

Before the High Court

Getting It Right: Where is the Place of the Wrong in a Multinational Torts Case?

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Abstract

The High Court has in recent years settled on the law of the place of the wrong as the choice of law rule in tort. This inevitably means that arguments will turn to the identification of that place, as a recent case shows, particularly where a situation has links with more than one jurisdiction. This is an issue about which reasonable minds will differ, but it is concluded in this article that, in the context of a claim in negligence in relation to workplace-related injuries, the place of the wrong should be where the employee was exposed to the dangerous working environment. Such a conclusion finds support in other High Court and New South Wales Court of Appeal cases in this area, as well as in legislative and case law developments elsewhere.

1. *Where is the Place of the Wrong in a Multinational Torts Case?*

The identification of the place of a wrong can occur in various contexts in our legal system, including (a) to determine whether the rules of court mean the claim is within a court's jurisdiction, in cases where the originating process is to be served outside Australia;¹ (b) as one factor in assessing a *forum non conveniens* claim; and (c) in determining which law should be applied once jurisdiction is established. As the article focuses on a particular case, I will focus mainly on (c) as this was the main issue in dispute in the case, with (b) a secondary question. I will not focus here on various rules of court in relation to jurisdiction.

2. *Introduction*

In May 2008, the High Court granted special leave to appeal from the decision of the Victorian Court of Appeal in *Puttick v Fletcher Challenge Forests Pty Ltd*.² In this article I outline the case and decision in the Court of Appeal, before assessing its compatibility with statements about the law in this area by other Australian courts, by courts in other jurisdictions, and by academic writers. It will be submitted that the High Court should allow the plaintiff's appeal from the decision of the Victorian Court of Appeal on the question of the location of the place of the wrong on the facts of this particular case.

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1 See, for example, the *Uniform Civil Procedure Rules 2005* (NSW) Schedule 6(d).

2 *Puttick v Fletcher Challenge Forests Pty Ltd* [2007] VSCA 264 ('Puttick'); *Puttick v Fletcher Challenge Forests (Pty) Ltd* [2008] HCA Trans 207

3. *The Claim*

The claimant was the wife of Russell Puttick. During the period 1981–1989, Mr Puttick was employed by Tasman Pulp and Paper Company Limited (Tasman), a subsidiary of Fletcher Challenge Forests Pty Ltd (Fletcher), the respondent. Both Tasman and Fletcher were companies incorporated in New Zealand. During the period of his employment with Tasman, Puttick lived in New Zealand. He was sent by Tasman to examine various asbestos product manufacturing plants in Belgium (three times) and Malaysia (eight times), and in doing so inhaled asbestos dust. Mr Puttick was not aware this was dangerous and did not use protective equipment, and part of the allegation in negligence was that his employer had failed to warn him of these dangers. In 2002, as a Victorian resident, Mr Puttick developed symptoms of asbestos-caused malignant mesothelioma. He commenced action in Victoria against Fletcher alleging negligence, but died shortly thereafter. His wife continued the action.

The major (and related) issues for the court to consider were the question of which law applied to resolve the case, and the question of whether the proceedings should be stayed on the basis of *forum non conveniens*. The High Court of Australia had decided in 2002 that the law of the place of the wrong should be applied to resolve cases involving torts committed outside Australia,³ but the uncertainty here was over the application of that rule — where did the wrong take place? It might be argued that the wrong had taken place in New Zealand, where the direction to visit Belgium and Malaysia was given. This was (arguably) the place where the employer might have, but did not, warn Mr Puttick of the conditions he was likely to face in these countries, and where the employer might have, but did not, provide appropriate safety instructions and/or protective clothing. It might be argued that the wrong took place in Belgium and Malaysia, because this was where Mr Puttick was exposed to a dangerous working environment, and where he likely suffered his injuries.⁴ This issue was the primary one, because of its relevance to the second question, whether Victoria was a clearly inappropriate forum in which to litigate the issues.⁵

4. *Decision at First Instance*

The trial judge concluded that the location of the tort was New Zealand. Harper J said:

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

4 The claim as amended particularised the alleged negligence as including (a) causing or permitting Mr Puttick to be exposed to asbestos in Belgium and Malaysia; (b) failing to provide and maintain a safe system of work for Mr Puttick while he was working in Belgium and Malaysia; and (c) failing to warn or instruct Mr Puttick or Tasman about the need for protective clothing and equipment while working with or whilst exposed to asbestos.

