provision for non-pecuniary loss, a matter noted elsewhere by the trial judge.

the General Principle in relation to special circumstances and this …

[McKECHNIE J:] Could you just read the first two words again? Is it "If force"? --- It force. I mean it means if – I use the words "If" force which may be a Chinese – it means or it can be considered as the meaning of special circumstance under article 137. If the right holder cannot exercise his rights due to the objective barriers during this, so I keep on …

STAUDE, MR: Could you spell those two words that you used at the beginning of your statement, Mr Liu? --- I'm not sure whether this translates it correctly but it force - I use the words "It force."

It, i-t? --- I-t, yes, force.

F-o-r-c-e? --- for meaning translation it says it should be considered as (indistinct)

McKECHNIE J: So we could read it as, "It may be considered as the meaning of"? --- Considered.

…

STAUDE, MR: In the researches that you've carried out for the purposes of preparing your opinion have you discovered any cases where article 137 has been applied? --- No, actually not."

232 The trial judge considered the operation of the Chinese choice of law rule. Article 146 of the General Principles provided:

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

233 It was not in issue that the parties answered the description of nationals of, or persons domiciled in Australia. His Honour determined that Australian common law should apply because the remedy of negligence was available which was not dissimilar to the cause of action contemplated by Art 106 of the General Principles. In determining this, his Honour also thought it relevant that the dispute between the appellant and the first respondent had its genesis in Australia, as that was where the assumption of a duty of care by the first respondent occurred.

234 The trial judge found that under the Australian common law of negligence, the first respondent owed a duty of care to the appellant to provide safe premises, similar to that owed by a landlord to a tenant, and that it had breached that duty (269). His Honour also found that the appellant made no negligent contribution to her injuries.

(269) The *Occupiers' Liability Act 1985* (WA) could have no possible application on the facts of the case.

The Full Court of the Supreme Court of Western Australia

235 The first respondent's insurer which had been a party to the proceedings, successfully appealed to the Full Court of Western Australia (McLure and Johnson JJ and Wallwork A-J) (270). McLure J, with whom Johnson J and Wallwork A-J agreed, was of the view that the trial judge erred in applying Australian domestic law to the appellant's claim in tort.

236 Her Honour identified a potential for conflict between the choice of law rule in tort in Australia and the relevant rule in China. If proceedings are commenced in Australia in respect of a tort that occurred in a foreign country, the law of that foreign country should be applied to determine the legal rights and liabilities of the parties to the tort as held by this Court in *Zhang*. In the present case, that would require the application of Chinese law to resolve the issue of the first respondent's liability for the appellant's injury. Under Chinese law however, and in particular, Art 146 of the General Principles, the law of a foreign country may be applied if both parties are nationals of that country. Her Honour was of the view that the case therefore raised the vexed question of the operation of the renvoi doctrine in private international law, a question which may be answered in no fewer than three ways: that the court of the forum might apply the domestic law of the foreign country without regard to its choice of law rules (the no renvoi solution); the court of the forum might apply the foreign choice of law rules, accept the remission to its law by the foreign law and apply the law of the forum (single renvoi); or the court of the forum might resolve the issue in the same manner as a foreign court, that is as if that court were to exercise local jurisdiction in the same case on the same facts.

237 McLure J considered this Court's reasoning in *Pfeiffer* and *Zhang* and was of the view that those decisions were inconsistent with the application of the renvoi doctrine to torts that occur in a foreign country. Her Honour determined therefore that the "no renvoi" solution should be adopted, and the lex loci delicti, as the domestic law of the place of the wrong, should have been applied. Her Honour said (271):

> "The High Court in *Zhang* has deliberately selected a rigid choice of law rule in tort to promote certainty and predictability. It would be inconsistent with the reasoning and result in *Zhang* to superimpose a renvoi doctrine the purpose and effect of which is to soften or avoid the rigidity of choice of law rules. Further, the implication in the reasons and reasoning of the majority in *Pfeiffer* and *Zhang*, particularly relating to certainty and territoriality, is that the chosen choice of law rule identifies or defines the law applicable to the determination of the relevant substantive rights in dispute (the lex causae) not the jurisdiction or law area which in turn will

(270) *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206.
(271) (2004) 28 WAR 206 at 216 [48].

identify (or facilitate the identification of) the lex causae. It follows that the no renvoi solution should apply and the lex loci delicti be construed as a reference to the domestic law of the place of the wrong. In summary, I am satisfied that the reasoning of the High Court in *Pfeiffer* and *Zhang* is inconsistent with the application of the renvoi doctrine to international torts. Accordingly, the trial judge erred in applying Australian domestic law to [the appellant's] tort claim."

