Cases and Comments

Choice of Law on the High Seas: *Blunden v Commonwealth*

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Abstract

The High Court of Australia has in recent years clarified issues of choice of law in tort, formulating a *lex loci delicti* rule for both intra and international torts. The emphasis that had been placed on the importance of certainty and uniformity in doing so has now been undermined by the recent case of *Blunden v Commonwealth*. Given the opportunity to formulate a corresponding choice of law rule for torts that occur on the high seas, the court instead limited its decision by reference to the federal nature of the action, unanimously determining the applicable law to be that of the forum in accordance with s80 of the *Judiciary Act* 1903 (Cth). This paper evaluates the High Court's decision in *Blunden*, arguing that the court's failure to develop a general rule to resolve the choice of law issues presented is out of line with its previous decisions.

1. Introduction

With the cases of *John Pfeiffer Pty Ltd v Rogerson*[1] and *Regie Nationale des Usines Renault SA v Zhang*,[2] the High Court of Australia formulated new rules for choice of law in tort, and in doing so favoured certainty and uniformity over flexibility. In *Pfeiffer* the Court provided that the applicable substantive law for intranational torts that are connected to more than one Australian jurisdiction is the *lex loci delicti*.[3] In *Zhang* they extended their reasoning to international torts occurring outside Australia yet being brought before an Australian court, finding that the same rule applied. The recent case of *Blunden v Commonwealth*[4] presented to the High Court the opportunity to examine choice of law rules once more, this time when considering a tort occurring on the high seas.[5]

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1 (2000) 203 CLR 503; 172 ALR 625 (hereinafter *Pfeiffer*).

2 (2002) 210 CLR 491; 187 ALR 1 (hereinafter *Zhang*).

3 Consistent with practice within the courts and academic commentary, the terms *lex loci delicti* (or law applying at the place of the commission of the tort) and *lex fori* (or law of the forum) are used.

4 (2004) 203 ALR 189 (hereinafter *Blunden*).

5 The term 'high seas' has been defined as 'beyond the geographical territory of Australia and beyond any internal waters or any waters which Australian law treats as territorial waters': see *Blunden*, above n4 at [56] (Kirby J). See also Convention on the High Seas done at Geneva on 29 April 1958, 1963 *Australia Treaty Series* 12 (entered into force for Australia on 13 June 1963).

The issue of choice of law on the high seas that presented itself in *Blunden* was not addressed in either *Pfeiffer* or *Zhang*. As Kirby J pointed out, 'the issue presented identifies an apparent gap in the statement of principles contained in *Pfeiffer* and *Zhang*.'[6] The joint judgment in *Zhang* specifically reserved issues of maritime and aerial torts for further consideration, stating that 'special considerations' may apply to these types of torts.[7]

Maritime torts were examined post-*Zhang* in *Union Shipping New Zealand v Morgan*,[8] where it was held that in the case of a tort committed on board a foreign ship moored in territorial waters, the law to be applied was that of the littoral state. However, the Court of Appeal in *Morgan* was careful to confine its decision to the factual context of that case.[9] Heydon JA expressly left open the prospect that the applicable law for torts occurring where a ship is merely engaged in innocent passage through territorial waters may be that of the flag of the ship, and not that of the littoral state.[10]

Where an internal tort occurs within a vessel on the high seas there is a general assumption, albeit one for which little judicial authority exists, that the governing law is that of the flag of the ship.[11] Yet where a tort on the high seas involves a collision between two ships of different flag states, it has been suggested that the *lex fori* applies, which in Australia includes the general principles of maritime law.[12] Neither of these principles, however, were sufficient to address the situation in *Blunden*, concerned as it was with a collision between ships on the high seas belonging to the same nation state.

The Commonwealth in *Blunden* submitted that the reasoning of the High Court in *Pfeiffer* and *Zhang* establishing the common law choice of law rules for intra and international torts should be extended to torts occurring in places where there is no system of law, thereby 'completing the triangle'.[13] The High Court, however, declined to do so. Instead the Court unanimously found their answer in the construction of s80 of the *Judiciary Act* 1903 (Cth).[14]

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6 *Blunden*, above n4 at [58] (Kirby J). See also id at [20] (Gleeson CJ, Gummow, Hayne & Heydon JJ).