5 I accept that in assessing *forum non conveniens* applications, the question of the law to be applied is one issue, among others, to be considered. The test in Australia regarding *forum non conveniens* applications is whether the chosen forum is a clearly inappropriate forum, see *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 ('Voth'), which is different from the 'clearly more appropriate forum' test used in the United Kingdom: *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

The act of which Mrs Puttick complains is the direction given to her husband to inspect asbestos plants. These, it is true, happened to be in Malaysia and Belgium. If the owners of the plants were being sued, the *lex loci delicti* (sic) would doubtless be the law of the country in which the plant was situated. But the owners of the plants are not being sued. The defendant is a New Zealand company, said to have exercised total control over its New Zealand subsidiary; and it was the New Zealand subsidiary by which Mr Puttick was employed and by which he was instructed to proceed to his inspections of the Malaysian and Belgium plants. The instruction was issued and received in New Zealand. That country is in substance the place where the present cause of action arose. The plaintiff does not allege as against the defendant any act or omission in either Malaysia or Belgium ... a lay person would probably respond that a cause for complaint arose immediately the relevant instruction was given. Whether a complete cause of action in law had been made out would to the lay person be irrelevant. Any employee instructed to undertake on the employer's behalf a dangerous assignment without any reasonably available measures being taken to avoid or minimise the risk, or warn of it, would complain the moment the truth were known and some kind of protest could be lodged.⁶

For this reason, and for other reasons associated with where most of the evidence and witnesses were located, the trial judge ordered a stay of the Victorian proceedings on the basis that Victoria was a clearly inappropriate forum in which to litigate this matter.

5. *Court of Appeal*

By a majority of 2–1, the Victorian Court of Appeal (Warren CJ and Chernov JA, Maxwell P dissenting) dismissed the appeal from the above judgment, on the question of the place of the wrong, and that of the *forum non conveniens*.⁷

The majority explained that past authorities had given the relevant tests in determining the place of the wrong as where in substance the cause of action arose,⁸ or the place which gives the plaintiff cause for complaint.⁹

Warren CJ applied these tests as follows:

Whether the act that gave the applicant her cause for complaint constitutes the failure by the respondent to provide a safe system of work or the failure by the respondent to warn of the dangers of asbestos dust, it should be considered to have occurred in New Zealand ... because if the respondent was going to fulfil its duty of care by providing Mr Puttick with a safe workplace or warning Mr Puttick of the dangers of asbestos, the respondent would have done so in New Zealand, not Belgium or Malaysia. For all intents and purposes, Mr Puttick's contact with the respondent ceased upon his leaving the country; ... there is no allegation ... that the respondent failed to do something in Belgium or Malaysia ... the quality of

6 *Janita Puttick (as executor of the estate of Russell Simon Puttick) v Fletcher Challenge Forests Ltd* [2006] VSC 370 at [25].

7 *Puttick* [2007] VSCA 264.

8 *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575 at 606 ('Dow Jones'); *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 at 468 ('Distillers'); *Metall Und Rohstoff AG v Donaldson Lufkin and Jenrette Inc* [1990] 1 QB 391 at 449 and *Jackson v Spittall* (1870) LR 5 CP 542 ('Jackson').

9 *Voth* (1990) 171 CLR 538 at 567.

the defendant's conduct ... occurred entirely in New Zealand. Further, to consider that they occurred in Belgium and/or Malaysia is to focus upon the damage caused to Mr Puttick and is thereby contrary to the High Court instruction (in *Dow Jones*). The same result eventuates if the alleged negligence is considered to be constituted by positive acts. Whether it is alleged that the respondent breached its duty of care in exposing Mr Puttick to asbestos dust, by providing an unsafe system of work ... or by providing inadequate warnings as to potential dangers in overseas factories, the applicant cannot point to an act committed by the respondent in Belgium or Malaysia that constitutes these alleged wrongs — only acts in New Zealand. For these reasons, I would conclude that the *lex loci delicti commissi* is the law of New Zealand.¹⁰

Similarly Chernov JA focused on the place where the direction to work was given, and noted the plaintiff had not alleged as against the defendant any act or omission in either Malaysia or Belgium. Chernov JA concluded that the fact the disease may have been contracted in Malaysia, Belgium or both was 'beside the point'.¹¹

