

CHOICE OF LAW IN DEFAMATION AFTER *JOHN PFEIFFER PTY LTD V ROGERSON*

MATT COLLINS¹

ABSTRACT

[171] The cause of action for defamation accrues on publication and in the place where the material is viewed, read or heard by a person other than the publisher and the plaintiff. As a result, the traditional double actionability choice of law test derived from *Phillips v Eyre* has a uniquely complicated application in multi-jurisdictional defamation cases. In *John Pfeiffer Pty Ltd v Rogerson*, a personal injuries case decided in 2000, the High Court abandoned double actionability as the choice of law test in intra-Australian tort cases. The High Court also reformed the common law substance-procedure distinction as it applies to limitation periods and heads of damages. This article examines how the High Court's decision will be likely to apply in defamation cases involving publications occurring in more than one Australian State or Territory. It concludes that while the decision will greatly simplify choice of law questions in most tort cases, it is likely to do little to reduce the complexity or cost of defamation actions involving publications in multiple jurisdictions.

Introduction

In *John Pfeiffer Pty Ltd v Rogerson*,² the High Court greatly simplified the rules relating to choice of law in cases involving intra-Australian torts. That decision will, however, do little to improve the lot of litigants in defamation proceedings. In cases involving national publications, courts will still have to grapple with the different defences which operate in each State and Territory. In cases involving publications occurring outside Australia, it appears that the *Phillips v Eyre* test,³ with all its attendant difficulties, will continue to apply.

[172] The cause of action for defamation accrues on publication.⁴ Material is published each time it is viewed, read or heard by a person other than the publisher and the plaintiff.⁵ Plaintiffs have a cause of action in respect of each publication of the

¹ Dr Matt Collins is a Melbourne barrister and the author of *The Law of Defamation and the Internet*.

² (2000) 172 ALR 625 (21 June 2000).

³ (1870) LR 6 QB 1.

⁴ For example, *Gorton v Australian Broadcasting Commission* (1973) 1 ACTR 6, 7 (Fox J).

⁵ For example, *Pullman v Hill & Co Ltd* [1891] 1 QB 524, 527 (Lord Esher MR); *Webb v Bloch* (1928) 41 CLR 331, 363 (Isaacs J); *Berezovsky v Michaels* [2000] 2 All ER 986, 993 (Lord Hoffman); *Hebditch v MacIlwaine* [1894] 2 QB 54, 61; *Joseph Evans & Sons v John G Stein &*

offending material.⁶ As a consequence, where defamatory material is published nationally, separate causes of action accrue in each State and Territory. In cases arising out of national publications, it is necessary to identify which law or laws should be applied to resolve the substantive and procedural issues.

The law prior to *John Pfeiffer Pty Ltd v Rogerson*

Double actionability

Prior to the decision in *John Pfeiffer Pty Ltd v Rogerson*, the traditional starting point for any consideration of the law to be applied where a tort was committed in one jurisdiction but sued upon in another was Willes J's classic statement of principle in *Phillips v Eyre*:

As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. Secondly, the act must not have been justifiable by the law of the place where it was done.⁷

The *Phillips v Eyre* test was reformulated by Brennan J in *Breavington v Godleman* in these terms:

A plaintiff may sue in the forum to enforce a liability in respect of a wrong occurring outside the territory of the forum if —

1. the claim arises out of circumstances of such a character that, if they had occurred within the territory of the forum, a cause of action would have arisen entitling the plaintiff to enforce against the defendant a civil liability of the kind which the plaintiff claims to enforce; and
2. by the law of the place in which the wrong occurred, the circumstances of the occurrence gave rise to a civil liability of the kind which the plaintiff claims to enforce.⁸

Earlier in his judgment, Brennan J said:

Company [1904] 12 SLT 462; *Bata v Bata* [1948] WN 366; *Jenner v Sun Oil Co Ltd* [1952] 2 DLR 526, 536–7; *Shevill v Presse Alliance SA* [1996] AC 959, 983; *Lee Teck Chee v Merrill Lynch International Bank Ltd* [1998] 4 CLJ 188, 194–5.

⁶ *Toomey v Mirror Newspapers Ltd* (1985) 1 NSWLR 173, 177–8 (Hunt J).
⁷ (1870) LR 6 QB 1, 28–9.