7 *Zhang*, above n2 at [76] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ). Unfortunately the judgment does not give any indication as to what these 'special considerations' may be. Some possible considerations are explored in Lawrence Collins (ed), *Dicey & Morris on the Conflict of Laws* (13th ed, 2000) at 1537–1543.

8 (2002) 54 NSWLR 690 (hereinafter *Morgan*).

9 Id at [104]–[106] (Heydon JA; Hodgson & Santow JJA agreeing).

10 Id at [105] (Heydon JA; Hodgson & Santow JJA agreeing).

11 This was assumed in the case of *Roerig v Valiant Trawlers Ltd* [2002] 1 WLR 2304. Dictum to this effect can be found in *Morgan*, above n8 at [17] (Heydon JA). See also CF Finlayson, 'Shipboard Torts and the Conflict of Laws' (1986) 16 *VUWLR* 119 at 140; Collins, above n7 at 1537. In a federal system such as exists in Australia, the law of the place of registration will apply: Finlayson, above at 140.

12 See William Tetley 'Choice of Law – Tort and Delict – Common Law/Civil Law/ Maritime Law – Maritime Torts' (1993) 1(1) *Tort LR* 42.

13 See *Blunden v Commonwealth of Australia* [2003] HCATrans 262 (7 August 2003) at <http://www.austlii.edu.au/au/other/HCATrans/2003/262.html> (27 July 2004).

14 Hereinafter the *Judiciary Act*.

2. The Facts[15]

On 10 February 1964, in the course of a naval training exercise, two ships of the Royal Australian Navy came into collision off the Australian coast. The aircraft carrier HMAS *Melbourne* struck the destroyer HMAS *Voyager* on the high seas 18.4 miles from Australian Territory, and the *Voyager* sank. The plaintiff in this action, Mr Barry Blunden, was at the time of the collision serving as a member of the crew on the *Melbourne*. Shortly before the collision the two ships had sailed from Sydney, with the *Melbourne* anchoring in naval waters in New South Wales. The vessels had departed territorial waters on the morning of the collision and were due to return that evening.

As national naval vessels of Australia, neither ship had a port of registration or home port.[16] The Royal Australian Navy was at the time controlled and administered by the Naval Board, which was located in Canberra. The flag officer commanding the naval exercise was at the time of the collision physically present in Canberra, although he retained operational control of the fleet.

3. The Proceedings

Over 34 years after the incident, on 14 May 1998, the plaintiff commenced proceedings against the Commonwealth in the Supreme Court of the Australian Capital Territory. Mr Blunden claimed damages for personal injuries[17] allegedly caused by the negligent acts and omissions for which the Commonwealth was responsible.

On 11 March 2003, on application by the Attorney General for the Commonwealth and pursuant to s40(2) of the *Judiciary Act*, there was removed to the High Court the part of the cause pending in the Supreme Court 'involving the question of what, if any, limitation law applies to the plaintiff's claim for damages in so far as it relates to any negligent acts or omissions by servants or agents of the Commonwealth in international waters'.[18] This choice of law issue was foregrounded as the proceedings had an arguable connection with more than one Australian jurisdiction.

The Commonwealth contended that the proceedings were subject to a defence based on the statutory limitation laws of either the Australian Capital Territory or New South Wales applying to the plaintiff's claim.[19] The plaintiff alleged that due

15 The facts are primarily obtained from *Blunden*, above n4 at [1]–[5] (Gleeson CJ et al), [78]–[79] (Kirby J).

16 See id at [26] (Gleeson CJ et al), [78] (Kirby J).

17 Chronic post-traumatic stress disorder; major depressive disorder; alcohol abuse; and shock and sequelae.

18 *Blunden*, above n4 at [3] (Gleeson CJ et al).