In dissent, Maxwell P claimed that to confine the relevant conduct to the single act of instructing Mr Puttick to go overseas was to misapprehend the cause of action and ground of complaint. The essence of the negligence action was the employer's conduct in causing Mr Puttick to work in unsafe workplaces overseas. The conduct commenced in New Zealand, but this was merely the first step. By itself, it created no cause of action. The conduct about which the plaintiff complained was not complete until Mr Puttick actually worked overseas. The omissions in New Zealand merely created a risk of harm, which could have been eliminated any time before he commenced working overseas.¹² There was nothing fortuitous about Mr Puttick being exposed to harm in Belgium and Malaysia.¹³ As a result, Maxwell P would have allowed the appeal, finding the place of the wrong to be in Malaysia and Belgium.

6. Views in Other High Court Cases Regarding the Identification of the Place of the Wrong in Tort Cases

In the landmark decision of *John Pfeiffer Pty Limited v Rogerson*,¹⁴ when the High Court abandoned double actionability in favour of the primacy of the law of the place of the wrong as the substantive law where a claim founded on a tort committed in one state or territory of Australia was litigated in another state or territory of Australia, the court acknowledged that sometimes the place of the tort could be ambiguous or diverse. This had occurred in earlier cases such as *Voth*, but

10 *Puttick* [2007] VSCA 264 at [20]. At [31], Warren CJ added that the applicant could not reasonably allege that the respondent should have been present in Belgium or Malaysia to fulfil its duty of care.

11 *Puttick* [2007] VSCA 264 at [98].

12 *Puttick* [2007] VSCA 264 at [58]–[60].

13 This was mentioned because some authorities have considered that where the place of the wrong is in some way incidental or fortuitous, the place of the wrong might not be the substantive law applied to the dispute. See, for example *Chaplin v Boys* [1971] AC 356 ('*Chaplin*') where the so-called 'flexible exception' was suggested.

14 *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503 ('*Pfeiffer*') at 538 (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ).

that case and cases since have provided guidance in the determination of this issue, central to the dispute in *Puttick*. I turn now to consider what assistance may be gained in the resolution of this issue in *Puttick* from comments in other cases.

In the *Pfeiffer* case itself, which like *Puttick* arose in the context of employment and involved negligence, the plaintiff was injured in an accident in New South Wales. He was a resident of the Australian Capital Territory, and the defendant had its principal business office in the Territory. The defendant employed the plaintiff in the Australian Capital Territory. It was accepted that the place of the wrong was New South Wales, where the plaintiff suffered the injury. This was also the position reached in *BHP Billiton Limited v Schultz*.¹⁵

In *Zhang*,¹⁶ which like *Puttick* involved an allegation of negligence, the plaintiff sued in New South Wales after being involved in a motor accident in New Caledonia. He alleged his injuries were caused by the negligent design and manufacture of the vehicle by the defendants, who were foreign companies whose principal place of business was in France. The court acknowledged that it would have been difficult to determine the place of the wrong in this case, because there were arguments in favour of both France (where the vehicle was designed) and New Caledonia (where the alleged defect led to the plaintiff's injuries). Unfortunately, the court was not required to decide one way or another, because it found that either way,¹⁷ French law would be applied as the law of the place of the wrong.¹⁸ However, Kirby J gave the test as being 'the law area in which the event, critical to legal liability, happens'.¹⁹ Callinan J concluded:

It was by no means unreasonable or inappropriate that (travellers) should ... be bound by the civil law of, and the remedies provided by, and to be pursued in, the courts of the jurisdictions *in which they have suffered injuries*. [Emphasis added.]²⁰

In *Voth*,²¹ the location of the wrong was an issue that divided the court. The case involved Australian plaintiffs suing *Voth*, an accountant residing in the United States practising in Missouri, for damages for professional negligence in relation to taxation advice. The joint reasons noted that some act of the defendant, and not its

15 *BHP Billiton Limited v Schultz* (2004) 221 CLR 400 ('*BHP*'); there the plaintiff allegedly suffered asbestos-related disease arising from work he conducted in South Australia. He sued his employer, and companies alleged to have supplied the insulation products containing the asbestos. BHP Billiton was a company incorporated in Victoria, and carrying on business in New South Wales and South Australia, whilst the other defendants were incorporated in the United Kingdom, the Australian Capital Territory and New South Wales. It was common ground that the place of the wrong was in South Australia.

