

## CHOICE OF LAW: THE PRESUMPTION IN THE PROOF OF FOREIGN LAW

ANTHONY GRAY\*

### I INTRODUCTION

The High Court of Australia in *Neilson v Overseas Project Corporation of Victoria Ltd*<sup>1</sup> had occasion recently to consider the question of proof of foreign law. *Neilson* also raised difficult questions associated with the *renvoi* doctrine. This article will not focus on the *renvoi* issue, which has been dealt with extensively elsewhere.<sup>2</sup> It will focus on what approach an Australian court should take in dealing with inadequacies of proof of foreign law, having been directed by its choice of law rules to apply foreign law. Given the High Court's recent acceptance of the law of the place of the wrong as the applicable choice of law rule in international torts cases,<sup>3</sup> it is submitted that these questions will increasingly be asked in our courts, making it ever more important that a conceptually coherent approach be taken. This is not a new problem or one unique to Australia. The article will consider: how other jurisdictions have dealt with the issue, and whether any presumptions should be made to deal with inadequacies of proof; occasions in a range of jurisdictions in which the presumption was applied or not applied; and the application of interest analysis, before making some recommendations for the future.

### II PROOF OF FOREIGN LAW IN *NEILSON*

In *Nielson*, the plaintiff was an Australian resident living with her husband in China in accommodation provided by her employer, the defendant. The defendant was an Australian company. The plaintiff fell down the stairs in her apartment and sustained injuries. She sued the defendant in negligence in an Australian court. The High Court adhered to the decision in *Regie* in determining that the law of the place of the wrong should be applied to resolve the case. Controversially, the majority also applied the *renvoi* doctrine by considering how a Chinese court would have applied its rules. According to the relevant Chinese

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\* (PhD) Senior Lecturer, School of Law, University of Southern Queensland.

1 (2005) 223 CLR 331 (*Neilson*).

2 See, eg. Reid Mortensen "'Troublesome and Obscure": The Renewal of *Renvoi* in Australia' (2006) 2(1) *Journal of Private International Law* 1; Mary Keyes 'Foreign Law in Australian Courts: *Neilson v Overseas Projects Corporation of Victoria*' (2007) 15 *Torts Law Journal* 9.

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

choice of law rule, while generally the law of the place where the accident happened would apply, an exception was possible where the parties were from the same country. In such a case, that country's law may apply.<sup>4</sup> The High Court has rejected the possibility of such a flexible exception for Australia.<sup>5</sup>

Unfortunately for the speedy resolution of the matter, but perhaps fortunately for choice of law scholars, there was little evidence presented at trial as to how a Chinese court might apply the choice of law rule, and whether the exception was likely to be applicable in Australia. This particularly presented a difficulty for those members of the Court who accepted the *renvoi* doctrine here. A bare majority applied the so called presumption that where there is no evidence to the contrary, foreign law was presumed to be the same as the law of the forum. Justices Gummow and Hayne, for instance, asserted that the presumption could be applied where, as here, the evidence as to foreign law was weak.<sup>6</sup> It could be assumed that the approach to the construction of a Chinese statute was the same as that applicable to an Australian statute. The absence of pleading or of proof as to the relevant content of foreign law was held not to be fatal to the plaintiff's case.<sup>7</sup> Justices Callinan and Heydon adopted a similar approach.<sup>8</sup>

Of the dissentients on this point, Gleeson CJ did not reject the presumption outright, but said it was not applicable in this case, given the High Court's rejection of the flexible exception in international torts cases.<sup>9</sup> He saw the folly in assuming that forum law was the same as foreign law, when he knew it was not. Justice McHugh was equally dismissive: 'It surely cannot be right to hold that there is a presumption that Australian courts would exercise a discretion in accordance with Australian law in respect of a foreign rule of law that is contrary to the Australian rule on the subject.'<sup>10</sup> Justice Kirby, while not rejecting the doctrine in all cases, clearly thought it was not relevant here:

it would be an absurd fiction to pretend that the elaborate principles of statutory construction developed by, or applicable to, Australian courts have exact equivalents in the courts of China, given the divergent historical and jurisprudential traditions of the two legal systems ... 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.<sup>11</sup>

The majority which assumed that Australian law and Chinese law were the same could not apply that principle consistently. Great difficulties would have

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4 *General Principles of the Civil Law of the People's Republic of China*, promulgated 12 April 1986, art 146 (entered into force 1 January 1987).

5 *Regie* (2002) 210 CLR 491, 519.

6 *Neilson* (2005) 223 CLR 331, 372.

7 *Ibid.*

8 *Ibid* 411, 416–7. There is notable irony involved, in assuming, as the majority here did, that the Australian court would apply the Chinese 'flexible exception' as would a Chinese court, when the High Court of Australia has emphatically rejected any 'flexible exception' to its newly adopted rule that the law of the place of the wrong always applies: see, eg, *Regie* (2002) 210 CLR 491.

9 *Neilson* (2005) 223 CLR 331, 343.

10 *Ibid* 348–9. See also Keyes, above n 2 and Mortensen, above n 2.

11 *Neilson* (2005) 223 CLR 331, 394–5, 397 (emphasis in original).

arisen if China's position on *renvoi* were assumed to be the same as that which the High Court determined to be the Australian position.<sup>12</sup>

### III HISTORICAL SOURCE OF THE PRESUMPTION

In order to better understand the so called presumption that in the absence of proof of foreign law, it is deemed to be the same as that of the forum, the historical development of the doctrine will be considered.

Originally, it was said that British courts did not recognise torts committed abroad. A person suing in a British court based on events overseas would have their action dismissed, or in exceptional cases admiralty courts would hear the matter.<sup>13</sup> Currie notes that by the seventeenth century, the common law courts had started accepting jurisdiction over foreign causes. In order to do so, they recognised a 'quaint device of permitting the pleader, after truly stating the foreign locality of the event, to add a fictitious, non-traversable allegation that the foreign locality was in England'.<sup>14</sup>

Currie notes that the reluctance of the English courts to hear such matters stemmed partly from the character of that country's jury as a body which judged according to its own knowledge of the facts. This clearly presented great obstacles when the facts relevant to the case did not occur locally.<sup>15</sup> As the jury was gradually transformed into a body acting based on testimony rather than personal knowledge of the facts, one reason for the court's reluctance to hear foreign matters disappeared.<sup>16</sup>

As Sass notes, the principles of common law developed as a body of laws for a feudal society based on tenures of land holding; it did not contain provisions for merchants and traders. Disputes concerning these matters went to special courts, including the court of staples and the piepowder courts, which decided cases according to a foreign body of laws, the law merchant. During the 14<sup>th</sup> century, the court of admiralty was created, and over time expanded its jurisdiction to hear all foreign disputes. As the number of cases increased, the supremacy of the common law courts became endangered, and there were moves to expand the

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12 In other words, the dreaded *circulus inextricabilis* would arise, where the law of one country would refer to the law of another, but the law of the other would in turn refer back to the first country's laws.

13 Alexander N Sack, 'Conflict of Laws in the History of the English Law' in Allison Reppy (ed) *Law: A Century of Progress* (1937) vol 3, 342, 344–5, 355. Sack notes that the effect was to remit the matter, though they may have been a British citizen, to the foreign court for redress; however if relief could not be obtained abroad, the Chancellor might, in appropriate cases, authorise extra-judicial relief by way of reprisal or distraint. Some such matters could fall within the jurisdiction of the lord constable and marshal, the court of 'chivalry'. In the sixteenth century, the admiralty assumed a broad jurisdiction of matters arising beyond as well as upon the seas; the law applied in that court being the 'general' law of nations, the maritime law, the law merchant; and the civil law.

14 Brainerd Currie, 'On the Displacement of the Law of the Forum' (1958) 58 *Columbia Law Review* 964, 967.

15 *Ibid* 967.

16 The link between the original role of the jury and the reluctance to hear foreign matters also appears in Stephen L Sass, 'Foreign Law in Civil Litigation: A Comparative Survey' (1968) 16 *American Journal of Comparative Law* 332, 335.

jurisdiction of the common law courts to include foreign matters.<sup>17</sup> As the common law lacked the ability to deal with commercial matters, the law merchant had to be applied. It was ‘foreign’ to the common law, so its provisions were treated as facts, to be pleaded and proved.<sup>18</sup>

English courts were, however, generally most comfortable applying their own law. There was a feeling that English legal principles were in general superior to those of other jurisdictions. That this has been the view of English judges has been noted in other cases of choice of law.<sup>19</sup> It does not merely affect the question of hearing a foreign matter; it has also influenced judges in relation to the distinction between substance and procedure, with the former being governed by the law of the cause, and the latter by the law of the forum.