The two conditions are not merely the criteria of the forum's jurisdiction; they state the substantive law which governs a plaintiff's right to recover a judgment in respect of an extraterritorial wrong. The two conditions govern [173] both the existence of the forum's jurisdiction and its exercise.⁹

The decision of the High Court in *Breavington v Godleman* comprised six separate judgments, with widely varying reasons. The first passage by Brennan J quoted above was, however, adopted by a majority of the High Court in two cases, *McKain v R W Miller & Company (South Australia) Pty Ltd*¹⁰ and *Stevens v Head*.¹¹

After Brennan J's formulation was accepted by a majority of the High Court in *McKain* and *Stevens v Head*, it was clear that the prevailing test was a 'double actionability' test: in tort cases involving an interstate element, plaintiffs could only succeed to the extent that the defendant was liable under both the law of the forum (the *lex fori*) and the law of the place of the tort (the *lex loci delicti*).¹² There remained doubt, however, in cases where the double actionability test had been satisfied, as to which law was to be applied to determine the substantive rights of the parties.¹³

⁸ *Breavington v Godleman* (1988) 169 CLR 41, 110–11.

⁹ Ibid 110. See also *Stevens v Head* (1993) 176 CLR 433, 439–40 (Mason CJ); cf *Wilson v Natrass* (1995) 21 MVR 41, 44–5 (Brooking J), 52–7 (Ashley J), 58–9 (Hedigan J); Martin Davies, 'Too Little Imagination or Too Much? *Phillips v Eyre* Revisited Yet Again' (1995) 3 *Torts Law Journal* 273, 283–5.

¹⁰ *McKain v R W Miller & Company (South Australia) Pty Ltd* (1991) 174 CLR 1, 39 (Brennan, Dawson, Toohey and McHugh JJ).

¹¹ *Stevens v Head* (1993) 176 CLR 433, 453 (Brennan, Dawson, Toohey and McHugh JJ).

¹² See Edward Sykes and Martin Pryles, *Australian Private International Law* (3rd ed, 1991) 552–4; Martin Davies, 'Exactly what is the Australian Choice of Law Rule in Torts Cases?' (1996) 70 *Australian Law Journal* 711, 712; Sally Walker, 'Choice of Law in Defamation Actions' (1994) 3 *Torts Law Journal* 228, 232; *Stevens v Head* (1993) 176 CLR 433, 439–40 (Mason CJ); Davies, above n 9, 283–5. Cf however *Wilson v Natrass* (1995) 21 MVR 41.

¹³ See eg the discussion in *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625, [26]–[36] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

The double actionability test in defamation cases

The double actionability test had been applied in a number of defamation cases.¹⁴ In *Carleton v Freedom Publishing Co Pty Ltd*,¹⁵ for example, Kelly J held that a defendant in defamation proceedings in the Australian Capital Territory concerning a national publication was entitled to plead defences available in each jurisdiction in which publication occurred in respect of liability for publication in that jurisdiction.¹⁶ The second condition in the double actionability test operated, in his Honour's view, to prevent the plaintiff from recovering in respect of publication in any given jurisdiction if the defendant had a good defence under the law of that jurisdiction.

A second example is *Australian Broadcasting Corporation v Waterhouse*.¹⁷ In that case, Hunt CJ of the New South Wales Supreme Court granted leave to the defendant to amend its defence to plead defences available under New South Wales law in answer to the plaintiffs' claims in relation to publication in jurisdictions other than New South Wales.

The defendant had been unsuccessful in a previous application in the same proceeding for leave to [174] amend its defence, but that application had been determined before *McKain* had been decided, and was based on an assumption as to the effect of the decision in *Breavington v Godleman* which was inconsistent with the majority decision in *McKain*.¹⁸

Hunt CJ noted that the effect of the double actionability test was to allow defendants to

¹⁴ See Walker, above n 12, 233. Cases include *Gorton v Australian Broadcasting Commission* (1973) 1 ACTR 6; *Renouf v Federal Capital Press of Australia Pty Ltd* (1977) 17 ACTR 35, *Cawley v Australian Consolidated Press Ltd* [1981] 1 NSWLR 225 and *Carleton v Freedom Publishing Co Pty Ltd* (1982) 45 ACTR 1; *Toomey v Mirror Newspapers Ltd* (1985) 1 NSWLR 173. Cases decided after *Breavington v Godleman* but before *McKain* are of limited value. For example, in *Waterhouse v Australian Broadcasting Corporation* (1989) 86 ACTR 1 and *Australian Broadcasting Corporation v Waterhouse* (1991) 25 NSWLR 519, Kelly J of the Supreme Court of the Australian Capital Territory, and the New South Wales Court of Appeal, respectively, proceeded on assumptions as to the *ratio* in *Breavington v Godleman* which were inconsistent with the subsequent majority decisions in *McKain* and *Stevens v Head*.