The appeal to this Court

The appellant's submissions

238 The appellant submitted that a "single renvoi" approach should be adopted to the interpretation of Art 146, and that the trial judge correctly applied Australian domestic law to determine the first respondent's liability to the appellant. It was contended that Art 146 did not require the application of Australian choice of law rules giving rise to the (futile) result that the matter should be referred to China, again, to be determined according to domestic Chinese law. The appellant submitted that such a course would be unnecessary because the Australian choice of law rule which requires the matter to be determined by the lex loci delicti, has been exercised, and therefore spent, on that, the first, referral to the law of the foreign jurisdiction.

239 The appellant argued that the language of Art 146 is generic and contemplates the potential application of as many different laws as there are countries. In those circumstances, the appellant contended, Art 146 reflects a policy decision to defer to the substantive law of another country to determine the result and does so for the good reason that the foreign law has a more appropriate connection with a dispute solely between its nationals than Chinese law.

The respondents' submissions

240 The respondents submitted that the first sentence of Art 146 would have been applied if the proceedings had been instituted in China at the time when they were instituted in Western Australia, in which event, the limitations laws as part of substantive Chinese law would have barred the appellant's action.

241 The respondents submitted that any choice of law rule that requires proof of foreign law is to be avoided. It was contended that an approach which reduces the uncertainties and costs of litigation accords with this Court's reasoning in *Pfeiffer* and *Zhang*, and would be beneficial to all litigants. The respondents further submitted that the application of the lex loci delicti rule for foreign torts without further application of choice of law rules achieves these aims.

Disposition of the appeal

242 In *Zhang*, this Court decided that the law of the place where a delict occurs should be applied by Australian courts to determine the substantive rights and liabilities of parties to that delict, whether it occurred in a different jurisdiction in Australia, or overseas. The

majority (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) were concerned to promote certainty in the law. Their Honours said (272):

> "The selection of the lex loci delicti as the source of substantive law meets one of the objectives of any choice of law rule, the promotion of certainty in the law. Uncertainty as to the choice of the lex causae engenders doubt as to liability and impedes settlement. It is true that to undertake proof of foreign law is a different and more onerous task than, in the case of an intra-Australian tort, to establish the content of federal, State and Territory law. But proof of foreign law is concomitant of reliance upon any choice of law rule which selects a non-Australian lex causae.
>
> When an Australian court selects a non-Australian lex causae it does so in the application of Australian, not foreign, law. While the content of the rights and duties of the litigants is determined according to that lex causae, it is necessary to recall that the selection of the lex causae is determined by Australian choice of law rules."

243 *Zhang* came before the courts on an application by a foreign defendant with no connection with Australia for a stay of the plaintiff's proceedings brought in New South Wales to recover damages caused and sustained in the territory of the foreign defendant. The application was made under the Rules of the Supreme Court of New South Wales on the basis that the lex loci delicti should be applied, and that the Supreme Court was for that and other reasons, an inappropriate forum. All members of the Court accepted the former but a minority only (Kirby J and Callinan J) were prepared to accept the latter. One of the results of the decision of the Court was to extend the rule that it had made in *Pfeiffer* governing the application throughout the Commonwealth of the lex loci delicti in the forum in which the action was brought, to foreign torts. In *Zhang*, the Court was invited to, but declined to recognise any exceptions, flexible or otherwise, to the rule.

244 The ultimate question to be resolved in this appeal is whether the lex loci delicti referred to by the majority in *Zhang* includes the choice of law rules, specifically Art 146, of the Chinese General Principles. But before that question is reached, it is necessary to decide whether that article would have been construed and applied by a Chinese court, by finding, adopting and applying the tort law of Australia to this case if it were before that court, a matter to which little, or no relevant useful evidence was directed at the trial. For the appellant to succeed she needs an affirmative answer to that question as well as these holdings: that in resolving the matter, the Chinese court would hold that despite the expiration of the Chinese limitations period (Art 136) it had jurisdiction to, and would entertain an application under Art 146 for the application of Australian law; that that law includes as substantive law,

(272) (2002) 210 CLR 491 at 517 [66]-[67].

Australian limitations law; and that the Chinese court would not read and apply *Zhang* as part of Australian law, requiring it to apply Chinese law only (double renvoi).