Chief Justice Dixon in *Maxwell v Murphy*<sup>20</sup> refers to the ‘inveterate tendency of English law to regard some matters as evidentiary or procedural which in reality must operate to impair or destroy rights in substance’. Justice Deane in *Breavington v Godleman* referred to orthodox conflicts rules as ‘show[ing] undue preference for the substantive law of the forum’.<sup>21</sup> Justice Kirby has noted that the previous ‘dominant position of Britain in the world also led to the temptation, not always resisted, to consider that British laws were superior to those of other lands’.<sup>22</sup> Lord Wilberforce himself in *Boys* referred to the substance and procedure distinction, noted it could sometimes be a fine line, and then claimed that ‘a not insubstantial makeweight, perhaps unconscious in its use, is to be found in a policy preference for the adopted [in other words, preferred] solution’.<sup>23</sup> An assessment of the fairness of the foreign rules has been used by one member of the House of Lords in deciding whether or not to hear the matter in England.<sup>24</sup>

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17 Ibid 336.

18 Sass, above n 16, 336–7.

19 See, eg, *Chaplin v Boys* [1971] AC 356, 392 (‘Boys’) (Wilberforce LJ).

20 (1956) 96 CLR 261, 267.

21 (1988) 169 CLR 41, 125 (‘*Breavington*’). See also Janeen Carruthers ‘Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages’ (2004) 53 *International and Comparative Law Quarterly* 691, 710: ‘Self promotion on the part of any forum foments reluctance to concede that foreign rules are substantive and encourages litigants to indulge in the vice of forum shopping’; A H Robertson, *Characterization in the Conflict of Laws* (1940) 247, stating that a forum ‘should endeavour to exercise a spirit of self-restraint, not self-promotion, for the whole foundation of the conflict of laws requires that a court should restrict the field of its own procedure and be prepared to follow as far as possible the foreign substantive law’.

22 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 547 (‘*Pfeiffer*’). His Honour added that ‘such considerations, and the ready familiarity of judges with the laws of their own forum, made it natural to expound and apply a choice of law rule that would enhance the role of the courts and law of the forum and diminish the significance of the foreign law of the place where the alleged wrong had occurred’. Justice Kirby made similar comments in *Regie* (2002) 210 CLR 491, 531.

23 *Boys* [1971] AC 356, 392. His Lordship also held that there was ‘some artifice in regarding a man’s right to recover damages for pain and suffering as a matter of procedure’: 393. Similarly, Lord Hodson conceded that ‘it is to be expected that a court will favour its own policies over those of other states and be inclined to give its own rules a wider application than it will give to those of other states’: 380. This issue is explored more fully in Reid Mortensen, ‘Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches’ (2006) 55 *International and Comparative Law Quarterly* 839, 857–68.

24 *Spliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 478 (Lord Goff) (‘*Spliada*’).

Direct links between this attitude and the presumption have been made by judges. For example, in *The Ship 'Mercury Bell' v Amosin*, a Canadian case, Hugessen J said in relation to the presumption that

[e]xpressions of the rule dating from the last century were obviously coloured by the climate of their time. English law and customs were being exported and spread by colonial expansion to every corner of the globe. English lawyers and judges, not unnaturally, viewed their system as being far superior to any other .... In these circumstances, it was perhaps understandable that the rule should frequently have been expressed in terms of a 'presumption' that the foreign law was identical to English law since the latter expressed the standard against which all others must be measured. In the modern context, however, such a presumption makes little or no sense.<sup>25</sup>

This 'superiority complex' at first led to the outright refusal to apply foreign law. Courts either rejected the foreign case outright, or resorted to a bizarre fiction, in the case of contractual obligations created abroad, that alleged the foreign locality to be in England so the court could apply the common law of England.<sup>26</sup> This approach was also adopted in tort cases.<sup>27</sup>

The common law courts, particularly influenced by Lord Mansfield, became increasingly willing to notice and apply foreign law. His Lordship in *Mostyn v Fabrigas* stated that 'the way of knowing foreign laws is, by admitting them to be proved as facts'.<sup>28</sup> In other words, the common law took the same approach to foreign law as it had to mercantile law. As a consequence of treating foreign law as a fact, it had to be proven by the parties, and the court was forbidden to 'know' it.

Even in the 19<sup>th</sup> century, continuing preference was given by English courts to the law of the forum. This appears in the notorious formulation of the requirements to succeed in an English court based on a foreign tort. Actionability as a tort if done in England was required, as well as a lack of justification of the act under the law of the place where the wrong occurred.<sup>29</sup> As applied in Australia, the reference to actionability according to the law of the forum has

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25 (1986) 27 DLR (4<sup>th</sup>) 641, 651; Marceau and Lacombe JJ, the other judges in that case, said the rule applied only where the provisions of the law potentially have some degree of universality: 650, 652.

26 Sack, above n 13, 376–7.

27 Justice Kirby in *Neilson* acknowledged the links between this practice and the presumption of similarity: 'This course is similar to the fiction earlier adopted in English law that a foreign law was to be treated as having occurred in England. Our law has abandoned that fiction. We should not adopt another one that is equally incredible' (2005) 223 CLR 331, 397.

28 (1775) 1 Cowp 161, 174.

29 *Phillips v Eyre* (1869) LR 4 QB 225, 239. See also *Chaplin v Boys* [1971] AC 356 and *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190. Justice Kirby in *Regie* noted that the approach in *Phillips v Eyre* (1869) LR 4 QB 225 in part 'rested on the fact that, initially, the common law courts in England could not entertain proceedings founded on foreign torts': (2002) 210 CLR 491, 531. These rules have now been superseded in all torts except defamation: *Private International Law (Miscellaneous Provisions) Act 1995* (UK), s 13. This is related to the theory of local law later developed by Cook. Cook claimed that where a court considers foreign law, it creates a fiction by adopting and enforcing as its own law a rule of decision identical or very similar to the content of the foreign law; in this way courts were enforcing not a foreign right but a right created by its own law: Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942) 20.

been argued to be either the sole choice of law rule<sup>30</sup> or one of two choice of law rules required to be satisfied.<sup>31</sup>

At a similar time, and in a related development, English courts were applying English law to torts, at least in the absence of evidence of the foreign law. For example, in *Mure v Kaye*, in an action for false imprisonment based on events in Scotland, the court applied the law of England in the absence of proof of the Scottish law on point.<sup>32</sup> In *King of Spain v Machado* a Spanish document, in the absence of evidence of Spanish law, was construed according to English rules of interpretation.<sup>33</sup> In *Nouvelle Banque de l'Union v Ayton*, the court applied English law to an issue of negotiability, in the absence of evidence of the Belgian principles.<sup>34</sup> The same approach was taken in a case of disputed ownership.<sup>35</sup> These cases can be expressed either as examples of a principle that the law of the forum should be applied in the absence of evidence of the law of the cause,<sup>36</sup> or as reflecting a presumption that, absent evidence to the contrary, the law of the cause is said to be the same as the law of the forum.<sup>37</sup> The practical result will for all intents and purposes be the same, and the remainder of the article will not refer to this distinction again.

## IV SUBSEQUENT ACCEPTANCE OF THE RULE

### A Australia

Prior to acceptance of the doctrine by a bare majority of the High Court in *Neilson*, some comments had been made in various cases to support the presumption. The presumption was applied in *Temilkovski v Australian Iron and Steel Pty Ltd*,<sup>38</sup> in *BP Exploration Co (Libya) Ltd v Hunt*,<sup>39</sup> in *United States Trust Co of New York v Australia and New Zealand Banking Group Ltd*,<sup>40</sup> *Wright, Heaton and Co v Barrett*,<sup>41</sup> in *Toshiba Corp v Mitsui OSK Lines Ltd (The Nichigoh Maru)*,<sup>42</sup> and in *Standard Bank of Canada v Wildey*.<sup>43</sup>

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30 *Koop v Bebb* (1951) 84 CLR 629, 644; *Anderson v Eric Anderson (Radio and TV) Pty Ltd* (1965) 114 CLR 20, 27–8 (Kitto J), 34 (Taylor J), 40–1 (Windeyer J).