16 *Zhang* (2002) 210 CLR 491.

17 *Zhang* (2002) 210 CLR 491 at 529 (Kirby J); given that New Caledonia is subject to French law.

18 The plaintiff had suggested that the relevant law was New Caledonian, with which the joint reasons did not express disagreement at 518. New Caledonia applies the law of France as the local law.

19 *Zhang* (2002) 210 CLR 491 at 538; to like effect Fridman refers to the 'most important act or event in the chain or sequence of events which ultimately leads to an action in tort must have taken place within the relevant jurisdiction' in Gerald Fridman, 'Where is a Tort Committed?' (1974) 24 *University of Toronto Law Journal* 247 at 261.

20 *Zhang* (2002) 210 CLR 491 at 572.

21 *Voth* (1990) 171 CLR 538.

consequences, should be the focus of attention.²² The majority found that the cause of complaint was the act of providing the accountancy advice incorrectly. This act was an act complete in itself, initiated and completed in the one place, Missouri.²³

The *Dow Jones* case also considered difficult questions of the place of the wrong, in the context of the tort of defamation.²⁴ There a Victorian resident sued in Victoria a United States corporation for allegedly defamatory material it had uploaded to the Internet. Uploading occurred in the United States. The Court said that in cases of trespass or negligence, usually the place of the defendant's actions would be critical, rather than the place where the consequences were felt. However, in relation to defamation, the court found that damage to reputation was critical, and damage had occurred in Victoria where the material was published.²⁵ The court acknowledged that identification of a single rule of location in such cases may be impossible, given the different kinds of tortious claims that could be made.²⁶

In *Neilson v Overseas Projects Corporation of Victoria Ltd*,²⁷ the place of the wrong was where the defendant failed to provide safe premises and where the victim was injured, in China, rather than the jurisdiction in which the plaintiff or defendant resided, or the place in which the contract of employment was executed.

A. *Application of These Views on the Facts in Puttick*

In the *Zhang* case, although the court did not finally determine the issue of whether the place of the wrong was France or New Caledonia, it not being necessary to decide, the *dicta* of Kirby and Callinan JJ are of use in the present context. Kirby J

22 *Voth* (1990) 171 CLR 538 at 567 (Mason CJ, Deane, Dawson & Gaudron JJ). Nygh & Davies allude to these comments in *The Conflict of Laws* (7th ed, 2002) in concluding at 421–422 that ‘the tendency in cases of double locality torts has been to stress the place at which the activity of the defendant was directed, rather than the place where the activity complained of originated’. Reid Mortensen in *Private International Law in Australia* (2006) at 435 concludes ‘a negligent act or omission will be presumed to have occurred in the place where the act was committed or, in the case of an omission, where the act was supposed to have taken place.’

23 *Voth* (1990) 171 CLR 538 at 569. See also at 590 (Toohey J) and 579 (Brennan J dissenting). In another case decided prior to the abandonment of double actionability, and involving alleged negligence by an employer, the court found that the place of the wrong was where the injuries occurred, which was South Australia. The defendant was a South Australian company and the plaintiff entered into an employment agreement in South Australia, however he was allocated to South Australia by a roster drawn up in Sydney: *McKain v R W Miller and Co (SA) Pty Ltd* (1991) 174 CLR 1 (*‘McKain’*).

24 *Dow Jones* (2002) 210 CLR 575.

25 *Dow Jones* (2002) 210 CLR 575 at 606–607 (Gleeson CJ, McHugh, Gummow & Hayne JJ) and to like effect, at 639 (Kirby J) ‘the publication of the material which damages the reputation of the plaintiff is essential. Merely creating and making the material available is insufficient’; and at 649 (Callinan J) ‘the most important event so far as defamation is concerned is the infliction of the damage, and that occurs at the place (or the places) where the defamation is comprehended’. See David Rolph ‘The Message, Not the Medium: Defamation, Publication and the Internet in *Dow Jones and Co Pty Ltd v Gutnick*’ (2002) 24 *Sydney Law Review* 263; Dan Svantesson ‘“Place of Wrong” in the Tort of Defamation — Behind the Scenes of a Legal Fiction’ (2005) 17 *Bond Law Review* 149 and Brian Fitzgerald ‘*Dow Jones and Co Inc v Gutnick*: Negotiating “American Legal Hegemony” in the Transnational World of Cyberspace’ (2003) 27 *Melbourne University Law Review* 590.