19 The case stated also nominated the potential applicability of the statutory limitation period prescribed by s3 of *Imperial Act 21* James 1, Chapter 16 (as it applied in the Australian Capital Territory or New South Wales). However, the *Imperial Ac*t was 'not supported by any viable argument': *Blunden*, above n4 at [69] (Kirby J), and accordingly was not dealt with in the course of judgment.

to the place of the wrong being the high seas, the applicable law was the common law unmodified by statute and that therefore no relevant limitation period existed in respect of his claim.[20]

4. Decision by the High Court

The Court handed down three judgments. The joint judgment consisted of Gleeson CJ, Gummow, Hayne and Heydon JJ. Kirby J, while approaching some of the issues differently, was essentially in agreement with the findings of the joint judgment. Callinan J also agreed with the joint judgment, adding only a few additional remarks regarding the circumstances of the case.

It was accepted by the Court that the Supreme Court had the jurisdiction to decide the matter by virtue of s56 of the *Judiciary Act*.[21] It was further accepted that what was invoked was federal jurisdiction, attracted by the identity of the defendant as the Commonwealth.[22] What was stressed, however, was that possessing jurisdiction to decide a matter was only the initial step a court must take. Questions dealing with choice of law must then be addressed as a separate issue.[23]

The Court's decision ultimately rested upon the interpretation of s80 of the *Judiciary Act*. Section 80 states:

> So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

It was necessary for the plaintiff to invoke s80 in order to render the Commonwealth liable to him in tort.[24] The case of *Commonwealth v Mewett*[25] established that the liability of the Commonwealth in tort is created by the common law.[26] A court's power to render the common law applicable to the Commonwealth comes only from federal legislation, and thus the plaintiff needed to rely on the federal statute of the *Judiciary Act*, specifically s80.[27] Section 64 of the same statute makes the Commonwealth liable to the plaintiff as though it were a natural person.[28]

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20 *Blunden*, above n4 at [623] (Kirby J). See also *Blunden*, above n4 at [61] (Kirby J): 'the common law did not develop a general principle to oblige the commencement of proceedings within a given time'.

21 Id at [9] (Gleeson CJ et al), [107] (Callinan J).

22 Id at [9] (Gleeson CJ et al), [89] (Kirby J).

23 Id at [12] (Gleeson CJ et al), [86] (Kirby J). See also Pfeiffer, above n1 at [25] to [28] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ).

24 *Blunden*, above n4 at [89]–[91] (Kirby J).

25 (1997) 191 CLR 471 at 525–7; 146 ALR 299 at 328–9 (Gaudron J).

26 *Blunden*, above n4 at [9] (Gleeson et al), note 97 (Kirby J).

27 Id at [90]–[91], note 97 (Kirby J).

28 Id at [43] (Gleeson CJ et al), [91] (Kirby J).

Both parties accepted that s80 was relevant to the claim, but differed in their submissions as to its application. In order to evaluate the submissions of the plaintiff and the Commonwealth, it will be helpful to examine the Court's application of s80 in three parts.

(a) 'So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect or to provide adequate remedies or punishment…'

Should the laws of the Commonwealth be found to be applicable and capable of being carried into effect, the balance of s80 would not have occasion to arise. The plaintiff submitted that this was the case here, arguing that the opening words, 'laws of the Commonwealth', were not confined to the statute law, but included also the common law of Australia – a law which was applicable and sufficient to provide an adequate remedy, notwithstanding the absence of any applicable limitation laws.[29]

Primarily, the plaintiff submitted that the common law, through *Pfeiffer* and *Zhang*, dictated that the *lex loci delicti* be applied in the present case. The *lex loci delicti*, the plaintiff went on, must be the common law of Australia, 'because the tort occurred on an Australian ship "carrying its Australian law"'.[30] The joint judgment clearly rejected any such suggestion that ships 'carry the law' of the territory to which they belong.[31] Such an argument, the so-called 'floating island' theory, was understood by the Court to be untenable and abandoned, following comments of Lord Atkin in the Privy Council decision of *Chung Ch Cheung v R*.[32]

In addition to arguing that the common law in its pristine form was 'applicable' in this way, the plaintiff further argued for the common law as modified by the *Navigation Act* 1912 (Cth).[33] This argument was dismissed in the joint judgment as they found that the relevant provisions of the *Navigation Act* did not 'speak to Mr Blunden's claim'.[34]

Further, the Court also rejected the suggestion that the opening words of s80 refer to the common law at all. Applying *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd*,[35] they stressed that the term 'laws of the Commonwealth' refers expressly to statute law.[36]

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29 Id at [28] (Gleeson CJ et al).