31 See, eg, *Breavington* (1988) 169 CLR 41 110–1 (Brennan J); *Stevens v Head* (1993) 176 CLR 433, 439–40 (Mason CJ) (dissenting).

32 (1811) 4 Taunt 34.

33 (1827) 4 Russ 225.

34 (1891) VII TLR 377 ('*Nouvelle Bank*').

35 *The Parchim* [1918] AC 157.

36 See *Shaker v Al-Bedrawi and Ors* (2001) EWHC Ch 159.

37 See *Kuwait Oil Tanker Company SAK v Al Bader* [2000] 2 All ER 271.

38 (1966) 67 SR (NSW) 211, 231.

39 [1980] 1 NSWLR 496, 503 ('*Hunt*').

40 (1995) 37 NSWLR 131, 147.

41 (1892) 13 NSWLR 206.

42 (unreported, Supreme Court of New South Wales, 1991).

43 (1919) 19 SR (NSW) 384, 388. See also *Walker v W A Pickles Pty Ltd* [1980] 2 NSWLR 281. It was also accepted in the New Zealand case of *Mount Cook (Northland) Ltd v Swedish Motors Ltd* [1986] 1 NZLR 720, 726–7.

Nygh and Davies state:

[t]he forum when faced with a question which is governed by the law of a foreign country starts, as a general principle, with the presumption that the law of that country is the same as that of the forum unless proven otherwise. This presumption applies whether the foreign country is a common law country ... or a civil law country.<sup>44</sup>

Justice Heydon makes similar comments in *Cross on Evidence*:

The burden of proof rests on the party asserting that foreign law differs from domestic law. This is frequently expressed, rather infelicitously, by saying that there is a presumption that foreign and domestic law are the same. That is, in the absence of a satisfactory proof of, or agreement about, foreign law, the *lex fori* will be applied. That “presumption” is general, but not universal. It has been said to operate against, not in favour, of the party whose obligation it is to prove foreign law.<sup>45</sup>

The Australian Law Reform Commission in its *Choice of Law* report noted the rule, observing that ‘at common law the parties can agree, by not raising foreign law, that the law of the forum should apply to the particular case’. It did not criticise this approach.<sup>46</sup> The *Evidence Act 1995* (Cth) does not refer to the presumption.<sup>47</sup>

## B England

It has long been said that foreign laws are facts, not laws,<sup>48</sup> and therefore cannot be known to judges.<sup>49</sup> As a result, there is a need to prove foreign law and consequences arise if this does not occur. The rule has been accepted by many English authorities, including the House of Lords.<sup>50</sup> In *Dicey and Morris on the Conflict of Laws*, it is put thus:

The burden of proving foreign law lies on the party who bases his claim or defence on it. If that party adduces no evidence, or insufficient evidence, of the foreign law,

44 P E Nygh and Martin Davies *Conflict of Laws in Australia* (7<sup>th</sup> ed, 2002) [17.1].

45 Justice John D Heydon, *Cross on Evidence*, (7<sup>th</sup> ed, 2004) [41005] (references omitted). Justice Heydon then notes possible exceptions relating to fraud cases, in cases involving the validity of a will, and marriage recognition legislation [41005].

46 Report No 58 (1992) [4.9]. However elsewhere in the Report, the Commission bemoans reliance on forum law, stating that it may disadvantage defendants, and promotes forum shopping [1.14].

47 The relevant sections are s 143 (proof not required of Australian law); s 144 (matters of common knowledge need not be proven – defined to mean matters known in the jurisdiction, or capable of verification by reference to a document the authority of which cannot be questioned. In such cases, the court is given power to acquire knowledge of this matter by any means considered necessary); ss 174 and 175 allowing evidence of foreign statutory and common law respectively to be adduced, and s 176, clarifying that where a jury is hearing a case, the judge alone must decide on questions of foreign law.

48 *Mostyn v Fabrigas* (1775) 1 Cowp 161, 174 (Lord Mansfield); *Bumper Development Corporation v Commissioner of Police of Metropolis* [1991] 1 WLR 1362, 1368 (*‘Bumper Development Corporation’*).

49 As Lord Langdale eloquently put it in *Earl Nelson v Lord Bridport* (1845) 8 Beav 527, 534–5: With foreign laws an English Judge cannot be familiar; there are many of which he must be totally ignorant: there is, in every case of foreign law, an absence of all the accumulated knowledge and ready associations which assist him in the consideration of that which is the English law, and of the manner in which it ought to be applied, in a given state of circumstances to which it is applicable. He is not only without the usual and necessary assistance afforded by the accumulated knowledge and able suggestions contained in the arguments which are addressed to him, but he is constantly liable to be misled by the erroneous suggestions of analogies which arise in his own mind, and are pressed upon him on all sides.

50 *Hartman v Konig* (1933) 50 TLR 114.

the court applies English law. This principle is sometimes expressed in the form that foreign law is presumed to be the same as English law until the contrary is proved. But this mode of expression has given rise to uneasiness in certain cases. Thus in one case the court refused to apply the presumption of similarity where the foreign law was not based on the common law, and in others it has been doubted whether the court was entitled to presume that the foreign law was the same as the statute law of the forum. In view of these difficulties, it is better to abandon the terminology of presumption, and simply to say that where foreign law is not proved, the court applies English law.<sup>51</sup>

The general rule is subject to exceptions.<sup>52</sup> One is that where the foreign law involved is that of a Commonwealth country, the court can order that law to be ascertained if it is considered necessary to resolve the case. This does not require a motion from the parties and the parties need not have pleaded the foreign law.<sup>53</sup> In practice, however, this provision has very rarely been used due to its cost and delay. *Dicey and Morris* states that the court can also take judicial notice of a foreign law if its content is, at least partly, based on English law, and the laws remain substantially similar.<sup>54</sup> A different view is taken in *Cheshire and North*:

The established rule is that knowledge of foreign law, even of the law pertaining in some other parts of the common law world, is not to be imputed to an English judge. Unless the foreign law ... is pleaded by the party relying thereon, then it is assumed that it is the same as English law ... If there is no such plea, or if the difference is not satisfactorily proved, the court must give a decision according to English law.<sup>55</sup>

It is considered impermissible for a British judge to conduct research on the foreign law.<sup>56</sup> The problem will not arise if the British court which would otherwise apply foreign law to the dispute believes that there is a more appropriate forum in which the case should be tried. In assessing such a *forum non conveniens* application, the question of the proper law to be applied to the dispute is an important factor.<sup>57</sup>

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51 Lawrence Collins (ed), *Dicey and Morris on the Conflict of Laws* (13<sup>th</sup> ed, 2000) [9-025] (references omitted), with the exception of bigamy. The authors note that 'the general rule is that if a party wishes to rely on a foreign law he must plead it in the same way as any other fact. Unless this is done, the court will decide a case containing foreign elements as though it were a purely domestic English case' [9-003] (references omitted). This was endorsed by the Court of Appeal in *Bumper Development Corporation* [1991] WLR 1362, 1368.

52 These include where the foreign law is notorious, where legislation allows judicial notice to be taken, where the parties agree otherwise, or where it is possible to establish foreign law merely by reading foreign legal materials: Richard Fentiman, *Foreign Law in English Courts* (1998) 4. The *European Convention on Information on Foreign Law*, opened for signature 7 June 1968, CETS No: 062 (entered into force 17 December 1969) provides a procedure for obtaining foreign official assistance in foreign law matters; Great Britain, however, has not as yet expressly implemented the law.

53 Collins, above n 51, [9-003].

54 *Ibid* [9-006].

55 Sir Peter North and J J Fawcett, *Cheshire and North's Private International Law* (12<sup>th</sup> ed, 1992) 99–100 (references omitted).

56 *Bumper Development Corporation* [1991] WLR 1362, 1369.

57 *Spiliada* [1987] AC 460; *Muduroglu Ltd v TC Ziraat Bankasi* [1986] QB 1225; *Hamed El Chiaty & Co (T/A Travco Nile Cruise Lines) v The Thomas Cook Group Ltd* [1992] 2 Lloyd's Rep 399; *The Varna (No 2)* [1994] 2 Lloyd's Rep 41; *The Forum Craftsman* [1985] 1 Lloyd's Rep 291.