245 Article 146 was the subject of some inconclusive cross-examination on behalf of the appellant.

> "Can I turn you to article 146? --- Yes.
>
> I will just read that for the benefit of the transcript:
>
> > "With regard to compensation for damages resulting from an infringement of rights, the law of the place in which the infringement occurred shall be applied. If both parties are nationals of the same country or domiciled in the same country, the law of their own country or of their own place of domicile may also be applied?"
>
> --- Yes.
>
> Is that not a relevant provision in the context of this case? --- That's because – the reason I think it's irrelevant is because I think this is the law of conflict – I mean, lieu of conflict laws, and lieu of conflict laws under my knowledge is only used when a court – court used that – courts decide a case, decide which application is in a place where the case will be submitted, so, for example, this clause is only used when a case submitted in the Chinese court and the Chinese courts before hearing any further on the substantive issues would decide which law should be used as governing law, so this article will be used to decide that.
>
> Yes? --- So what I understand, according to my knowledge, is if a case rest in other countries – so other country like Australia, a court in Australia should use the law of Australia conflict to decide which law to use, so that's why to that extent I think it's not relevant to this case.
>
> That's just a matter of your opinion? --- That's right, yes, of course.
>
> …
>
> Can I put it to you that article 146 would have enabled [the appellant], had she sued in China, to apply for an order applying Australian law? --- Apply for that. That's a possibility, yes."

246 I cannot regard that evidence as of much assistance. It certainly did not say anything useful about what the likely conclusion of a court in China would be as to the question whether the tort law of the appellant's domicile should in fact be applied.

247 There was evidence, one way it must be said, that the appellant would have been unlikely to have had a Chinese court's discretion to extend time exercised in her favour. The trial judge found to the contrary, and if the outcome of this appeal depended on that finding, the appellant would fail. But it does not. What must be visualised is a case instituted in China by the appellant, out of time, and in respect of which the respondents raise Art 136 as a bar. It is in that situation that the Chinese court could be expected to look to Art 146, and to entertain

a request for the application of the second sentence of it. No suggestion was made that Art 136 could operate to prevent any party from starting a case in China and coming before the court to invoke Art 146. Indeed the contrary is the position. The expert in one of the passages that I have quoted from his evidence expressly saw such a request as a possibility. The second matter to which I adverted is also made out. *Pfeiffer* clearly holds that limitations laws are substantive laws in this country (273). The third matter to which I have referred raises the ultimate question in this case, and I will leave it aside for present purposes.

248 The question which I have posed involves the proper construction and application of the second sentence of Art 146 of the General Principles. The appellant submitted that there was expert evidence that a Chinese court would in applying the General Principles adopt principles of fairness and justice and that fairness or justice required the application of Australian law. The better view however is the one accepted in argument by the respondents, and correctly so in my opinion, that no expert evidence of any present relevance or utility was given on this matter at the trial. In any event I would not be prepared to say that fairness or justice is to be found, or found exclusively in Australian law rather than Chinese law. The evidence is simply silent on that matter.

249 In those circumstances, the absence of relevant evidence of the Chinese approach to the construction and application of Art 146, it is right in my opinion to presume that the Chinese principles of statutory construction are the same as the Australian ones and to use the latter. This is consistent with authority in which English law has been applied to resolve questions involving a foreign law in the absence of any, or sufficient evidence of that law, which otherwise is in the usual case, to be pleaded and proved as a fact (274). In *Jabbour v Custodian of Israeli Absentee Property* (275), Pearson J, who was confronted with an unassisted need to construe some Israeli statutes, said this (276):

> "I did not feel entitled or qualified to look through volumes of Palestine or Israeli ordinances or statutes or law reports as they were not in evidence and I would not know which of the ordinances or statutes were still in force or which of the reported decisions were still good law at any material time. It must be assumed that the Israeli rules of construction are the same as the English rules of construction."

(273) (2000) 203 CLR 503 at 544 [100] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

(274) *Lloyd v Guibert* (1865) LR 1 QB 115 at 129; *Nouvelle Banque de l'Union v Ayton* (1891) 7 TLR 377 at 378; *Re Parana Plantations Ltd [No 1]* [1946] 2 All ER 214 at 217-218; *Szechter v Szechter* [1971] P 286 at 296.

(275) [1954] 1 WLR 139; [1954] 1 All ER 145.

(276) [1954] 1 WLR 139 at 148; [1954] 1 All ER 145 at 153.