30 Id at [30] (Gleeson CJ et al). See also the transcripts of the High Court proceedings where counsel for the plaintiff encouraged the view that *lex loci delicti* referred not specifically to a geographical place but rather to a 'law area'; here, it was submitted, the Court must deal with the *lex loci delicti* as a 'Commonwealth law area': *Blunden v Commonwealth of Australia* [2003] HCATrans 262 (7 August 2003) at <http://www.austlii.edu.au/au/other/HCATrans/2003/262.html> (27 July 2004).

31 *Blunden*, above n4 at [30]–[32] (Gleeson CJ et al).

32 [1939] AC 160 at 174. See also DP O'Connell, *The International Law of the Sea* (1984) at 735–7; Martin Davies & Anthony Dickey, *Shipping Law* (2nd ed, 1995) at 60.

33 Hereinafter the *Navigation Act*.

34 *Blunden*, above n4 at [34] (Gleeson CJ et al), [108] (Callinan J).

35 (1922) 31 CLR 421 at 431 (Knox CJ & Gavan Duffy J).

36 *Blunden*, above n4 at [28]–[29] (Gleeson CJ et al), [91] (Kirby J).

The joint judgment summarised the situation thus far when they said 'the fundamental point remains that, to Mr Blunden's claim, the provisions of the federal statute law, s80 itself apart, would be insufficient to provide him with any adequate remedies.'[37] It was thus ruled necessary for the plaintiff to invoke the balance of s80 in order for him to claim the liability of the Commonwealth in tort under the common law.

(b) '…the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held… shall govern all courts exercising federal jurisdiction…'

Having needed to rely on this portion of s80 in order to claim the liability of the Commonwealth in tort, the Court then held that the plaintiff was bound by it in its entirety. That is, they held that the common law respecting limitation of actions applied as modified by the statutory law (including the *Limitation Act*)[38] of the Australian Capital Territory.[39]

It is emphasised many times throughout the judgments that this is a necessary condition of the plaintiff invoking the common law through s80. Kirby J highlights the issue:[40]

> The plaintiff cannot accept the provisions of s 80 of the Judiciary Act, rendering the common law applicable to his claim against the Commonwealth, but reject the 'modification' enacted by the same provision, subjecting that common law claim to the limitations statute of the Australian Capital Territory. By the terms of s 80, the two go together.

The Commonwealth contended that this was not necessary. In the Commonwealth's submission, the common law choice of law rules impliedly recognised a necessary addition as follows (in the words of the joint judgment):[41]

> Where the events giving rise to the Commonwealth's liability occur in international waters and involve ships that carry the flag of a federal nation but which (unlike merchant vessels) do not have a port of registration, the locus delicti is that law area within Australia with which the events have the closest relevant connection.

Such a rule, it was argued, was the correct extension of the common law rules resolved by the High Court in *Pfeiffer* and *Zhang*. For a tort occurring in a place where there was no applicable *lex loci delicti*, it was suggested that analogous reasoning would point a court to the law of the jurisdiction with the 'closest connection'.[42]

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37 Id at [35] (Gleeson CJ et al), 108 (Callinan J).

38 Hereinafter the *Limitation Act.*

39 Id at [35], [38]–[39], [45] (Gleeson CJ et al), [91] (Kirby J), [109] (Callinan J).

40 Id at [97] (Kirby J).

41 Id at [36] (Gleeson CJ et al). Note that Kirby J in characterising the Commonwealth's submission did not limit the suggested rule to events which gave rise to the Commonwealth liability but rather to any 'cause of action arising on the high seas': id at [67].