The rule has been applied in a broad range of cases, including contract issues,<sup>58</sup> statutory interpretation,<sup>59</sup> marriage issues,<sup>60</sup> and corporations law issues.<sup>61</sup> It was recently reaffirmed in a case based on the tort of negligent misstatement.<sup>62</sup> Most recently, the court in a marine insurance laws case assumed that the law of New York on point was the same as the law of England, given the ‘special reasons’ for keeping these laws in harmony.<sup>63</sup> It has been applied to assume that foreign conceptions of public policy are similar to those of England.<sup>64</sup> It has also been applied where, although evidence of foreign law was presented, the evidence was deemed to be insufficient.<sup>65</sup>

The ‘presumption’ was applied in a recent defamation action involving alleged defamatory material in a magazine. The plaintiffs sought to amend their statement of claim, which alleged only publication in England, to include a number of foreign jurisdictions. The defendant complained that the plaintiff had simply asserted that the publication was actionable in other jurisdictions, without particularising their claim. The court rejected the defendant’s claim, finding that ‘[t]he plaintiff need only set out that it [the tort] is actionable by the law of the foreign country and then say there is the presumption. If he chooses to do that, it is then for the defendant to raise the issue that the foreign law is different from English law’.<sup>66</sup>

Notably, the presumption has been applied both in cases governed by statute law and by common law, and in cases where the foreign legal system involved was not a common law system. It seems that the presumption is not affected by the *Rome Convention*.<sup>67</sup>

### C United States of America

The presumption was accepted by the authors of the *Restatement (Second) of Conflict of Laws* (1971) in relation to common law.<sup>68</sup> Case examples in the United States in which the presumption has been applied are numerous. They include *Louknitsky v Louknitsky*, involving a divorce suit filed in California

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58 *Dynamit Actien-Gesellschaft v Rio Tinto Co Ltd* [1918] AC 260 (‘Dynamit’) (validity of a contract during wartime); *Sedgwick, Collins and Co Ltd v Highton* (1929) 34 Ll L Rep 448 (insurance); *Royal Boskalis Westminster NV v Mountain* [1999] QB 674 (duress); *The Parchim* [1918] AC 157 (Privy Council) (sale of goods contract).

59 *The Torni* [1932] P 78.

60 *Casey v Casey* [1949] P 420 (whether marriage voidable), *De Reneville v De Reneville* [1948] P 100 (whether marriage void).

61 *Pickering v Stephenson* (1872) LR 14 Eq 322.

62 *MCC Proceeds Inc v Bishopsgate Investment Trust PLC and Ors (No 4)* [1998] EWCA Civ 1680.

63 *King v Brandywine Reinsurance Co* [2005] Lloyd’s Rep IR 509.

64 *Dynamit* [1918] AC 260, 295; *The Colorado* [1923] P 102, 111; *Bumper Development Corporation* [1991] 1 WLR 1362, 1369.

65 *Nouvelle Bank* (1891) VII TLR 377.

66 *University of Glasgow v The Economist* [1997] EMLR 495, 502.

67 *Rome Convention on the Law Applicable to Contractual Obligations*, opened for signature 19 June 1980, OJ L 266, 0001. Article 3(1) does require a contract to be governed by the law chosen by the parties, but art 1(2)(h) states that this does not apply to evidence and procedure.

68 American Law Institute, *Restatement (Second) of Conflict of Laws* (1971) S136 provides the general position that the common law of one country is presumed to be the same as that of another country.

concerning property settlement. The property had been purchased while the parties were living in China, and been paid for by money earned in China. Given the failure of the parties to lead evidence of Chinese law, the court presumed that Chinese marital property law was the same as that of California.<sup>69</sup> This was also the position taken in *Walter v Netherlands Mead NV*,<sup>70</sup> *Bartsch v Metro-Goldwyn-Meyer Inc*,<sup>71</sup> *Banque Libanaise Pour Le Commerce v Khreich*,<sup>72</sup> *Gonzalez v Volvo of America Corp*,<sup>73</sup> *Commercial Insurance Co of Newark N J v Pacific-Peru Construction Corp*,<sup>74</sup> and by the United States Court of Appeals recently in *Butler v IMA Regiomontana SA de CV*.<sup>75</sup>

The same result was achieved through slightly different reasoning in *Leary v Gledhill*,<sup>76</sup> a case involving an alleged loan in France from the plaintiff to the defendant. The plaintiff failed to prove French law on point. The court rejected the presumption that foreign law was the same as United States law, but then presumed that in the absence of proof of foreign law, the parties acquiesced in the application of the law of the forum, either common law or statutory.<sup>77</sup> Different rules might apply where the foreign country is England.<sup>78</sup> There has been some suggestion that the presumption, in respect of a non-common law foreign legal system should only be applied in respect of universally recognised fundamental principles of right or wrong.<sup>79</sup> As the previous sentence implies, some courts have confined the presumption only to cases where the foreign country is a common law country.<sup>80</sup> At other times, however, a 'presumption' has

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69 266 P 2d 910 (Cal Dist Ct App 1954). Another Californian example is *Norris v Harris*, [1860] 15 Cal 226, 254. See also Albert Kales, 'Presumption of the Foreign Law' (1906) 19 *Harvard Law Review* 401; William B Stern, 'Foreign Law in the Courts: Judicial Notice and Proof' (1957) 45 *California Law Review* 23.

70 514 F 2d 1130, 1137 n 14, (3d Cir 1975), *cert denied* 423 US 869 (1975).

71 391 F 2d 150, 155 n 3 (2d Cir 1968), *cert denied* 393 US 826 (1968).

72 915 F 2d 1000 (5<sup>th</sup> Cir 1990).

73 752 F 2d 295 (7<sup>th</sup> Cir 1985).

74 558 F 2d 948, 952 (9<sup>th</sup> Cir 1977).

75 210 F 3d 381 (9<sup>th</sup> Cir 2000).

76 84 A 2d 725 (NJ 1951) 269.

77 Further examples of the acquiescence approach include *Commercial Insurance Co of Newark, NJ v Pacific-Peru Construction Corp* 558 F 2d 948 (9<sup>th</sup> Cir 1977) and *Morse Electro Products Corp v SS Great Peace* 437 F sup 474, 487 (DCNJ 1977). Acquiescence can be express, such as in *Loebig v Larucci*, 572 F 2d 81 (2<sup>nd</sup> Cir 1978), where the parties agreed that New York law should apply to resolve a case based on facts that occurred in Germany. This has been described as a 'fiction' by Symeon C Symeonides, Wendy T Perdue and Arthur T von Mehren, *Conflict of Laws: American, Comparative, International* (1998) 108; Arthur Nussbaum dismisses it as 'nothing but a crude fiction': 'The Problem of Proving Foreign Law' (1941) 50 *Yale Law Journal* 1018, 1037. I A Hunter also regards the presumption as an 'obvious fiction [that] has rightly incurred the criticism of those who regard all fictions in the law as an exercise in judicial self-deception': 'Proving Foreign and International Law in the Courts of England and Wales' (1978) 18 *Virginia Journal of International Law* 665, 666.

78 *Siegelman v Cunard White Star Limited* 221 F 2d 189 (2<sup>nd</sup> Cir 1955).

79 See, eg, *Parrot v Mexican Cent Ry Co* 93 NE 590 (Mass, 1911); RQ: *Read v Lehigh Valley R Co* 31 NE 2d 891 (NY 1940); *Compagnie Generale Transatlantique v Rivers* 211 F 294 (2d Cir 1914); *Arams v Arams* 45 NYS 2d 251 (NY Sup Ct 1943).

80 *Frost v CW Cone Taxi and Livery Co* 139 A 227 (Me 1927); *Hammond, Snyder & Co v American Express Co* 68 A 496 (Md 1908).

applied identically of the laws of Hong Kong and Washington,<sup>81</sup> Guatemala and California,<sup>82</sup> and Italy and Pennsylvania.<sup>83</sup>

## V WHERE THE PRESUMPTION WAS DENIED OR CRITICISED

Accepting that many exceptions to the doctrine have been suggested, and that the so-called rule cannot be placed higher than a general presumption, it has nevertheless received substantial criticism and has been questioned in numerous cases.

