enforcement by the forum of the law of the place of the wrong would be contrary to public policy of the forum. However, Kirby J dissented from the joint judgment because he discerned no error in the primary judge's weighing of the factors relevant to the stay. He stated that, having rejected *Phillips v Eyre* as the applicable choice of law rule, the Court should not succumb to a new provincialism in the guise of exercising the discretion to stay proceedings.

Callinan J also dissented. He held that the word 'inappropriate' in the rule should not be burdened with the encrustations of 'oppressiveness' and 'vexatiousness'. He held that suits should not be determined in a jurisdiction which has, with respect to the relevant events, no real connection with the defendant. He held that, on any test, New South Wales was an inappropriate forum. Callinan J did not deal with the application of Pfeiffer to foreign wrongs.

Some lessons for counsel include:

1) the evidence necessary to be led on a stay application may extend beyond merely evidence of the procedures of the relevant foreign Court and the relative advantages and disadvantages generated by such procedures, to evidence of the substantive content of the foreign law applicable to the claim;

2) this will probably require the obtaining of affidavits from qualified lawyers in the foreign jurisdiction, deposing to the relevant law;

3) to be admissible, the affidavits should depose to the content of the foreign law but not seek to apply it to the facts of the particular case;

4) there is room to develop the categories of public policy whereby an Australian court might decline to apply foreign law otherwise mandated by the relevant Australian choice of law rule;

5) despite the direction in *Voth v Manildra Flour Mills* 171 CLR 538 at 565 that the stay applications ought to be able to be determined quickly, often in the privacy of the judge's chambers, this may not be possible where there is a body of evidence led concerning not only the procedures of the foreign court but also the substantive foreign law and factual disputes are thereby generated;

6) the burden on the applicant for the stay remains a heavy one because it is necessary to establish that the continuation of the proceedings in the local court would be vexatious or oppressive in the sense defined above;

7) in claims like personal injuries claims where the damage travels with the plaintiff, New South Wales courts will often remain a viable forum notwithstanding the accident occurred overseas and foreign law will govern the tort claim.

Lake Macquarie City Council v McKellar [2002] NSWCA 90

By Justin Gleeson SC

In this appeal, the appellant failed in its attempt to overturn the judgment of Sidis DCJ that the Council was negligent in allowing a nail to remain on a basketball court. The plaintiff had stepped backwards during the course of a basketball game on the courts and his foot became caught by the nail rivet on the concrete surface of the court. The plaintiff fell back heavily injuring himself.

The point of general significance is that senior counsel for the appellant developed oral argument which Ipp AJA described as bearing very little relationship to the written submissions which had been previously filed (prepared by different counsel previously briefed in the matter). Ipp AJA stated:

> The Court has a heavy burden of cases and if judgments are to be delivered within a reasonable time it is desirable that judgments in more straightforward cases be delivered at the conclusion of oral argument. Otherwise the period between argument and the delivery of judgment will grow to an inordinate degree. This process however will be prevented if the oral argument differs in substance from the written submissions.

Ipp AJA also stated:

> Where, after written submissions have been filed, new counsel is briefed who wishes to present different arguments, the new counsel is duty bound to ensure that amended written submissions, properly reflecting these new arguments, are filed in good time.

Heydon JA agreed with the observations of Ipp AJA. He stated that in a future case it may be necessary for the Court to take the extreme step of declining to hear oral arguments which are outside the parameters of written argument unless there has been some good explanation for why the disparity exists.

Handley JA agreed with Ipp AJA.

The lessons for counsel are:

1) written submissions must be filed on time;

2) if new counsel is briefed, amended written submissions must be filed in adequate time prior to the hearing if different arguments are to be presented; and

3) if these steps are not followed there is the prospect of not only costs orders against counsel, but the possibility of argument not being allowed on the fresh points which could prompt a negligence claim against counsel.

Any barristers who consider that the suggestions by the Court may be unworkable or overly harsh are invited to write to the Association or this journal with their comments.