¹⁵ *Carleton v Freedom Publishing Co Pty Ltd* (1982) 45 ACTR 1.

¹⁶ *Ibid* 22.

¹⁷ *Waterhouse v Australian Broadcasting Corporation* (Unreported, Supreme Court of New South Wales, Hunt CJ, 7 February 1992). This judgment was in the proceeding originally transferred from the Supreme Court of the Australian Capital Territory by Kelly J in *Australian Broadcasting Corporation v Waterhouse* (1989) 86 ACTR 1.

plead to claims based upon torts committed elsewhere in Australia defences available to them had those torts been committed in [New South Wales], in addition to defences available by the law of the place where those torts were committed.¹⁹

In summary, prior to *John Pfeiffer Pty Ltd v Rogerson*, where defamatory material was published in more than one jurisdiction, the double actionability test limited liability to the extent that the defendant was liable under both the law of the forum and the law of the place of publication. Defendants could rely on defences available in the forum to avoid liability in respect of publications, wherever they occurred. Defendants could rely on defences available in any other jurisdiction in which publication occurred to avoid liability in respect of publications in that jurisdiction.

Forum shopping

The double actionability test probably encouraged forum shopping in defamation actions, because its application could lead to different outcomes, depending on the jurisdiction in which proceedings were brought. Suppose, for example, that a defendant published in a national newspaper material conveying an imputation which was true, but that the publication was not for the public benefit, did not relate to any matter of public interest, and was not published under qualified privilege. In those circumstances, the defendant would have a defence of justification under the law of Victoria, South Australia, Western Australia and the Northern Territory, where truth *simpliciter* is a defence, but not under the law of New South Wales, Queensland, Tasmania or the Australian Capital Territory.²⁰

In such a case, applying the double actionability test, the plaintiff would fail entirely if proceedings were brought in Victoria, South Australia, Western Australia or the Northern Territory. If proceedings were brought in New South Wales, Queensland, Tasmania or the Australian Capital Territory, on the other hand, the plaintiff would succeed in relation to publications occurring in those jurisdictions.

¹⁸ *Australian Broadcasting Corporation v Waterhouse* (1991) 25 NSWLR 519.

¹⁹ *Australian Broadcasting Corporation v Waterhouse* (Unreported, Supreme Court of New South Wales, Hunt J, 7 February 1992) 2.

²⁰ In New South Wales, the defence of justification only applies where the imputation relates to a matter of public interest or is published under qualified privilege: *Defamation Act 1974* (NSW) s 15(2). In Queensland, Tasmania and the ACT, the publication must be for the public benefit:

The substance-procedure distinction

An important exception to the double actionability test is that matters of procedure are always governed by the law of the forum. Drawing the line between matters of substance and matters of procedure raised particular difficulties in relation to limitation periods, and the availability of heads of damages.

Limitation periods

In *McKain*, the majority judges held that limitation provisions which barred a remedy, but did not extinguish a right, were procedural in nature.²¹ Following *McKain*, each jurisdiction enacted legislation [175] reversing this result, by deeming all limitation provisions to be substantive.²² The point is not without relevance in defamation cases. The limitation period for defamation is six years in most jurisdictions, but only one year in the Australian Capital Territory,²³ three years in the Northern Territory,²⁴ and two years for slander in South Australia.²⁵ In Western Australia, the limitation period is two years for most forms of slander²⁶ and 12 months for libels published in newspapers.²⁷ Deeming limitation periods to be substantive, rather than procedural, removed the possibility of plaintiffs forum shopping for a jurisdiction in which the limitation period had not yet expired.

Heads of damages

In *Stevens v Head*, the majority judges held that the statutory limitations on recoverable non-economic loss under the *Motor Accidents Act 1988* (NSW) were procedural in nature. The limitations affected only the measure of damages. The limitations would

Defamation Act 1889 (Qld) s 15; *Defamation Act 1957* (Tas) s 15; *Defamation Act 1901* (NSW) s 6 (applicable in the ACT).

²¹ *McKain* (1991) 174 CLR 1, 44 (Brennan, Dawson, Toohey and McHugh JJ).