42 Id at [68], [80] (Kirby J).

According to the Commonwealth, such a rule would lead the Court to either the law of the Australian Capital Territory (as the seat of administration of the Royal Australian Navy, and the jurisdiction in which the ultimate control of the ships lay) or New South Wales (as the jurisdiction from which the *Melbourne* had departed before the collision and to which the ship was due to return,[43] and the jurisdiction with the closest proximity to the collision).[44]

It was then submitted that as the common law pointed the Court to the jurisdiction with the closest connection, it was the limitation law of this jurisdiction which provided the solution and thus, within the meaning of s80, 'the common law is not modified by the Constitution or… by the statute law in force in the [forum] territory.'[45]

Ultimately, the Court declined to follow this line of reasoning. Primarily, the joint judgment felt that such an addition to the common law choice of law rules was taking a step back in that it was essentially applying the 'proper law of the tort', an approach which had been rejected in *Pfeiffer*.[46] In addition, they emphasised that such a rule would operate to violate the principle, reflected in the *Judiciary Act* itself,[47] that the Commonwealth should be on equal footing with a defendant.[48] Kirby J felt that s80 was sufficient to decide the contested point and that therefore no opportunity arose to consider the validity of the Commonwealth's arguments concerning the proposed 'closest connection' rule.[49]

(c) '…so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth…'

The requirement of applicability is addressed in detail by Kirby J.[50] Kirby J firstly established that 'there is no relevant provision in the Constitution or federal statute law inconsistent with this consequence.'[51] He next ruled out any objection that may come from either the fact that the cause of action arose outside of the jurisdiction of the *Limitation Act*,[52] or that the Act was enacted after the cause of action arose.[53]

Kirby J then addressed the reality that a statute would not be 'applicable' for the purposes of s80 if it were dealing with a procedural issue – these are established as being governed by the forum.[54] The Court recognised the classification of limitation laws as substantive in nature; this being through the statute law of each state, and the common law itself as established in *Pfeiffer*.[55]

43 Applying *Commonwealth v Mewett* (1997) 191 CLR 471 at 527 (Gaudron J).
44 *Blunden*, above n4 at [36] (Gleeson CJ et al), [69], [80], [83] (Kirby J).
45 Id at [37] (Gleeson CJ et al).
46 Id at [40]–[42] (Gleeson CJ et al).
47 *Judiciary Act 1903* (Cth) s 64.
48 *Blunden*, above n4 at [43] (Gleeson CJ et al). See also [99] (Kirby J).
49 Id at [100], [101] (Kirby J).
50 The joint judgment also specifically notes that '[the *Limitation Act 1985*] speaks to actions such as the present instituted in the courts of the territory': id at [38] (Gleeson CJ et al).
51 Id at [92] (Kirby J).
52 Id at [94] (Kirby J). See also [19] (Gleeson CJ et al).
53 Id at [94] (Kirby J). See also [46] (Gleeson CJ et al).
54 Id at [5] (Kirby J).

Finally, Kirby J deals with the possible argument that the *Limitation Act* is inapplicable by reason of the only applicable law being that of the high seas in line with *Pfeiffer* and *Zhang*. This argument he rejects by emphasising that the plaintiff, in invoking s80, 'attracts the benefits and burdens of that section.'[56]

(d) The Outcome

The outcome of the above application of s80 of the *Judiciary Act* was that the applicable limitation law was found to be the *lex fori*, that of the Australian Capital Territory. This was because the *Limitation Act* modifies the common law rights in accordance with s80 of the *Judiciary Act*, and in terms that are applicable to the cause of action.[57]

5. Analysis

The High Court in *Blunden* declined to formulate a general common law approach to determining choice of law issues where there is no relevant body of law. In so doing, the Court declined to 'complete the triangle' that it had begun constructing in *Pfeiffer* and *Zhang*.

In the course of judgment, Kirby J commented that the Commonwealth's submission for a 'closest connection' principle had 'obvious logical attractions'.[58] The decision that Kirby J ultimately made turned on a construction of s80 that allowed him to decline to resolve the arguments put forward by the Commonwealth.[59] Similarly, the joint judgment rejected the 'obvious logical attractions' of the Commonwealth's submissions with little substantive analysis of them.

That the Court was able to do this reflected the unique nature of the case.[60] The invocation of federal jurisdiction by virtue of the Commonwealth being a party to the action; the fact that the two ships were in the same ownership; the absence of any non-Australian features that would give a foreign jurisdiction an interest in the proceedings: all of these were facts that allowed the Court to reason in the way it did.