26 *Dow Jones* (2002) 210 CLR 575 at 606.

27 *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 (*‘Neilson’*).

asked where the event, critical to legal liability, occurred. Surely in the *Puttick* case, the event critical to legal liability was the exposure of the plaintiff to the dangerous working environment in Belgium and Malaysia. Without this event, there would be no claim. A failure in New Zealand to warn about dangerous conditions in these other countries would not have been actionable of itself, unless the defendant had caused the plaintiff's husband to go there. Callinan J believed it was reasonable that travellers should be subject to the remedy provisions that existed in the place where they suffered injuries. In the *Puttick* case, this was clearly Belgium and Malaysia. Mr Puttick suffered no injury in New Zealand.

Similarly, in *Voth* the High Court considered the crux of the claim. The essence of the plaintiff's claim here is the exposure of Mr Puttick to a dangerous working environment in Belgium and Malaysia. The Court in *Voth* focused on an act of the defendant, not its consequences, and this was also suggested in *Dow Jones*. These comments give a consistent answer here — the act of the defendant was the exposure of the plaintiff to such conditions. The fact that the consequences, Mr Puttick's condition, became apparent in Australia at a later time is irrelevant. Of course, Mr Puttick could have been in any country at this time,²⁸ so the Court rightly, with respect, dismissed such a consideration as having no bearing on the claim.

In *Pfeiffer*, although both the plaintiff and defendant were residents of the Australian Capital Territory, the court found that the place of the wrong was in New South Wales, where the unsafe system of work was used, and where the plaintiff was exposed to it. The employer was in a position to control the workplace. Similarly, Mr Puttick was exposed to the allegedly unsafe system of work in Belgium and Malaysia.

7. *State Court of Appeal Decisions*

Several Court of Appeal decisions have considered the issue of the place of the tort. One recent case is *Amaca Pty Ltd v Frost*.²⁹ There the plaintiff was employed in New Zealand and injured in that country by asbestos fibre from insulation products manufactured in New South Wales by James Hardie and Co., for whose liabilities Amaca was responsible. The materials were not accompanied by warnings that they contained asbestos, or the risks inherent when exposed to that substance. The allegations of negligence against Amaca included a failure to warn of the inherent risks, as well as manufacturing the products, making them available for sale, and not researching alternatives to the use of asbestos. A key issue was the place of the wrong, because the common law claim would not exist if the tort were deemed to have been committed in New Zealand.

The Court of Appeal (Spigelman CJ, Santow JA and McColl JA) found that the wrong had occurred in New Zealand. This was not a case where the product could be consumed anywhere in the world, such that the place of exposure to risk could be seen as fortuitous. The products were to be distributed in New Zealand and Australia. The court found the admitted breaches were breaches of duty owed to a

28 Or, as some would say, the location of the consequences of the failure becoming apparent was fortuitous.

29 *Amaca Pty Ltd v Frost* [2006] NSWCA 173 ('*Amaca*').

person in New Zealand. The element of causation occurred in New Zealand. The cause of action arose there, it was where the plaintiff was exposed to the risk, it was where the cause for complaint arose, or where the earlier conduct assumed significance.³⁰

Similar reasoning had led the New South Wales Court of Appeal in other similar cases to identify the place of the wrong as the place in which the plaintiff, whether in the capacity of employee or purchaser of products, was exposed to the danger. These cases include *James Hardie and Co Pty Ltd v Hall*, where the victim was employed in New Zealand. James Hardie supplied raw asbestos to the victim's employer, but failed to warn the employer or their employees about the risks associated with asbestos and any failure to provide a safe system of work. The court was satisfied the breaches of duty occurred in New Zealand, and this was the place of the wrong. The shipping of the product in Australia was only one step in a series of steps leading to the plaintiff's injuries.³¹

A. *Application of These Views on the Facts in Puttick*

One would have thought that on very similar facts in the *Puttick* case, the court would have reasoned that the place of the wrong was Belgium and Malaysia. The Court of Appeal in *Amaca* found that causation arose not where the dangerous goods were created but where the plaintiff was exposed to the danger, where the defendant failed to take stringent safety precautions, and where the failure to warn occurred. The exposure to danger in that case was in New Zealand. In *Puttick*, surely Mr Puttick was exposed to the danger in Belgium and Malaysia. That is where his injuries were caused.