²² *Choice of Law (Limitation Periods) Act 1993* (NSW) s 5; *Choice of Law (Limitation Periods) Act 1993* (Vic) s 5; *Choice of Law (Limitation Periods) Act 1996* (Qld) s 5; *Limitation of Actions Act 1936* (SA) s 38A; *Choice of Law (Limitation Periods) Act 1994* (WA) s 5; *Limitation Act 1974* (Tas) s 32C; *Limitation Act 1985* (ACT) s 56; *Choice of Law (Limitation Periods) Act 1994* (NT) s 5.

²³ *Limitation Act 1985* (ACT) s 21B(1): one year from the date the offending material was first published. The Court must increase the limitation period to two years in cases where it was not reasonable for the plaintiff to have known about the publication within one year from the date of first publication: s 21B(2).

²⁴ *Limitation Act 1981* (NT) s 12(1)(b).

²⁵ *Limitation of Actions Act 1936* (SA) s 37.

²⁶ *Limitation Act 1935* (WA) s 38(1)(a)(ii).

²⁷ *Newspaper Libel and Registration Act 1884 Amendment Act 1888* (WA) s 5.

have been substantive had they affected the heads of liability in respect of which damages might be awarded.²⁸

The categorisation of heads of damages is of significance in defamation law. In *Costello v Random House Australia Pty Ltd*,²⁹ Higgins J held that the abolition of exemplary damages in New South Wales effected by s 46(3) of the *Defamation Act 1974* (NSW) was procedural in nature. His Honour held that exemplary damages were not a distinct head of damages available in defamation proceedings; rather, they were a component of a single concept of damages available to successful defamation plaintiffs.³⁰ In his Honour's view, therefore, plaintiffs suing outside New South Wales would be entitled to exemplary damages, in appropriate circumstances, even in relation to publications occurring within New South Wales.³¹

Different views were expressed by Hunt CJ in *Waterhouse v Australian Broadcasting Corporation*,³² and by Crispin J in *Steiner Wilson & Webster Pty Ltd v Amalgamated Television Services Pty Ltd*.³³

A flexibility exception?

Finally, in *McKain*, Brennan, Dawson, Toohey and McHugh JJ each rejected the operation of any flexibility exception to the operation of the double actionability test in cases involving intra-Australian torts, having regard to the desirability of certainty in the operation of common law choice of law rules within Australia.³⁴

²⁸ *Stevens v Head* (1993) 176 CLR 433, 459–60 (Brennan, Dawson, Toohey and McHugh JJ).

²⁹ *Costello v Random House Australia Pty Ltd* (1999) 137 ACTR 1.

³⁰ *Ibid* [374], [384]–[385].

³¹ *Ibid* [386]–[387].

³² *Waterhouse v Australian Broadcasting Corporation* (1992) 27 NSWLR 1, 3 (Hunt CJ). See also Walker, above n 12, 245.

³³ *Steiner Wilson & Webster Pty Ltd v Amalgamated Television Services Pty Ltd* [1999] ACTSC 123 (Unreported, Crispin J, 18 November 1999), [219]–[221]. See also *Waterhouse v Australian Broadcasting Corporation* (1989) 86 ACTR 1, 19 (Kelly J).

³⁴ *McKain* (1991) 174 CLR 1, 38–9. Cf *Chaplin v Boys* [1971] AC 356, 378 (Lord Hodson), 389–92 (Lord Wilberforce); *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190, 206 (Lord Slynn); see also Andrew Dickinson, 'Further Thoughts on Foreign Torts: *Boys v Chaplin* Explained?' [1994] *Lloyds Maritime and Commercial Law Quarterly* 463; P B Carter, 'Choice of Law in Tort: The Role of the *Lex Fori*' (1995) 54 *Cambridge Law Journal* 38; Pippa Rogerson, 'Choice of Law in Tort: A Missed Opportunity?' (1995) 44 *International and Comparative Law Quarterly* 650. The choice of law in torts rules in the United Kingdom have been substantially reformed by the *Private International Law (Miscellaneous Provisions) Act 1995* (UK). The reforms do not, however, apply to defamation.