A. Evaluating the High Court's Approach

The factors that make the reasoning of the High Court in dealing with the Commonwealth's submissions disappointing are twofold. The first of these is demonstrated by the differing ways that the two main judgments characterised the Commonwealth's submission. As noted above, while the joint judgment limited the scope of the common law rule said to be proposed by the Commonwealth to claims brought *against the Commonwealth*, Kirby J did not.[61] An examination of the transcript of the proceedings shows clearly that the Commonwealth proposed developing a general common law principle for torts committed in an area where

55 Id at [6]–[8] (Gleeson CJ et al), [95] (Kirby J).
56 Id at [98] (Kirby J).
57 Id at [35] (Gleeson CJ et al), [91] (Kirby J), [109] (Callinan J).
58 Id at [84] (Kirby J).
59 As said by Kirby J himself: id at [100].
60 Id at [106] (Callinan J). See also id at [25] (Gleeson CJ et al), [99] (Kirby J).
61 See above n41 and accompanying text.

there is no *lex loci delicti*, not one limited in the way that the joint judgment suggests.[62] What is particularly worrying about this mischaracterisation is that the alleged limitation of the rule to claims against the Commonwealth is one of the very reasons that the joint judgment uses to reject the rule.[63] Ultimately, this means that the Commonwealth's actual submissions were not evaluated as they should have been.

Secondly, the High Court places much emphasis on the similarity between the Commonwealth's submissions for a 'closest connection' rule and the disfavoured theory of the 'proper law of the tort'.[64] Quoted from *Pfeiffer* are two specific objections.

The first of these is that United States experience has shown that 'where the proper law of the tort theory has been adopted… it has led to very great uncertainty.'[65] This criticism is difficult to accept in the face of the final approach taken by the courts. While the Commonwealth was proposing a rule that would be compatible with the expectations of the parties, the end result of the Court's reasoning, in contrast, leaves questions of substantive issues to be left to the choice of the *lex fori*. Even more difficult to accept in the face of this reality, for obvious reasons, is the criticism that 'often enough, the search for the proper law of the tort has led… to the application of the law of the forum'.[66]

B. Evaluating the Commonwealth's Approach

What the Commonwealth was submitting for was a rule that could be applied in any circumstance where a tort is committed in an area with no appropriate body of law. It is undeniable that it is a limited category of claims that such a rule would address.[67] Yet this in itself is not a reason to refuse to develop the common law. Uncommon situations may yet arise where a tort occurs in a place where there is no relevant body of law that can govern the claims.[68] Not all of these will necessarily be able to be decided by reference to s80 of the *Judiciary Act*, as was done in *Blunden*.

What is particularly appealing about the Commonwealth's approach in the context of recent Australian choice of law decisions is that it addresses the primary concerns articulated by the High Court in formulating the *lex loci delicti* rule. The

62 *Blunden v Commonwealth of Australia* [2003] HCATrans 261 (6–7 August 2003) at <http://www.austlii.edu.au/au/other/HCATrans/2003/261.html> (27 July 2004).

63 *Blunden*, above n4 at [43] (Gleeson CJ et al).

64 Id at [41] (Gleeson CJ et al).

65 Ibid, citing *Pfeiffer*, above n1 at [79] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ).

66 Ibid, citing *Pfeiffer*, above n1 at [78] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ).

67 As emphasised by the joint judgment: id at [42] (Gleeson CJ et al).

68 Examples given by the Solicitor–General of the Commonwealth and dismissed by the joint judgment as 'fanciful' (id at [42]) include unregistered pleasure craft off the coast, unregistered pirate ships, two swimmers in the middle of the ocean, new volcanic islands, a reef in the middle of the ocean, places where no particular foreign government is recognised as being in defacto control, a war zone where law and order has so totally broken down that there is no regime recognised by Australia as being a regime in power there: *Blunden v Commonwealth of Australia* [2003] HCATrans 262 (7 August 2003) at <http://www.austlii.edu.au/au/other/HCATrans/2003/262.html> (27 July 2004).