250 I propose accordingly to construe Art 146 as I would construe an Australian enactment. The first step is to have regard to its context. It forms part of Ch VIII of the General Principles which is wholly devoted to the application of the law to civil relations involving foreigners. The separate and detailed treatment of these immediately suggests that they are special matters apart from the mainstream of Chinese domestic law. That this is so is also implied by the well-known fact of which the Court can take judicial notice that China is avid for international trade and investment after many years of the maintenance of a different kind of economy. What is implicit in these matters is made explicit by Art 146, that the Chinese courts are to have a discretion in respect of activities in their country carried out by foreigners to allow the foreigners' law to determine their differences.

251 What then are the sorts of factors which are likely to trigger the exercise of the discretion conferred by Art 146? In my opinion a Chinese court would regard the following factors as determinative of the exercise of the discretion to apply Australian law if the discretion were, as I have held it to be, assumed to be exercisable according to Australian legal principles: the absence of any question of liability of a Chinese national or authority; the fact that liability, if found, would be the liability of an authority or company of a polity of Australia; that there is no allegation of a breach of any written building laws, or laws of occupiers' liability in China; that the relationship between the parties came into existence in Australia; that the court might, as it did, need to construe, even if adversely to the appellant, a contract made in Australia; that the expenses and standards of treatment of the appellant would be Australian ones; that Chinese nationals would not be required to give evidence (except perhaps as to the effect of Chinese law); and that the outcome of the case on the application of Australian law would be of no, or little relevance or interest to the Chinese law makers or reformers.

252 I do not overlook however that there are matters which can be put with some force the other way. One of them is what I noted in *Zhang* in a different context and which can be said of any court, including a Chinese court (277):

> "No doubt, courts in Australia can and do regularly apply foreign law, but it would be vain to claim that they can, or would do it with the same familiarity and certainty as the courts of the jurisdiction in which it was created."

253 That is not inconsistent also with what Kahn-Freund said in *General Problems of Private International Law* (278):

> "Nor is this in private international law merely a facet of the eternal and eternally insoluble dilemma of certainty of the law against fairness in the individual case. In this field it has a special

(277) (2002) 210 CLR 491 at 563 [192]. See also *Earl Nelson v Lord Bridport* (1845) 8 Beav 527 at 534-536 [50 ER 207 at 210-211] per Lord Langdale MR.

(278) (1976), p 323.

> significance. That significance stems from what is, when all is said and done, the principal, perhaps the only, justification why any country should in any circumstances apply any law except its own. This is to prevent a party from gaining advantages and to protect him from suffering disadvantages owing to his or his opponent's ability to invoke a particular jurisdiction. The ideal of 'harmony' or (better) 'uniformity' is not an aesthetic caprice of academics: it is in this sphere a requirement of justice. The ideal is unattainable. All ideals are. Never shall we see the day when all countries will apply the same law to the same situation. This does not mean that we should give up pursuing the ideal, following a road leading in its direction – but this, too, is no more than a 'guiding line', not a 'policy' to be adhered à outrance."

In short, any court in exercising a discretion as to the law to be applied should keep in mind the difficulties of finding, understanding and applying the law of a foreign country, the nuances of which at least may well elude the most diligent and careful of courts. Another countervailing consideration is that China is the country where the injury was suffered. Chinese principles of statutory construction could conceivably be called into question as the case progressed.

254 Even so, as I have said, I am of the opinion that on balance, a Chinese court would be likely to prefer Australian law in all of the circumstances.

255 The respondents' response to everything so far is of course that if a Chinese court were to apply Australian law it should do so comprehensively, and not selectively by disregarding or qualifying the absolute rule stated in *Zhang*. Such an approach would be however unproductive of an attractive and clear result: Australian conflict law says, go to China to find and apply Chinese law; then Chinese law says a Chinese court may and would in the circumstances apply Australian law, including Australian conflict law, with the result that the matter would have to be decided according to the Chinese law of delict.

256 No matter which solution is to be adopted by Australian courts, the result will not be entirely satisfactory intellectually and in logic. This does not stem wholly however from the unwillingness of the Court to recognise in *Zhang* what in hindsight might have resolved this case, a flexible exception in special circumstances of the kind which the second sentence of Art 146 of the Chinese General Principles expressly contemplates, but from the fact that absolute rules however apparently certain and generally desirable they may be, almost always in time come to encounter a hard and unforeseen case.