### A Australia

Section 118 of the *Australian Constitution*, providing for full faith and credit to be given by the courts of one State to the laws of another State, could be interpreted so as to avoid any presumption of similarity in the absence of proof where the matter involves the laws of two different states.<sup>84</sup> That result was obtained pre-federation in *Flornance v Hutchinson*,<sup>85</sup> where the Victorian Court refused to assume that gaming legislation in New South Wales was the same for relevant purposes as that in Victoria.

The section does not, however, address situations where the relevant 'foreign' law is that of another country. There are many comments expressing reservations to such an approach in those situations.

In *BP Exploration Co (Libya) Ltd v Hunt*,<sup>86</sup> a case involving service of process overseas, the question arose whether the Court could assume that the requirements for service were the same there as in New South Wales. Justice Hunt dismissed the suggestion, concluding that the presumption 'is intended to operate against, not in favour of, the party whose obligation it is to prove the foreign law, so that he is deprived of the benefit of a right or exemption given by that foreign law, but not by New South Wales law, if he does not establish that foreign law in the proper way.'<sup>87</sup> He claimed it would be

an absurd interpretation of the requirements of Pt 10, r 5 (that non-personal service be in accordance with the law of the country in which service is to be effected) which enabled a judgment creditor, by mere non-disclosure on the ex parte application for registration, to obtain the benefit of a more advantageous New South Wales provision as to service, which is in fact not available in the foreign jurisdiction in which service is to be effected. Such an interpretation would render the requirement in r 5 otiose.<sup>88</sup>

81 *Fletcher v Murray Commercial Co*, 130 P 1140 (Wash, 1913).

82 *Christ v Superior Court in and for City and County of San Francisco* 296 P 612 (Cal 1931).

83 *In re Rucci's Estate* 58 Pa D and C 210, 214 (Pa Orph, 1946); a fuller discussion of the cases appears in John Sprankling and George Lanyi, 'Pleading and Proof of Foreign Law in American Courts' (1983) 19 *Stanford Journal of International Law* 3.

84 *Breavington* (1988) 169 CLR 41. See also the recognition of State laws required by the *State and Territorial Laws and Records Recognition Act* 1901 (Cth) (repealed).

85 (1891) 17 VLR 471.

86 [1980] 1 NSWLR 496, 503.

87 *Ibid.*

88 *Ibid.*

The Victorian court in *Zoubek v Zoubek*<sup>89</sup> refused to assume that the law of celebration of marriage was the same abroad as in that State. The presumption was also criticised in *Allsopp v Incorporated Newsagencies Co Pty Ltd*<sup>90</sup> and by Fox J in *Elders IXL Ltd v Lindgren Pty Ltd*.<sup>91</sup>

Justice Heydon, when on the New South Wales Court of Appeal in 2001, refused to make the assumption when dealing with the capital gains tax regime of Germany. Hearing of at least one respect in which German and Australian capital gains tax differed, Heydon J concluded that the German position ‘was so radically different from the Australian position as to suggest that to make an assumption that German and Australian law are the same for any purposes in relation to capital gains tax is to embrace an entirely artificial and almost certainly misleading fiction’.<sup>92</sup>

The High Court did not squarely address the issue in *Regie*, but the joint reasons refer to comments by Hutley JA in *Walker v W A Pickles Pty Ltd*<sup>93</sup> to the effect that foreign law is presumed to be the same as local law, and a fact presumed to be true need not be pleaded. The point is then made that ‘a party who relied on a foreign law of the place of the wrong must allege and *if necessary* prove it.’<sup>94</sup> Nothing is said as to the consequences if this does not occur.

As indicated, three of the current members of the High Court in *Neilson* rejected the presumption, at least on the facts of that case. The presumption has been the subject of recent academic criticism in Australia.<sup>95</sup> It would not apply where foreign law is sufficiently notorious, because in that case the court can take judicial notice of the law.<sup>96</sup> The parties may agree that judicial notice should be taken of the content of foreign law, in which case the presumption again would not be applicable.<sup>97</sup>

The *Evidence Act 1995* (Cth) does not refer to the presumption, and section 144 refers to matters not requiring proof. The definition includes matters that are ‘capable of verification by reference to a document the authority of which cannot

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89 [1951] VLR 368.

90 (1975) 26 FLR 238, 242.

91 (1987) 79 ALR 411, 415.

92 *Damberg v Damberg* (2001) 52 NSWLR 492, 504.

93 [1980] 1 NSWLR 281.

94 210 CLR 491. The judges do not elaborate on what they mean by ‘if necessary’ – in particular, whether it is only necessary when the defendant raises the issue, and otherwise the presumption applies. The majority, however, go on to require a person seeking to enforce the foreign law to provide sufficient evidence as to its contents: 518–9.

95 Martin Davies points to the apparent inconsistency between the presumption and the fact several members of the High Court regularly refer to foreign material. He states that no-one wishing to rely on a proposition of English law would think of calling an expert to testify as to the law. He claims that an Australian court would, if pressed, feel comfortable about taking judicial notice of English law, and wonders whether ‘Australia [is] still so parochial that it cannot treat other foreign laws in the same way?’: ‘*Neilson v Overseas Projects Corporation of Victoria Ltd*: Renvoi and Presumptions About Foreign Law’ (2006) 30 *Melbourne University Law Review* 244, 265.

96 Justice Heydon, above n 45, [41005].

97 *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, 801.

be questioned'.<sup>98</sup> In such cases, the court can acquire knowledge of this kind of matter in any way it thinks fit. It may be submitted that the section is broad enough in its terms to include judicial notice of at least some foreign law. Justice Sackville in *Prentice v Cummins*<sup>99</sup> suggested recently in obiter that section 144 could apply to knowledge of other cases. These comments might also be applied to knowledge of cases in other jurisdictions.

## B Britain

Lord Roskill in *Osterreichische Landerbank v S'Elite Ltd*<sup>100</sup> questioned the applicability of the presumption in relation to a fraud case based on relevant parts of legislation. The presumption was refused in relation to cases involving gambling laws,<sup>101</sup> bigamy,<sup>102</sup> rules of evidence,<sup>103</sup> and intellectual property.<sup>104</sup> The Scottish Court of Sessions refused to assume Scots law was the same as the English, in a tort case brought in Scotland based on a car accident in England.<sup>105</sup>

Richard Fentiman in his book *Foreign Law in English Courts* criticises the so-called presumption:

It is intuitively unacceptable for a party to seek the application of foreign law and at the same time, with luminous inconsistency, to invite the court to apply English law by declining to offer evidence of any other. It is also potentially unfair that one party should (in effect) be made to prove (or disprove) a matter which another has introduced ... [T]he idea that an unproved foreign law is presumed to be the same as English law may allow a plaintiff to allege a fact which is arguable but which may have scant foundation – typically that a tort is actionable in the *lex loci* when in truth it is not. It may also be inconsistent with general principle that a plaintiff should shelter behind the presumption of similarity so as to avoid establishing the truth of any assertion as to foreign law. But for that presumption the usual rule would presumably apply whereby any assertion of fact must be established by evidence, which imposes the burden of proof on one who makes such an assertion ... Such arguments suggest that a party who relies upon foreign law must normally offer evidence as to its content or face dismissal of its claim or defence.<sup>106</sup>

## C United States of America

The classic American case is *Cuba Railroad Company v Crosby*,<sup>107</sup> involving a workplace injury that occurred in Cuba. No evidence was given as to Cuban law, the proceedings having been commenced in the United States. The United States Supreme Court refused to assume that Cuban law was the same as that of the relevant American state. It did not dismiss the assumption in all cases, conceding

98 *Evidence Act 1995* (Cth) s 144(1)(b).

99 (2002) 124 FCR 67, 86.

100 [1981] 1 QB 565; Brightman LJ and Sir David Cairns agreed.

101 *Saxby v Fulton* [1909] 2 KB 208, 211.

102 *The King v Naguib* [1917] 1 KB 359.

103 *R v Governor of Brixton Prison; ex parte Caldwell* [1961] 1 All ER 606.

104 *Mother Bertha Music Ltd v Bourne Music Ltd* (No 2) [1997] EMLR 457.

105 *M'Elroy v M'Allister* 1949 SLT 139, 150: 'a pursuer who sues not in the *forum delicti* but in another forum, and there seeks a remedy founded on foreign law, must make a sufficiently specific and relevant case as to her rights by that foreign law'.