joint judgment in *Pfeiffer* placed considerable weight on the 'odd or unusual' outcome that may occur in a federal system, where the substantive issues to be decided in an action for a tort will be influenced by where the Court is sitting.[69] Specifically, in an action commenced in the original jurisdiction of the High Court (as indeed *Blunden* could have been) these matters will be determined simply by where the Court happened to be sitting at the time of the hearing.[70] It is anomalous that in *Pfeiffer* such a result warranted 'reconsideration of the question of the applicable law in matters involving federal jurisdiction,'[71] yet in *Blunden* the Court gave no attention to the same issue whatsoever. As noted above, actions may arise to be decided where there is no governing *lex loci delicti* but which do not fall under federal jurisdiction. For these actions to require a different rule from similar actions that attract federal jurisdiction is undesirable.[72] As articulated by the joint judgment in *Pfeiffer*: 'ideally, the choice of law rules should provide certainty and uniformity of outcome no matter where in the Australian federation a matter is litigated, and whether it is litigated in federal or non-federal jurisdiction.'[73]

However, it is worth remembering that the Commonwealth's submissions are not necessarily the natural equivalent to the '*lex loci delicti*' decisions in *Pfeiffer* and *Zhang*, and the 'closest connection' rule must itself be evaluated. The primary attractiveness of the closest connection rule is that where there is no applicable *lex loci delicti*, it will provide an outcome that is most compatible with the expectations of the parties.[74] Further, issues of forum shopping that are associated with a rule providing the *lex fori* are avoided.[75]

In sum, it appears that the Commonwealth's approach is in line with the High Court's approach to choice of law issues to date. That the High Court refused to give substantial consideration to the Commonwealth's submissions is surprising. It is true that s80 of the *Judiciary Act* provided them with a solution that made it unnecessary to resolve the arguments.[76] However, this was also the case in *Pfeiffer*[77] and there the Court nevertheless formulated a general rule for the purposes of consistency and uniformity.

6. Further Implications

A. Forum Shopping

The High Court's decision allows a plaintiff in the position of Mr Blunden to effectively elect the substantive law that will govern his or her claim. As the

69 *Pfeiffer*, above n1 at [58] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ).

70 See Jeremy Kirk, 'Conflicts and Choice of Law Within the Australian Constitutional Context' (2003) 31 *Fed LR* 247 at 259.

71 *Pfeiffer*, above n1 at [59] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ).

72 Id at [60] Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ).

73 Id at [44] (Gleeson CJ et al).

74 This is the primary appeal of the *lex loci delicti* rule according to Tetley: above n12 at 43. See also *Pfeiffer*, above n1 at [87] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ), [129] (Kirby J); *Zhang*, above n2 at [130] (Kirby J).

75 See Part 6A below.

76 *Blunden*, above n4 at [100] (Kirby J).

77 *Pfeiffer*, above n1 at [200] (Callinan J); Kirk, above n70 at 258.

Judiciary Act allows a claim which did not arise in a state or territory to be brought against the Commonwealth in *any* state or territory,[78] such a plaintiff will be free to choose the forum in which they sue.[79] The Commonwealth's objection to a rule that allows a plaintiff the opportunity to 'forum shop' in this way was noted in all three judgments.[80]

Mixed views on forum shopping exist, and a general consensus has at this point by no means been established.[81] Nevertheless, the High Court has in recent times criticised choice of law rules that allow forum shopping. Indeed, issues of forum shopping impacted on the decisions in *Pfeiffer* and *Zhang*. In *Pfeiffer*, Kirby J held that 'it is not reasonable that such a choice [of venue], made unilaterally by the initiating party, should materially alter that party's substantive legal entitlements to the disadvantage of its opponents.'[82] Further, the Australia Law Reform Commission has noted the current trend against forum shopping.[83]

Yet, the decision in *Blunden* gave relatively little weight to the issue of forum shopping. All three judgments felt that it was relevant in reply to such an objection that the Commonwealth had to date foregone the opportunity to enact a limitation regime for civil claims commenced in federal jurisdiction, or any other such limitation regime under which the plaintiff's action would fall.[84] Further, the joint judgment emphasised that the plaintiff's claim fell within 'a limited category within the class of maritime torts'.[85]

While these justifications for ignoring forum shopping concerns may carry some weight in the present case, the High Court has established a precedent whereby claims against the Commonwealth that occurred in a place with no relevant body of law will be governed by the *lex fori*. Thus substantive issues beyond the applicable limitation law have the potential to be chosen by the plaintiff.