257 In most respects this one is not a hard case. The proceedings have in fact been instituted in Australia. There is no contest between courts. The parties are all here. Their presence in China was temporary. The issue of liability was a simple one of negligence according to Australian common law. No one has argued that the Supreme Court of Western Australia was an inappropriate forum. All of those should incline the Australian court, if it may, to the application of Australian

law. They are, it can be said, considerations arguing against the rebounding of the question of the law to be applied backwards and forwards potentially infinitely between Australian and Chinese law, and the mechanical use of renvoi as to which Scoles et al say (279):

> "Nevertheless, a mechanical use of renvoi by all concerned jurisdictions could theoretically produce the problem of circularity. In this case, however, it is suggested that the forum accept the reference to its own law, refer no further, and apply its own law. This is the practice of most jurisdictions that do employ renvoi (280). This is good policy: the foreign conflicts rule itself discloses a disinterest to have its own substantive law applied, indeed it recognises the significance of the forum's law for the particular case; the case therefore probably presents a 'false conflict.' This view was expressly adopted by the Court of Appeals of Maryland. Furthermore, since uniformity in result would not otherwise be achieved in these circumstances, ease in the administration of justice is furthered by the application of forum law rather than by the use of foreign law."

(Further footnote omitted.)

258 The matters to which I have referred are the sorts of matters which influence courts in deciding the appropriateness of a forum. The two questions, which law should be applied, and in which forum should it be applied, are closely related (281), and will often admit, indeed demand, the same answer. In all of the circumstances here, the Western Australian Supreme Court is an appropriate forum and is better fitted, unless it is compelled not to do so, to find and apply Australian law to this case.

259 I agree that the right course to adopt here is for the Australian courts to accept the (likely) Chinese reference to Australian law in accordance with the practice of most other jurisdictions. The truth is that although

(279) *Conflict of Laws*, 4th ed (2004), pp 139-140.

(280) See, eg, *Austria*: Federal Statute on Conflict of Laws §5(2), Bundesgesetzblatt 1978, No 304; *France*: Cass Civ June 24, 1878, DP 79.1.56, S 78.1.429 and Cass Reg February 22, 1882, S 82.1.393 (*Forgo Case*); *Germany*: Introductory Law to the Civil Code (EGBGB) Art 4(1) (1986), and Kegel & Schurig, Internationales Privatrecht 393-94, 9th ed (2004); *Japan*: *X v Y* [1994] HJ (1493) 71 (S Ct of Japan), transl in 18 Japanese Ann Int'l L 142 (1995); *Switzerland*: Federal Statute on Private International Law Art 14 (1987). For the German provision see also Ebenroth & Eyles, Der Renvoi nach der Novellierung des deutschen Internationalen Privatrechts, 1989 IPRax 1. For comparative treatment see Bauer, Renvoi im internationalen Schuld-und Sachenrecht (1985). European law makes one exception: there is no renvoi in choice of law for contract. Rome Convention on the Law Applicable to Contractual Obligations Art 15; Germany, EGBGB Art 35(1). In addition, the EU Commission's Proposal for a Regulation for the Law Applicable to Non-Contractual Obligations would also exclude renvoi in cases of tort injury without mandate, and unjust enrichment. Art 20 COM (2003) 0427; *Japan*: *X v Y* [1994] HJ (1493) 71 (S Ct) transl in 18 Japanese Ann Int'l L 142 (1995). [Balance of footnote omitted.]

(281) cf Briggs, "In Praise and Defence of Renvoi", *International and Comparative Law Quarterly*, vol 47 (1998) 877, at p 883.

choice of law rules are part of the domestic or municipal laws of a country, they are very special rules as this case shows and should not be mechanically applied to all situations. Indeed as Lord Atkinson pointed out in *Casdagli v Casdagli*, fallacies lurk in the term "municipal law" in any event (282).

260 It is also important to note that in that case, the House of Lords approved the dissenting judgment of Scrutton LJ in the Court of Appeal, in which his Lordship said (283):

> "Practical and theoretical difficulties arise from the fact that, while England decides questions of status in the event of conflict of laws by the law of the domicil, many foreign countries now determine those questions by the law of the nationality of the person in question. Hence it has been argued that if the country of allegiance looks to or sends back the decision to the law of the domicil, and the country of domicil looks to or sends back (renvoyer) the decision to the law of nationality, there is an inextricable circle in 'the doctrine of the renvoi' and no result is reached. I do not see that this difficulty is insoluble. If the country of nationality applies the law which the country of domicil would apply to such a case if arising in its Courts, it may well apply its own law as to the subject matter of dispute, being that which the country of domicil would apply, but not that part of it which would remit the matter to the law of domicil, which part would have spent its operation in the first remittance. The knot may be cut in another way, not so logical, if the country of domicil says 'We are ready to apply the law of nationality, but if the country of nationality chooses to remit the matter to us we will apply the same law as we should apply to our own subjects.'"