106 Fentiman, above n 52, 152–3 (references omitted).

107 222 US 473 (1912), 478–9 ('*Cuba Railroad*').

it might have some value in ‘rudimentary contracts or torts committed abroad’, or in cases of two common law countries. This was not the position here. Justice Holmes concluded that

when an action is brought upon a cause arising outside of the jurisdiction, it always should be borne in mind that the duty of the court is not to administer its notion of justice, but to enforce an obligation that has been created by a different law. The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With very rare exceptions, the liabilities of the parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. That and that alone is the foundation of their rights ... the only justification for allowing a party to recover when the cause of action arose in another civilised jurisdiction is a well-founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff’s case, and if there is reason for doubt, he must allege and prove it.<sup>108</sup>

The famous case of *Leo Walton v Arabian American Oil Co*<sup>109</sup> had the same result. There the plaintiff, an American citizen, was injured in a collision between his vehicle and a vehicle owned by the defendant, an American company. The accident occurred in Saudi Arabia. It was clear that the defendant’s vehicle was on the incorrect side of the road at the time of the crash. The plaintiff was permanently disabled as a result of the accident. Neither the plaintiff nor the defendant led any evidence as to the law of Saudi Arabia. As a result, the court dismissed the case because it could not determine the plaintiff’s rights under the relevant law, that of Saudi Arabia. It refused to apply the so called presumption and decide the case under the law of the forum, being New York. Had the court applied the presumption, done so, the plaintiff almost certainly would have won the case. Some authors have been scathing in their assessment of the suggested presumption.<sup>110</sup>

The *Interstate and International Procedures Act*, adopted by six states, allows judges to take judicial notice of foreign law if it has not been properly pleaded by the relevant party or parties.<sup>111</sup> Many more states have enacted their own laws providing for judicial notice of foreign law, or allowing the court, in determining

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108 *Cuba Railroad* 222 US 473 (1912), 478–9 (references omitted). Some see the case as a pure application of the vested rights theory, under which a cause of action exists only under the foreign law which created it. Failure to plead the foreign law means there is something missing which is essential to support the cause of action, so the cause of action must fail: see, eg, Rudolf Schlesinger, ‘A Recurrent Problem in Transnational Litigation: the Effect of Failure to Invoke or Prove the Applicable Foreign Law’ (1973) 59 *Cornell Law Review* 1.

109 233 F 2d 541 (2<sup>nd</sup> Cir 1956), cert denied 352 US 872 (1956) (*Walton*).

110 Arthur Nussbaum, for instance, dismisses it as a ‘crude fiction’ and ‘so unrealistic that it offends common sense’: Nussbaum, above n 77, 1037–8; Kales, above n 69, criticises it on the basis that it places an undue evidentiary burden on the defendant: 412; Yolanda Morentin dismisses it as ‘ludicrous’ in ‘Failure to Prove Foreign Law in United States Courts’ (1988) 5 *Arizona Journal of International and Comparative Law* 228, 242. See also Joseph Beale, *The Conflict of Laws* (1937) 1664; Larry Kramer, ‘Interest Analysis and the Presumption of Foreign Law’ (1989) 56 *University of Chicago Law Review* 1301, 1306; cf Rudolf Schlesinger, ‘A Recurrent Problem in Transnational Litigation: The Effect of Failure to Invoke or Prove the Applicable Foreign Law’ (1973) 59 *Cornell Law Review* 1, who favours a multi-factor approach to the question of when the presumption should apply.

111 Section 4-01 allows a court to consider any relevant material or source, regardless of whether or not the material was submitted by the parties. For a fuller discussion, see Otto Sommerich and Benjamin Busch, ‘The Expert Witness and the Proof of Foreign Law’ (1953) 38 (2) *Cornell Law Quarterly* 125.

foreign law, to consider any relevant material or source, regardless of admissibility.<sup>112</sup> Some courts have drawn the line, however, when the foreign law is not ‘easy to understand’; in such cases, the court has found for the defendant where the plaintiff has not proved the foreign law.<sup>113</sup> Legislation and court rules<sup>114</sup> contemplate evidence of foreign law being given. Under the *Federal Rules of Civil Procedure* the court’s determination of foreign law is a question of law rather than fact. The courts can take judicial notice of foreign law without the need for pleading by the parties. It must be conceded that on many occasions judges (upon their own admission) are too busy to arrange such research,<sup>115</sup> and/or fear the unknowns associated with foreign law.<sup>116</sup> These rules nonetheless clearly operate to downplay the importance of the presumption.

### D Other Jurisdictions

The law of most mainland European countries requires that that foreign law be proven, subject to exceptions.<sup>117</sup> It is not generally presumed that the law of the cause is the same as the law of the forum. For example, Article 292 in Germany’s *Code of Civil Procedure* of 1877 contains the following:

Law in force in another country, customary law, and municipal ordinances require proof only insofar as they are unknown to the court. In ascertaining these legal norms, the court is not confined to the evidence adduced by the parties; it is authorised to avail itself of other sources of information and to make such orders as may be necessary for the purpose.

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112 Schlesinger, above n 110, 16; Morentin, above n 110, 229–30.

113 *Walton* 233 F 2d 541 (2<sup>nd</sup> Cir 1956), cert denied 352 US 872 (1956). See Gregory Alexander, ‘The Application and Avoidance of Foreign Law in the Law of Conflicts’ (1976) 70 *Northwestern University Law Review* 602 and Schlesinger, above n 110, for a discussion of the relevant cases.

114 Rule 44.1 of the *Federal Rules of Civil Procedure* allow the court in determining foreign law to consider all relevant material, whether or not submitted by the parties: see Judge Milton Pollack, ‘Proof of Foreign Law’ (1978) 26 *American Journal of Comparative Law* 470; John Schmertz, ‘The Establishment of Foreign and International Law in American Courts: A Procedural Overview’ (1978) 18 *Virginia Journal of International Law* 697; Arthur Miller, ‘Federal Rule 44.1 and the ‘Fact’ Approach to Determining Foreign Law: Death Knell for Die-Hard Doctrine’ (1967) 65 *Michigan Law Review* 613; Sprankling and Lanyi, above n 83.

115 Pollack, above n 114, 471.

116 Judge Roger Miner ‘The Reception of Foreign Law in the U.S. Federal Courts’ (1995) 43 *American Journal of Comparative Law* 581, 584–5.

117 Refer for example to Article 12 of the *New Code of Civil Procedure* (France), *Reboux and Schule* Civ 11 and 18 Oct 1988; Stein and Jonas, *Kommentar zur Zivilprozessordnung, Vol III* (21<sup>st</sup> ed, 1997) § 293 (foreign law is regarded as law not fact in that country); and the *Swiss Law on Private International Law* (1987) (Article 16(1) states that the court must, subject to two exceptions, determine the content of foreign law *ex officio*): for more comparison see Trevor Hartley, ‘Pleading and Proof of Foreign Law: The Major European Systems Compared’ (1996) 45 *International and Comparative Law Quarterly* 271; Stephen Sass, ‘Foreign Law in Civil Litigation: A Comparative Survey’ (1968) 16 *American Journal of Comparative Law* 332, 355; Symeon Symeonides, ‘The New Swiss Conflicts Codification: An Introduction’ (1989) 37 *American Journal of Comparative Law* 187; and George Yates III, ‘Foreign Law Before Domestic Tribunals’ (1978) 18 *Virginia Journal of International Law* 725.

The views of Puchta and Savigny were influential in developing this approach.<sup>118</sup>

Sass summarises recent developments as evidencing a shift away from the proof of foreign law being a matter of fact. Some jurisdictions, such as Germany, have achieved this by virtue of specific statutory rules; in others such as the Netherlands the courts have reached this conclusion themselves; in other countries such as Greece, Austria, Spain, Portugal and Hungary, courts have assumed a discretionary power to treat foreign law *ex officio*.<sup>119</sup> Belgian courts traditionally apply foreign law, whether or not the parties have raised it. In other words, while foreign law must be proven, in the absence of proof from the parties, the typical continental approach requires the judge to undertake their own investigation.

## VI CONCLUSION ON COMPARISON

In summary, we see a range of approaches taken in different jurisdictions to this issue. The English courts are most supportive of an approach applying forum law, through either a presumption of similarity in the absence of party-led evidence, or an application of forum law in the absence of evidence. As a general rule, continental courts will seek to apply the 'proper law', and if this is foreign law, judges are expected to investigate the matter and introduce the foreign law if necessary. A variety of approaches is evident in the United States but statutes in most states now allow, but do not compel, judges to take judicial notice of at least some foreign law in the absence of evidence from the parties. It will up to the judge whether or not he or she does so.