B. The Significance of International Law

In *Blunden*, Kirby J stressed that for claims based on extra-territorial acts, the first step in reasoning must always be an examination of public international law for any applicable principles.[86] This step is particularly important in adjudicating torts on the high seas (or indeed any other place that does not fall within the jurisdiction of any particular law area). For torts committed in such areas, sufficient attention

78 *Judiciary Act 1903* (Cth) s 56(1)(c): the claim may be brought 'in the Supreme Court of any State or Territory or in any other court of competent jurisdiction of any State or Territory'.

79 See further, 'Court Win for Melbourne's Crew' *The Age* (11 December 2003), available at <http://www.theage.com.au/articles/2003/12/10/1070732282494.html> (27 July 2004).

80 *Blunden*, above n4 at [42] (Gleeson CJ et al), [84] (Kirby J), [108] (Callinan J).

81 Compare Friedrich K Juenger, 'What's Wrong with Forum Shopping?' (1994) 16 *Syd LR* 5 and Brian R Opeskin, 'The Price of Forum Shopping: A Reply to Professor Juenger' (1994) 16 *Syd LR* 14. See also Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (2003).

82 *Pfeiffer*, above n1 at [129] (Kirby J), [184] (Callinan J); *Zhang*, above n2 at [194] (Callinan J).

83 Australian Law Reform Commission, *Choice of Law*, Report No 58 (1992) at 1.16.

84 *Blunden*, above n4 at [44] (Gleeson CJ et al), [63]–[66], [99] (Kirby J), [108] (Callinan J).

85 Id at [42] (Gleeson CJ et al).

86 Id at [70], [76] (Kirby J).

must be given to the terms of treaties and to customary international law.[87] Kirby J made the important point that while in Mr Blunden's claim there existed a substantial and bona fide connection between the subject matter and the source of the jurisdiction, in other circumstances this principle of public international law affecting extra-territorial acts could — in other circumstances — 'control, or certainly affect, the ascertainment of the rule applicable in an Australian court otherwise having jurisdiction over the parties.'[88] Thus, in a similar situation to the *Voyager*/*Melbourne* collision, occurring between vessels flying different flags, it may be necessary for the Court to have consideration of principles of international law such as, for example, Article 11, paragraph 1, of the Convention on the High Seas.[89] This provides that in the event of a collision on the high seas 'no penal or disciplinary proceedings may be instituted against… persons except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.'[90]

7. Conclusions

In *Blunden*, the High Court was offered the opportunity to resolve tort choice of law issues that have as yet been left open. Specifically, the occasion presented itself to formulate a choice of law rule for torts occurring in a geographical place where there is no relevant body of law that can supply the *lex loci delicti*.

Unfortunately, the Court chose to limit its decision to the specific federal nature of the cause of action. It is unclear why the Judges felt limited in such a way, as three years earlier a similarly constituted Court did not adopt such a narrow decision when addressing a claim in federal jurisdiction in *John Pfeiffer Pty Ltd v Rogerson*.

Ultimately, the refusal of the High Court to consider the choice of law issues presented in a broader manner and in accordance with previous Australian High Court decisions as suggested by the Commonwealth, is disappointing. The 'apparent gap' in principles as established by *Pfeiffer* and *Zhang* remains. Further, the High Court has taken a step away from their established stance on issues such as forum shopping and on the uniformity in choice of law matters, regardless of the nature — federal or non-federal — of the jurisdiction being invoked.

87 See for instance Convention on the High Seas, above n5; United Nations Convention on the Law of the Sea done at Montego Bay on 10 December 1982, 1994 *Australian Treaty Series* 31 (entered into force for Australia on 16 November 1994).

88 *Blunden*, above n4 at [76] (Kirby J). As to the requirement of a 'substantial and bona fide connection', see id at [72] (Kirby J); *Zhang*, above n2 at [105]; Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) at 309.

89 See above n5. See also Convention on the Law of the Sea, above n87 at Art 97 para 1.

90 See also *Blunden*, above n4 at [74] (Kirby J).