261 How then should the principle be stated? In my opinion, it is, in relation to the remedying of wrongs committed in foreign countries, that although the lex loci delicti is to be applied to cases brought in Australian courts, if the evidence shows that the foreign court would be likely to apply Australian law by reason of its choice of law rules or discretions, then the Australian common law of torts should govern the action. This is a solution which offers finality, and limits the need to search for and apply foreign law. It does not however eliminate the need to find the foreign choice of law rules so that it can be ascertained whether they would be likely in fact to require the application of Australian tort law. Each case will depend upon the evidence before the court. Foreign law must as a matter of fact be pleaded and proved (or absent proof, presumed) as with any other fact in issue.

262 The appeal should be allowed with costs. I agree with the consequential orders proposed by Gummow and Hayne JJ.

(282) [1919] AC 145 at 192-193.

(283) [1918] P 89 at 111. See also *Jaber Elias Kotia v Katr Bint Jiryes Nahas* [1941] AC 403 at 413, which was a decision of the Privy Council.

263 HEYDON J. The background circumstances are set out in the judgments of Gummow and Hayne JJ and Callinan J. I agree with the orders proposed by Gummow and Hayne JJ for the following reasons, grouped under headings noting the key questions for decision.

What law determines the plaintiff's rights?

264 Since the events giving rise to the plaintiff's injury took place in the People's Republic of China, it is necessary to look to the lex loci delicti – the law of that place – for the resolution of her claim (284).

How much of the law of China is to be looked to?

265 The respondents' submission was in effect that in applying the lex loci delicti – Chinese law – an Australian court should only look at Arts 106 (285) and 135-137 (286) of the General Principles of Civil Law of the People's Republic of China (the General Principles). They submitted that it would be wrong for Australian courts to have recourse to Ch VIII of the General Principles because this was to have impermissible recourse to the conflicts rules of China. Alternatively, it was submitted for the same reason that if Australian courts were to have recourse to Ch VIII, and Art 146 within that Chapter, they were limited to the first sentence of Art 146, and could not examine the second. Article 146 provides:

> "With regard to compensation for damages resulting from an infringement of rights, the law of the place in which the infringement occurred shall be applied. If both parties are nationals of the same country or domiciled in the same country, the law of their own country or of their place of domicile may also be applied.
>
> Acts which occur outside the territory of the People's Republic of China and which the law of the People's Republic of China does not recognise as acts of infringement of rights shall not be dealt with as such."

266 In evaluating the merits of the respondents' submission, it is desirable to analyse its consequences. Those consequences can only be seen by examining what, on each side's case, are said to be the relevant provisions of Chinese law. In deciding the content of those provisions, it is necessary to apply appropriate principles of construction.

267 There was no evidence about what principles of construction ought to be applied to Art 146. That is so for the reasons given by Callinan J (287). It is appropriate to employ Australian principles of construction, both for the reasons given by Callinan J (288) and for the reasons given by Gummow and Hayne JJ (on the hypothesis that there

(284) *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.
(285) Article 106 is set out at 404-406 [231] of Callinan J's reasons.
(286) Articles 135 and 137 and the relevant parts of Art 136 are set out at 404-406 [231] of Callinan J's reasons.
(287) Callinan J's reasons at 411 [248]-[249].
(288) Callinan J's reasons at 411 [249].

was an evidentiary deficiency on this point (289)). The general correctness of that approach (pursuant to which the relevant foreign law is assumed to be the same as the lex fori if there is no, or only incomplete, proof of the foreign law) has been questioned (290), but no argument adverse to its general correctness was advanced in this appeal, and it was described by the respondents as "trite". The only relevant argument was that that approach should not be permitted to result in the plaintiff's success, for that would destroy, by a side-wind, the requirement that only the domestic lex loci delicti be applied. For reasons given below, there is not in the present case any requirement of that kind. Further, this Court in *Regie Nationale des Usines Renault SA v Zhang* (291) said nothing about the approach in question.