Further in *Hall*, the place of the wrong was not from where the defendant might have issued a warning, New South Wales, but where the breach occurred, which was when the goods were supplied in New Zealand. Analogously here, the alleged breach against Fletcher occurs when it allows Mr Puttick occupation of dangerous premises in Belgium and Malaysia, without appropriate warnings and protective gear. Just as the shipping of the product in *Hall* was only one step in a series leading to the plaintiff's injuries, so in *Puttick* the commissioning of the work took place in New Zealand as merely one step in a series. If all Fletcher were accused of was a failure to warn, there would have been no case. It was the alleged exposure of the plaintiff to dangerous working conditions in Belgium and Malaysia that substantially created his claim, and surely this means his rights must be determined by that law.

30 *Amaca* [2006] NSWCA 173 at [42]–[44]; these tests were drawn from earlier decisions such as *Voth* (1990) 171 CLR 538; *Distillers* [1971] AC 458; and *Jackson* (1870) LR 5 CP 542.

31 *James Hardie and Co Pty Ltd v Hall* ('*Hall*') (1998) 43 NSWLR 554 at 577; see also *James Hardie Industries Limited v Grigor* (1998) 45 NSWLR 20, where the plaintiff purchased asbestos products in New Zealand for renovation purposes. He alleged negligence against James Hardie, which manufactured the asbestos in New South Wales. The negligence alleged was again failure to warn, and failure to withdraw the product knowing it was dangerous. The Court of Appeal found the failure to warn occurred when the plaintiff was exposed to the asbestos without warning. This occurred in New Zealand.

Maxwell P referred to the *Hall* and *Grigor* cases, and used their reasoning to justify his (dissenting) view that the place of the wrong in the *Puttick* case was Belgium and Malaysia. The majority judges viewed the above cases differently, denying that they meant that the place of the tort was the place where the exposure occurred. Warren CJ for example claimed that the cases stood for the general proposition that the place of the tort was usually where the warning should have operated to protect the plaintiff, or where the system of work should have been safe.³² With respect, this may be correct, but I do not agree that this leads to the conclusion that Warren CJ reached, that on the facts of *Puttick*, that place was New Zealand. Certainly, on one view the failure of Fletcher to warn should have operated to protect the plaintiff in Belgium and Malaysia. Surely the ‘system of work’ that was not safe was, substantially, the unsafe conditions on the ground in those countries, rather than the failure to warn of them.

8. *Other Arguments in Favour of Applying the Law of Belgium and Malaysia*

A. *Rationale for Adoption of the Law of the Place of the Wrong as the (Sole) Choice of Law Rule in Tort Cases*

Given that the question of identifying the place of the wrong has gained more prominence since the court adopted that place as the (sole) choice of law rule in torts cases,³³ it makes sense to see whether in the rationale for that legal reform there are some indications of how that place might be identified in difficult cases.

In *Pfeiffer*, the joint reasons of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ state that:

The chief theoretical consideration in favour of applying the law of the place of commission of the tort to decide the substantive rights of the parties ... is that reliance on the legal order in force in *the law area in which people act or are exposed to risk of injury* gives rise to expectations that should be protected.[Emphasis added.]³⁴

Applying these *dicta*, I would suggest that the place where Mr Puttick was ‘exposed to risk of injury’ was Belgium and Malaysia. The reference to the place where ‘people act’ is less certain in meaning, but read together with the decision in *Voth*, might be taken to be a reference to an act of the defendant. This would return us to the issue which divided the Victorian Court of Appeal in *Puttick*, the question whether the ‘act’ is the failure to warn, or the provision of workplace premises that are allegedly dangerous. Again, it is submitted that the substance of the claim is the latter.³⁵

32 *Puttick* [2007] VSCA 264 at [26].

33 For interstate torts, in *Pfeiffer* (2000) 203 CLR 503, and for international torts, in *Zhang* (2002) 210 CLR 491.

34 *Pfeiffer* (2000) 203 CLR 503 at 536; the other chief benefit of application of the law of the place of the wrong is its simplicity, and fixed and certain application at 539, subject to the problem shown by cases such as *Puttick*, namely the difficulty on occasion in determining the location of the place of the wrong.