[176] Their Honours expressly left open, however, whether a flexibility exception might apply in cases involving torts committed outside Australia. Indeed, their Honours' judgment seems to concede that such an exception might have a place in cases involving foreign torts where the parties have no substantial connection with the law of the place where the tort was committed.³⁵

Support for the operation of a flexibility exception in cases involving foreign torts can also be found in dicta in the judgments of Mason CJ, Dawson and Toohey JJ in *Breavington v Godleman*.³⁶

John Pfeiffer Pty Ltd v Rogerson

Rogerson was employed by John Pfeiffer Pty Ltd in the Australian Capital Territory. He suffered an injury while working at the Queanbeyan District Hospital in New South Wales, and sued his employer for damages for personal injury in the Supreme Court of the ACT. By legislation in New South Wales, damages of the kind sought by Rogerson were capped by the *Workers Compensation Act 1987* (NSW). There was no equivalent legislation in the Australian Capital Territory.

The High Court held unanimously that Rogerson's damages were to be determined in accordance with the New South Wales Act.

Lex loci delicti the governing law for intra-Australian torts

Six of the seven judges³⁷ held that the common law choice of law rules for torts should be reformed, so that the *lex loci delicti* (the law of the place of the tort) is the governing law in relation to all torts occurring in Australia which have an interstate element.³⁸ In settling on the *lex loci delicti* as the governing law for intra-Australian torts, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ evaluated and rejected alternatives such as adopting a 'proper law of the tort' approach,³⁹ or the *lex fori*.⁴⁰ Their Honours

³⁵ Ibid 38.

³⁶ *Breavington v Godleman* (1988) 169 CLR 41, 77 (Mason CJ), 147 (Dawson J), 163 (Toohey J).

³⁷ Callinan J dissenting.

³⁸ (2000) 172 ALR 625, [87] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), [157] (Kirby J). The decision is consistent with Canadian authority: *Tolofson v Jensen* [1994] 3 SCR 1022.

³⁹ Ibid [79].

⁴⁰ Ibid [81]–[86].

saw applying the *lex loci delicti* in all cases of intra-Australian torts as promoting certainty, all but eliminating the potential for forum shopping, and giving effect to the reasonable expectations of most people in a federation.⁴¹ Against these advantages, however, had to be weighed the disadvantage that in some cases, it may be difficult to determine the place of the tort, or the place of the tort may be fortuitous.⁴²

The double actionability test discarded

The same six judges held that the double actionability test should be discarded,⁴³ primarily because their Honours thought that, within a federation, questions of public policy which in international cases might militate against giving effect to a law which was contrary to the law of the forum could have no application.⁴⁴ Secondly, their Honours considered that giving effect to laws of the forum in [177] cases where a tort was committed in some other place was to give to that law an unjustifiable extraterritorial operation.⁴⁵

The substance-procedure distinction

All seven judges held that limitation periods, of all kinds, should be considered substantive, rather than procedural, at common law, thereby bringing the common law into line with the legislation enacted to overcome the effect of *Stevens v Head*.⁴⁶ Statutory provisions limiting either heads of damages or measures of damages should also be considered substantive, rather than procedural, at common law.⁴⁷

The members of the Court agreed that all laws which bear upon ‘the existence, extent or enforceability of remedies, rights and obligations should be characterised as substantive and not as procedural laws.’⁴⁸ Only laws which were directed to governing

⁴¹ Ibid [83]–[87].

⁴² Ibid [82].

⁴³ Ibid [96] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), [155] (Kirby J).

⁴⁴ Ibid [91].

⁴⁵ Ibid [92].

⁴⁶ Ibid [100] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), [161] (Kirby J), [192]–[193] (Callinan J). The legislative provisions enacted to overcome *Stevens* are set out in n 22.

⁴⁷ Ibid [100] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), [133]–[134] (Kirby J), [192]–[193] (Callinan J).

⁴⁸ Ibid [102] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); see also [161] (Kirby J), [193]–[200] (Callinan J).

or regulating the mode or conduct of court proceedings were to be considered procedural.⁴⁹

References to defamation actions

There are only two pointers in the reasons for decision to the likely implications of *John Pfeiffer Pty Ltd v Rogerson* for defamation actions.

Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ observed that the tort of libel may be committed in many States when a national publication publishes an article that defames a person.⁵⁰ The observation was made in the context of their Honours' discussion concerning the relative merits of the *lex loci delicti* and the *lex fori* as potential governing laws for intra-Australian torts. Their Honours did not go on to consider the implications for defamation actions of adopting the *lex loci delicti* as the governing law for intra-Australian torts. Their Honours did say, however:

... for every hard case that can be postulated if one form of universal rule is adopted, another equally hard case can be postulated if the opposite universal rule is adopted.⁵¹

Kirby J noted that the problem where acts or omissions occurred in more than one single law area in Australia was 'tricky'. Although not specifically adverting to defamation actions, his Honour said:

It may be appropriate to solve [the problem] by applying the substantive law of the law area within Australia with which the proceedings have the predominant territorial connection. No final conclusion on this aspect of the matter need be stated in the present proceedings.⁵²

Implications for defamation acts

The decision in *John Pfeiffer Pty Ltd v Rogerson* will have wide-ranging implications for the conduct of defamation actions in Australia.

⁴⁹ Ibid [99] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), [161] (Kirby J), [192] (Callinan J).

⁵⁰ Ibid [81].

⁵¹ Ibid [82].

Most obviously, the adoption of the *lex loci delicti* as the governing law for intra-Australian torts will mean that, in cases involving national publications, defendants will need to continue to plead distinct [178] defences for each place in which the offending material was published. The abolition of the double actionability rule will, however, mean that plaintiffs will not benefit from forum shopping. To return to the example given earlier, suppose a defendant publishes nationally material conveying an imputation which is true, but whose publication is not for the public benefit, which does not relate to any matter of public interest, and is not published under qualified privilege. Previously, it was to the plaintiff's advantage to sue in respect of such a publication in New South Wales, Queensland, Tasmania or the Australian Capital Territory, because the application of the double actionability test meant that defendants could not succeed in a defence of justification, even in respect of publications occurring in those jurisdictions where truth *simpliciter* is a defence.⁵³ The abolition of the double actionability test means that now, wherever proceedings are brought, the defendant will fail in a defence of justification in respect of publications occurring in New South Wales, Queensland, Tasmania or the Australian Capital Territory, but succeed in a defence of justification in respect of publications occurring in Victoria, South Australia, Western Australia and the Northern Territory.

Secondly, the classification of all laws governing heads of damages and measures of damages as substantive will mean that exemplary damages will be available in defamation actions in New South Wales in respect of publications occurring outside New South Wales, notwithstanding s 46(3)(a) of the *Defamation Act 1974* (NSW) which provides that damages for defamation 'shall not include exemplary damages'. In defamation proceedings in courts outside New South Wales, it is now clear that exemplary damages will not be available in respect of publications occurring in New South Wales.⁵⁴

It should be noted that the reforms in s 7A of the *Defamation Act 1974* (NSW), which redefined the role of the judge and jury in defamation trials in that State, are procedural

⁵² Ibid [158].

⁵³ Namely Victoria, South Australia, Western Australia and the Northern Territory.

⁵⁴ Cf *Costello v Random House Australia Pty Ltd* (1999) 137 ACTR 1; see above nn 29–31.

in character, and so will continue to govern all defamation trials in New South Wales, even in respect of national publications.⁵⁵

Thirdly, the decision in *John Pfeiffer v Rogerson* will remove a potential anomaly when defamation actions are transferred from one jurisdiction to another under the *Jurisdiction of Courts (Cross-Vesting) Acts 1987* of the Commonwealth and each State. Under s 11 of those Acts, where proceedings are transferred from one court to another, the applicable substantive law is prescribed. Where the right of action arises out of a written law of another State or Territory, s 11(1)(b) requires the court to apply the written and unwritten law of that State or Territory⁵⁶ — in other words, s 11(1)(b) directed the court in such cases not to apply the double actionability test, and to apply the *lex loci delicti*. The right of action for defamation arises as a matter of written law in Queensland, Tasmania, New South Wales and the Northern Territory.⁵⁷ In all other matters, s 11(1)(a) requires the court to apply the written and unwritten law in force in the forum, including the choice of law rules in the forum.⁵⁸ Prior to *John Pfeiffer v Rogerson*, therefore, s 11(1)(a) required the court in defamation actions which had been transferred to apply the double actionability test in respect of publications occurring in Victoria, South Australia, Western Australia and the Australian Capital Territory. Now that the *lex loci delicti* is the governing law for all intra-Australian torts, however, s 11(1)(a) will no longer have that effect. The *lex loci delicti* will govern the substantive rights and obligations of the parties in defamation actions, regardless of whether they have been transferred under the cross-vesting legislation.⁵⁹

[179] Finally, the decision in *John Pfeiffer Pty Ltd v Rogerson* has not changed the choice of law rules which apply in cases involving publications occurring outside

⁵⁵ The provision goes to the 'mode or conduct of court proceedings': *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625, [99] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), [161] (Kirby J).