268 On Australian principles of construction, Ch VIII is to be read as dealing with the application of the law to civil relations involving foreigners. The opening words of Art 142 make it plain that it does so in a manner which excludes other parts of the General Principles: "The application of the law to civil relations involving foreigners shall be determined by the provisions of this Chapter." Various provisions apart from Art 146 provide for the application of principles other than those of Chinese law. Thus the balance of Art 142 provides:

> "Where the provisions of an international treaty which the People's Republic of China has concluded or has acceded to differ from civil laws of the People's Republic of China, the provisions of the international treaty shall apply, with the exception of those articles to which the People's Republic of China has declared its reservation.
>
> Where the law of the People's Republic of China and international treaties concluded or acceded to by the People's Republic of China do not contain provisions in relation to civil matters involving foreigners, international practice may be applied."

Article 143 provides:

> "In the case of a citizen of the People's Republic of China who has settled in a foreign country, the law of the country in which he has settled may be applied with regard to his capacity for civil acts."

Article 144 provides:

> "With regard to the ownership of real estate, the law of the place in which the real estate is located shall be applied."

Article 145 provides:

> "Unless otherwise stipulated by law, the parties to a contract involving foreigners may choose the law applicable to the handling of disputes arising from the contract.
>
> If the parties to a contract involving foreigners have not made a choice, the law of the country of closest connection to the contract

(289) Reasons of Gummow and Hayne JJ at 372 [125].
(290) Fentiman, *Foreign Law in English Courts* (1998), pp 149-156.
(291) (2002) 210 CLR 491.

shall be applied."

Article 147 provides:

> "With regard to a marriage between a citizen of the People's Republic of China and a foreign national, the law of the place in which the marriage is concluded shall be applied. With regard to divorce, the law of the place in which the court handling the case is located shall be applied."

Article 148 provides:

> "With regard to the support of dependants, the law of the country of closest connection to the dependant shall be applied."

And Art 149 provides:

> "With regard to the legal inheritance of property, the law of the place in which the deceased was domiciled at the time of death shall be applied to personal property, while the law of the place in which real estate is situated shall be applied to such real estate."

269 Thus in some cases Ch VIII contemplates that a law other than Chinese law must apply (Arts 142 (second sentence), 144, 145, 146 (first sentence, subject to the second sentence), 147, 148 and 149). And in other cases the provisions of Ch VIII confer a discretion to select a law other than Chinese law, but they make it plain that once the other law is selected, it must apply. To all these possibilities there remains a residual exception in Art 150:

> "Where this Chapter provides for the application of the law of a foreign country or of international practice, this must not be contrary to the public interest of the People's Republic of China."

270 But subject to that, where questions about civil relations involving foreigners arise, the provisions of Ch VIII operate in place of other provisions of the General Principles. Among the provisions of Ch VIII is the second sentence of Art 146, which creates a discretion to apply Australian law and hence remove Chinese law as the relevant source of rights and obligations.

271 This conclusion would unquestionably have followed if the present parties, or parties in the position of the present parties, had participated in proceedings instituted in China. The respondents argued, however, that this conclusion did not follow where the proceedings had been instituted, as they were, in Australia. The respondents contended that there was a general "no renvoi" principle in the present circumstances: an Australian court required to apply the lex loci delicti was required to apply "the domestic law of the foreign law area". The respondents also contended that that principle was "implicit" in *Regie Nationale des Usines Renault SA v Zhang*, and one passage of the majority joint reasons was referred to (292). However, there was no textual demonstration that the principle contended for was to be found in any part of *Regie Nationale des Usines Renault SA v Zhang*, and indeed it

(292) (2002) 210 CLR 491 at 520 [75] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

cannot be found in that or any other case. Further, the principle, at least in cases like the present, cannot exist. That is because it would be absurd if it did. This Court has seen it as undesirable that "the existence, extent and enforceability of liability [should vary] according to the number of forums to which the plaintiff may resort" (293). It would be absurd for Australian courts to do what the supposed principle requires, namely to apply Chinese law to disputes even though Chinese law would not apply had the proceedings been instituted in China and a decision to apply Australian law were made pursuant to the second sentence of Art 146. That is, it would be absurd, if the supposed principle existed, that the body of law to be applied in proceedings commenced in China by the plaintiff against the respondents in relation to the incident causing her injuries should be different from that to be applied in proceedings commenced in Australia by the plaintiff against the same parties in relation to the same incident. Finally, it would be absurd that the regime – the lex loci delicti – which the Chinese Government enacted for incidents causing injuries of the type which the plaintiff suffered should be set at naught by reason of Australian law, as it would be if the supposed principle existed.

Is the plaintiff's action defeated by the Chinese law of limitations?