## VII INTEREST ANALYSIS AND THE PRESUMPTION

In recent times, there has been a growing literature advocating an approach to choice of law questions that explicitly considers the content of particular choice of law rules. Rather than a blind application of one choice of law rule over another, this approach asks decision-makers to consider the policy positions underlying particular choice of law rules, and to consider whether that policy position would be advanced by the application of that jurisdiction's law to resolve the case. In other words, the court considers whether particular jurisdictions are interested in the outcome of the case, evidenced by their

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118 Friedrich Carl von Savigny, *System des Heutigen Römischen Rechts* (1849) believed in a community of the law of nations, and thought that the mandatory application of foreign law was necessary to make this happen.

119 Sass, above n 117, 366. A fuller comparison appears in Jacob Dolinger, 'Application, Proof and Interpretation of Foreign Law: A Comparative Study in Private International Law' (1995) 12 *Arizona Journal of International and Comparative Law* 225 and in Sofie Geeroms, *Foreign Law in Civil Litigation: A Comparative Functional Analysis* (2004).

(presumed) wish for their law to apply to determine such outcome.<sup>120</sup> This author has earlier advocated an interest analysis approach, particularly in relation to choice of law rules for tort.<sup>121</sup>

Intuition might suggest that an interest analysis scholar would not be in favour of a so called presumption that forum law was the same as the foreign law, in the absence of proof to the contrary. For example, if in fact the foreign jurisdiction would be ‘interested’ in the dispute and would want its laws to be applied to the dispute because it would be consistent with the policy underlying the rules, its ‘interest’ could be set at nought by the failure of the relevant party to plead the foreign law, or plead it sufficiently. It appears incorrect to consider the interest of the foreign jurisdiction as being so fragile that it would stand or fall according to whether the relevant party happens to plead the law or not.

It is thus surprising, at least initially, when the original interest analysis scholar Brainerd Currie supports the presumption.<sup>122</sup> He sharply criticises the result in the *Walton* case referred to above. This case, it will be remembered, involved the question of an American citizen injured in a motor accident in Saudi Arabia. The defendant was an American company whose employee had been driving on the incorrect side of the road, and collided with the plaintiff. The plaintiff suffered serious injuries. Neither party to the proceedings pleaded the law of Saudi Arabia.

Currie attacks the result in *Walton* because

[a] court is not justified in holding that foreign law *displaces* local law as the rule of decision when it cannot make the determination that the interest of the foreign state is entitled to recognition, and it can seldom make that determination when it has no information concerning the foreign law and policy.<sup>123</sup> ... however artificial may be the reproductions [presumptions] they yield of the foreign law, their general tendency is to bring about the application of the law of the forum *which is as it should be*<sup>124</sup> in the absence of any appropriate showing of the foreign law.<sup>125</sup>

This wording surely betrays a preference for forum law to be applied, a consistent criticism made of Currie’s work.<sup>126</sup> The antipathy of an interest analyst to the foreign law is more explicable once this is borne in mind. If the party

120 See, eg. Brainerd Currie, *Selected Essays on the Conflict of Laws* (1963); Brainerd Currie, ‘Survival of Actions: Adjudication Versus Automation in the Conflict of Laws’ (1957) 10 *Stanford Law Review* 205; Harold Korn, ‘The Choice of Law Revolution: A Critique’ (1983) 83 *Columbia Law Review* 772; Russell J Weintraub, ‘An Approach to Choice of Law That Focuses on Consequences’ (1993) 56 *Albany Law Review* 701; Larry Kramer, ‘Rethinking Choice of Law’ (1990) 90 *Columbia Law Review* 277; Russell J Weintraub, ‘A Proposed Choice of Law Standard for International Products Liability’ (1990) 16 *Brookings Journal of International Law* 225.

121 Anthony Gray, ‘Flexibility in Conflict of Laws Multistate Tort Cases: The Way Forward in Australia’ (2004) 23 *University of Queensland Law Journal* 435; Anthony Gray, ‘The Rise of Renvoi in Australia: Creating the Theoretical Framework’ (2007) 30 *University of New South Wales Law Journal* 103; Anthony Gray, ‘Remedy Issues in Multinational Tort Claims’ (2007) 26 *University of Queensland Law Journal* 1.

122 Currie, above n 14.

123 *Ibid* 1003 (emphasis added).

124 *Ibid* 1005 (emphasis added).

125 *Walton v Arabian American Oil Company* 233 F 2d 541 (2<sup>nd</sup> d Cir 1956), cert denied 352 US 872 (1956).

126 See, eg. Lea Brilmayer, ‘Interest Analysis and the Myth of Legislative Intent’ (1980) 78 *Michigan Law Review* 392, 398 who criticises Currie’s version of interest analysis as ‘pro-resident, pro-forum and pro-recovery’.

making the case has not shown that they are entitled to recover under the applicable foreign law principles, what is the basis, according to Currie, for holding that forum law should apply? Why not reject the case on the basis that the plaintiff has not made out their case?

Currie dismisses this possibility:

The harsh alternative to deciding it [*Walton*] according to New York law is to dismiss it. No conflict of interest among states being apparent, justice between the parties becomes the sole consideration. Justice between the parties requires a decision on the merits. And where should the New York court look for a rule of decision which will do justice between the parties but to the body of principle and experience which has served that purpose, as well as the ends of government policy, for the people of New York in their domestic affairs? ... The courts which were willing to presume that the foreign law was the same as the common, but not the statutory, law of the forum were not merely expressing hostility toward legislation. They were expressing belief that the portion of the law of the forum which consisted of the product of judicial reasoning and experience in the adjudication of cases was a reservoir of wisdom and justice which could be fairly drawn upon in any case<sup>127</sup>

Why is the alternative of dismissing the case a harsh one? If this is harsh, courts are harsh every day. Courts regularly turn parties away because they have not made out the requirements of their case. Would Currie have a court ignore these requirements by resorting to some fictional ‘presumption’ in order to decide the case in accordance with what it considers to be ‘justice and wisdom’, however defined? Our legal system relies on the consistent application of principles to problems, and while the principles are susceptible of different interpretations, they cannot and should not be swept aside so as to fit with an individual judge’s conception of ‘justice and wisdom’. There is more at stake when a case is being adjudicated than the parties in that particular case, or whatever is considered to be ‘justice’ as between them. There is the need for coherency of principle and consistency of application.

Currie’s approach is a clear invitation to forum shoppers. A shrewd plaintiff in a case with similar facts to *Walton* would choose to bring the action (subject to a *forum non conveniens* limit) in a jurisdiction favourable to his or her case, and hope that the defendant would not raise any, or sufficient, evidence of the foreign law otherwise applicable to the case. The plaintiff could then take the benefit of the presumption that absent evidence to the contrary the foreign law is the same as forum law, and recovery would be allowed. It is interesting that Currie lauds such an approach, even when he concedes that in the *Walton* case, New York had no interest in applying its social and economic policy to the case, involving an injury in Saudi Arabia to an Arkansas resident, caused by the employee of a defendant based in Delaware.<sup>128</sup>

The author agrees with Larry Kramer, an interest analysis proponent who doesn’t agree with Currie’s endorsement of the so called presumption:

there is nothing “normal and natural” about presuming that forum law applies. (Indeed, I am astonished that anyone would consider it “normal and natural” for an Arkansas plaintiff injured in Saudi Arabia to recover damages from a Delaware

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127 Currie, above n 14, 1018.