⁵⁶ *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth and States) s 11(1)(b).

⁵⁷ The *Defamation Act 1889* (Qld) and the *Defamation Act 1957* (Tas) each codify the law of defamation. In NSW, see *Defamation Act 1974* (NSW) s 9(2); *Australian Broadcasting Corporation v Waterhouse* (1991) 25 NSWLR 519, 524 (Samuels JA). In the Northern Territory, see *Defamation Act 1938* (NT) s 2.

⁵⁸ *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth and States) s 11(1)(a).

⁵⁹ It should be noted that s 11(1)(c) of the *Jurisdiction of Courts (Cross-Vesting) Acts* provide that in all transferred cases, the rules of evidence and procedure to be applied are those which the court considers appropriate in the circumstances, being rules which are applied in an Australian superior court.

Australia.⁶⁰ This will be significant, in particular, in cases involving publications to a global audience via the internet. It appears that the double actionability test will ordinarily continue to apply in respect of publications occurring outside Australia in such cases, so that no remedy will be available in Australia in respect of defamatory material which would be actionable under the law of some other country, but not under the law of the (Australian) forum. A flexibility exception permitting the court in extreme cases to apply just the *lex fori* or just the *lex loci delicti* might, however, be available.⁶¹

Conclusion

It is an aphorism to say that Australia deserves uniform defamation laws.⁶² Where proceedings are brought in respect of a national publication, it seems absurd that a defendant, desirous of raising an affirmative defence, must look to and plead, potentially, the law of eight separate jurisdictions. Regrettably, the High Court's decision in *John Pfeiffer Pty Ltd v Rogerson*, which has laudably simplified the rules relating to choice of law in cases involving intra-Australian torts, will be unlikely to reduce the complexity or cost of defamation actions in Australia involving national publications.

The Australian Law Reform Commission in 1979 recommended the adoption of a simple choice of law rule in defamation cases that, in respect of any issue, the substantive law should be

that of the jurisdiction with which that issue is *most closely connected*, having regard to:

- (a) the extent of publication in the relevant jurisdictions; and
- (b) the extent of the harm suffered in each of these jurisdictions.

⁶⁰ *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625, [2] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), [153] (Kirby J).

⁶¹ See nn 34–36.

⁶² The point has been repeatedly recognised by law reform bodies: see eg Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979), ix, 25–7; Law Reform Commission of Western Australia, *Report on Defamation*, Project No 8 (1979), 17–23; New South Wales Law Reform Commission, *Defamation*, Report No 75 (1995), 6–9; Community Law Reform Committee (ACT), *Defamation*, Report No 10 (1995), 2–3, 103–5.

In the case of defamation of a natural person, the law to be applied would normally be that of the place where the person was ordinarily resident. In the case of a corporation, it would normally be that of the place where the corporation had its principal place of business.⁶³

The Commission recommended essentially the same reform again in 1992.⁶⁴ The Commission's proposal reflects the position in relation to choice of law in defamation actions adopted in most American jurisdictions,⁶⁵ and is consistent with the suggestion floated, but not resolved, by Kirby J in *John Pfeiffer Pty Ltd v Rogerson*.⁶⁶

It is to be hoped that the Court will, in an appropriate case, take up the opportunity to examine the implications of its decision in *John Pfeiffer Pty Ltd v Rogerson* in a defamation context, and further develop [180] the common law as suggested by Kirby J, so that substantive rights in defamation actions will be determined only by reference to the jurisdiction with the predominant territorial nexus with the publication. In such a case, it would be helpful for clear guidance to be given as to the relevance of factors such as the place of residence of the plaintiff, the place in which most publications occurred, and the extent of the harm suffered. It would certainly not be in the interests of litigants for the present unsatisfactory situation to be replaced by a rule which is uncertain in its application.

⁶³ Australian Law Reform Commission, above n 62, 191; cf Law Reform Commission and Scottish Law Commission, *Private International Law: Choice of Law in Tort and Delict*, Report Law Com No 193/Scot Law Com No 129 (1990), 20.

⁶⁴ Australian Law Reform Commission, *Choice of Law*, Report No 58 (1992), 59.

⁶⁵ American Law Institute, *Restatement of the Law, Second, Conflict of Laws 2d* (1971) §§ 149–150.

⁶⁶ See above n 52.