272 Had the plaintiff sued in China, assuming that no extension of the limitation period were granted under Art 137 and Australian law were not applied under Art 146, Art 136 would have debarred the plaintiff from suing. That is because she sued nearly six years after the incident causing her injuries, ie nearly five years after the period stipulated in Art 136(i). The question is whether Art 136 operates in the present circumstances rather than Art 146, or vice versa.

273 On Australian principles of construction, because Ch VIII is an exclusive statement of the principles which apply to civil relations involving foreigners, it applies in substitution for principles stated in other Chapters of the General Principles which might have applied if Ch VIII had not existed. Hence, where both parties to a dispute about compensation for damages resulting from an infringement of rights are nationals or domiciliaries of the same country, and the law of this country is applied pursuant to the second sentence of Art 146, the law so applied includes its law on limitations. This country's law on limitations therefore applies instead of Arts 135-137 in Ch VII.

Is the discretionary decision contemplated by the second sentence of Art 146 a decision of a Chinese court?

274 The answer is in the affirmative for the reasons given by Gummow and Hayne JJ (294).

(293) *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 539 [83] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

(294) Reasons of Gummow and Hayne JJ at 369 [113].

What factors are relevant to the decision of a Chinese court under the second sentence of Art 146?

275 The process of applying Australian principles of construction to Art 146 leads to the conclusion that the factors relevant to the decision of a Chinese court engaged in deciding how to exercise its discretion under Art 146 are those listed by Callinan J (295). Those factors support the conclusion that a Chinese court would exercise its discretion in relation to this controversy in favour of applying Australian law.

What parts of Australian law are to be applied?

276 Should the whole of Australian law be applied, including its rules as to the conflict of laws? Or only the domestic Australian law of tort?

277 The problem in this case is not to be solved by seeking to identify some principle of universal or general application. It is to be solved rather by construing Art 146. Article 146 is part of the Chapter of the General Principles dealing exclusively with foreigners in relation to the civil law of China. It sits alongside provisions contemplating that in many respects civil relations involving foreigners are to be resolved by bodies of law other than Chinese law. It contemplates that when a Chinese court decides to apply the law of the country of which the parties are nationals or domiciliaries to a claim for compensation for damages resulting from an infringement of rights, it is to decide to apply that law in such a way as to prevent any remission of the controversy to China. Thus in this case an application of the law of Australia under Art 146 would not apply any part of Australian law which might result in recourse back to China as the lex loci delicti. It is unnecessary to decide how Art 146 would operate if the parties were nationals or domiciliaries of a country having rules of the conflict of laws calling for the controversy to be decided by the law of a third country.

278 There is no inconsistency between: (a) deciding that in this case at least the Australian rules of the conflict of laws refer to the entirety of the lex loci delicti (as distinct from Chinese "domestic" law only); and (b) deciding that recourse to the second sentence of Art 146 leads to an application only of domestic Australian law.

279 That is so for two reasons.

280 First, the above examination of the lex loci delicti reveals that Ch VIII exhaustively deals with civil relations involving foreigners. There is no authority for any general principle mandating the exclusion of Ch VIII in relation to the foreigners engaged in these proceedings, and no such general principle could stand with the absurdity inherent in it of an Art 146 order applying Australian law if proceedings were instituted in China, but not if they were not.

(295) Reasons of Callinan J at 412 [251].

281 Secondly, to construe Art 146 in relation to an application of the law of Australia as an application only of Australian domestic law is not to describe any rule of the common law, but simply to reach a conclusion about the content of Chinese legislation.

282 In short, the result in this case turns on the specific content of Chinese legislation, not on the wider principles that each of the parties to this appeal advocated.

283 The respondents objected that an outcome favourable to the plaintiff could only rest on the recognition of some "flexible exception" to the rule that controversies about foreign torts are governed by the lex loci delicti, and that any such recognition was forbidden by earlier authority in this Court (296). That objection is groundless. There is a fundamental difference between, on the one hand, "flexible exceptions" to a rule of law commanding attention to the lex loci delicti, and, on the other hand, the consequences which flow from attention to and application of the rules of foreign law, proved or assumed as facts, varying as they do in the hundreds of jurisdictions throughout the world.

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Full Court of the Supreme Court of Western Australia made on 3 May 2004 that set aside:*
   (a) *the judgment entered at trial in favour of the plaintiff; and*
   (b) *the order made at trial for her costs.*
3. *In their place, order that the appeal to the Full Court against the judgment and order entered at trial be dismissed with costs.*

Solicitors for the appellant, *Talbot & Oliver*.

Solicitors for the respondent, *Minter Ellison*.

PTV

(296) *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 520 [75] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.