128 Ibid 1014.

defendant under New York law). On the contrary, once the applicable law becomes an issue, the “normal and natural” practice is to require the plaintiff to show that some law entitles him to recover, i.e. to show that some state has an ‘interest’. There is no need for a presumption of forum law as a default rule to ensure that some law applies – the conclusion that no state is shown to be interested is merely another way of saying that the plaintiff failed to establish a right to relief. All of this seems sufficiently straightforward to ask why Currie thought that a presumption of forum law was needed.<sup>129</sup>

As Fentiman puts it, ‘the proper and unexceptional response is that a party who does not plead and prove foreign law where this is necessary does not establish its case. The penalty is that the claim or defence simply fails’.<sup>130</sup>

## VIII CONSISTENCY OF APPROACH AND FAIRNESS TO THE DEFENDANT

After a long period applying the so-called double actionability test and the law of the forum as the substantive law, or at least as part of a double choice of law rule in interstate and international tort choice of law cases,<sup>131</sup> the High Court finally in the early 21<sup>st</sup> century abandoned the 19<sup>th</sup> century *Phillips* doctrine and adopted the *lex loci delictus* as the relevant rule in both types of case.<sup>132</sup> It reasoned that the new rule reflected the expectation of a person that when they went to another jurisdiction, their conduct would be governed by the rules applicable in that jurisdiction.<sup>133</sup> Justice Kirby reiterated in *Regie* that any rule other than that requiring the application of the law of the place of the wrong inevitably leads to forum shopping.<sup>134</sup> Justice Kirby rejected the first limb of *Phillips* as being a relic of the past, inconsistent with ‘attitudinal changes that reject or at least reduce xenophobic opinions about the worth and applicability of the law of other jurisdictions’.<sup>135</sup> He found that the ‘normal rule [applying the law of the place of the wrong] should not be distorted just because, in a particular case, its outcome imposes a burden on a particular plaintiff. The law must be just to defendants as well as plaintiffs’.<sup>136</sup>

Given the High Court’s position on these matters, it is submitted that consistency would require them to reject any presumption that foreign law and

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129 Kramer, above n 110, 1306–7.

130 See Fentiman, above n 52, 69.

131 See, eg, *Koop v Bebb* (1951) 84 CLR 629; *Anderson v Eric Anderson Radio and TV Pty Ltd* (1965) 114 CLR 20; *McKain v R W Miller and Co (SA) Pty Ltd* (1991) 174 CLR 1; *Stevens v Head* (1993) 176 CLR 433 (the test was modified slightly in the latter two cases, which relate to distinctions between procedural and substantive law).

132 *Pfeiffer* (2000) 203 CLR 503; *Regie* (2002) 210 CLR 491 (with the possible exception of Callinan J in relation to international torts); see also Geoffrey Lindell, ‘*Regie Nationale des Usines Renault SA v Zhang*: Choice of Law in Torts and Another Farewell to *Phillips v Eyre* but the *Voth* Test Retained for *Forum Non Conveniens* in Australia’ (2002) 3 *Melbourne Journal of International Law* 364; Martin Davies, ‘Exactly What is the Australian Choice of Law Rule in Torts Cases?’ (1996) 70 *Australian Law Journal* 711.

133 *Pfeiffer* (2000) 203 CLR 503, 536.

134 210 CLR 491, 533–4.

135 *Regie* (2002) 210 CLR 491, 539.

136 *Regie* (2002) 210 CLR 491, 538.

forum law are the same, where the evidence is lacking or insufficient. As has been noted, this presumption again opens the door to the use of the law of the forum where the law of the place of the wrong is not pleaded by the plaintiff, whether by accident or deliberately. A tactical plaintiff who is aware the foreign law does not support the case might make a conscious decision not to plead it, hoping instead to rely on the presumption that the forum law is the same and will be applied. It would then be incumbent on the defendant to lead such evidence, presuming the defendant is even aware of the issue.

Others have noted the same thing:

The *lex loci delicti* rule in *Zhang* is supposed to remove the incentive for forum-shopping, particularly when buttressed by the absence of a 'flexible exception', because it ensures that a plaintiff who has suffered harm as a result of a foreign tort can expect to have his or her claim determined by the same law in an Australian court as if the claim had been pursued in the place of the wrong. Yet, if the plaintiff comes to an Australian court and makes no effort to plead or prove the foreign law on which his or her claim depends, the claim will be determined by Australian law in any event. Thus, the presumption about foreign law undercuts the underlying intention of the *Zhang* rule by providing the plaintiff with a positive incentive simply to ignore foreign law, unless it is in some way more favourable than Australian law.<sup>137</sup>

This view is further supported by the actions of the plaintiff's legal representative in the *Neilson* case, who candidly admitted 'we're endeavouring to keep well away from the China law as we can [sic]'.<sup>138</sup> He was presumably aware of the much shorter limitation period also applicable in China. This approach also tends to reward forum shopping.

This effective transfer of the burden of proof onto the defendant in such cases cannot be supported. It is hard to reconcile with Justice Heydon's admonition that the presumption should be applied against, not in favour of, the party with the obligation to prove such foreign law, which should be the plaintiff.<sup>139</sup> Fentiman agrees, claiming that the 'true role of the presumption of similarity is to sanction those who rely upon foreign law but decline to prove it, not to reward them'.<sup>140</sup> A British review into this rule concluded it was unfair: 'The plaintiff can use this right as a daunting tactical ploy against the defendants by simply asserting, so it seems, that the foreign law is presumed to be the same as English law and leaving it to the defendants to incur the considerable cost of showing the contrary.'<sup>141</sup>

Fentiman notes the potential unfairness involved where one party should in effect be made to prove or disprove a matter which another has introduced.<sup>142</sup>

137 Davies, above n 95, 263–4. The apparent inconsistency is also noted in the writings of Reid Mortensen, above n 2, 16 and above n 23.

138 *Neilson* (2005) 223 CLR 331, [144].

139 Justice McHugh notes the same rule in *Neilson* (2005) 223 CLR 331, 349, as did Hunt J in *Hunt* [1980] 1 NSWLR 496, 503.

140 Fentiman, above n 52, 150.

141 Sir Brian Neill, *Report of the Supreme Court Procedure Committee on Practice and Procedure in Defamation* (1991) 47: 'the plaintiff can use this right as a daunting tactical ploy against the defendants by simply asserting, so it seems, that the foreign law is presumed to be the same as English law and leaving it to the defendants to incur the considerable cost of showing the contrary'.

142 See Fentiman, above n 52, 152.

## IX CONCLUSION

The author submits that Australian law should not continue with the presumption, in the absence of evidence of relevant foreign law, that it is the same as local (forum) law. The position of the minority in *Neilson* on this point is preferred. This is because:

- (a) the presumption is clearly a fiction, and the author does not advocate fictions in legal rules due to their unrealistic nature;
- (b) the presumption was created at a time when evidence of foreign law was scant and difficult to obtain, and when English courts had a particular fondness for applying their own law;
- (c) we have recently abolished in Australia another forum-friendly choice of law rule inherited from England; consistently we should remove this so-called associated ‘presumption’;
- (d) the presumption unfairly places the evidentiary burden onto the defendant;
- (e) as such, the rule flies in the face of the sound rule that the presumption should be applied against a party seeking to rely on the foreign law;
- (f) the presumption is not generally applied in the United States or continental Europe;
- (g) interest analysis should require us to apply foreign law if the foreign jurisdiction would be interested in the litigation and where its objects would be advanced by the application of its law here; it should not depend on whether the plaintiff or defendant happen to raise it in a particular case; and
- (h) applying the so called presumption is a fresh invitation to forum shopping, when the High Court has recently fashioned its choice of law rules in tort so as to minimise the opportunities available for obtain this outcome.

The author has considered whether the presumption could have any limited use. For example, some say it could apply when two common law countries are being considered, or it is the common law rather than statute law of two countries that are being considered. Some have said it should apply to ‘fundamental principles of universal application’. I have rejected such suggestions. It is open to interpretation precisely which principles are of universal application. As we have seen in this area, let alone others, there are vast differences in the law of common law countries. It remains unrealistic to assume they are the same when legal experience teaches us otherwise. It may not be as unrealistic to assume this about the common law or between common law countries, as it is to assume it about legislation in different jurisdictions or, say, between Chinese and Australian law, but it remains an unrealistic fiction.

The author suggests that once the applicable law (under choice of law principles) has been identified, the parties must lead appropriate evidence. If the relevant law is foreign and the plaintiff has not led any or the required evidence,

prima facie the plaintiff has not made out its case and the case should be dismissed. I believe there should be some discretion for the court to make its own enquiries about the foreign law, as United States courts are typically permitted to do. This would be at the court's discretion. Section 144 of the *Evidence Act* 1995 (Cth) may be sufficient for this purpose; however it may be that a more specific section is required, dealing with evidence as to the foreign law, in cases where it is applicable. It should allow a judge at their discretion to take judicial notice of foreign law in appropriate cases.