In *Zhang*, Kirby and Callinan JJ spoke of the expectations of the parties as justifying resort to the place of the wrong to resolve disputes. Kirby J referred to the ‘law area in which the event, critical to legal liability, happens’,³⁶ and Callinan J of the place ‘in which the (plaintiff) has suffered injuries’.³⁷ I have explained earlier why I think these places should be held to be Belgium and Malaysia.

A recurring theme in recent judgments has been the concern among all judges that legal principles in this area should not encourage plaintiffs to engage in forum shopping.³⁸ In other words, the theoretical incoherence of the idea that the legal resolution of the issues should be determined in any meaningful sense by the jurisdiction in which the plaintiff chooses to litigate has been exposed. The potential for such an approach to undermine the purpose of tort laws in other countries has been recognised.

By parity of reasoning, we should be alive to the possibilities that the approach applied by the majority in the Victorian Court of Appeal in *Puttick* might give to unscrupulous employers. Assume for example that an unscrupulous employer wanted an employee to work in Ruritania, a jurisdiction known for having very high expectations of employers in terms of occupational health and safety laws, and providing for very high compensation payouts for employees injured at work.

On the approach given by the majority, this employer might set up a subsidiary in a country known to have very lax occupational health and safety laws, making sure that they ‘engage’ the employee to work in Ruritania in this employer-friendly jurisdiction. If the employee were injured and part of the allegation is based on a failure to warn of dangerous conditions in Ruritania, the employer would be able to claim that the place of the wrong was where the failure to warn occurred, which was where the employee was engaged. In other words, the unscrupulous employer could completely circumvent the tough occupational health and safety laws of Ruritania, surely passed with the purpose of providing safe working conditions in that jurisdiction, by contracting with the relevant employees in another jurisdiction. This is not considered a far-fetched possibility — there are numerous cases where plaintiffs have sought fora for tactical reasons;³⁹ it is no less likely that another party may enter into employment obligations in other fora for similar tactical reasons.

35 Certainly occupational health and safety legislation tends to focus the employer’s obligation on premises they control being safe, rather than adequate warnings about safety: *Occupational Health and Safety Act 2000 (NSW)* s 8. The extent to which the employer in *Puttick* was in a position to control the safety of the work premises in Malaysia and Belgium may be an important factor if the view be taken that the position under occupational health and safety law and that of civil compensation laws should be consistent in this context.

36 *Zhang* (2002) 210 CLR 491 at 538.

37 *Zhang* (2002) 210 CLR 491 at 572.

38 *Pfeiffer* (2000) 203 CLR 503 at 539 (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ); 552 (Kirby J) and 570 (Callinan J).

39 For example *McKain* (1991) 174 CLR 1; *Stevens v Head* (1992) 176 CLR 433; *BHP* (2004) 221 CLR 400; and *Neilson* (2005) 223 CLR 331.

B. Other Jurisdictions

The Australian courts have particularly relied on the English cases in relation to the identification of the place of the wrong. Chief among them is *Distillers Co (Biochemicals) Ltd v Thompson*,⁴⁰ a Privy Council case from the New South Wales Court of Appeal. There an English company manufactured and sold in England to an Australian company a product containing thalidomide, obtained from German manufacturers. The English company did not warn the Australian company and did not provide a written warning on the label of the goods, that the product may be harmful to a foetus if the drug were taken by a pregnant woman. The plaintiff's mother took the drug, and as a result (so it was alleged) the plaintiff was born with defective eyesight and without arms.

The Privy Council considered three possible solutions to the problem, including (a) requiring that all ingredients of the cause of action occur within one country; (b) that the last ingredient necessary to bring the cause of action was the determining factor in relation to the place of the wrong; and (c) to consider where in substance the cause of action arose. The court dismissed (a) on the basis that it was too restrictive; and (b) on the basis that that place may be fortuitous. It adopted the third approach, considering in which jurisdiction arose the plaintiff's cause for complaint. Applying the approach, the court found that the goods were not manufactured improperly; the cause of action was the failure to warn, and this occurred in New South Wales.⁴¹

The case *Johnson v Coventry Churchill International Ltd*⁴² has some similarities with the case presently under consideration. There the defendants were an English employment agency which recruited English personnel to work overseas. The plaintiff, an English resident, responded to one of their advertisements to work in Germany. He was hired by the agency in England, and directed to a work site in Germany, where he suffered personal injury. The plaintiff's claim in tort alleged the failure of the defendant to provide a safe system of work.

At that time, the law of England provided for double actionability, and this test required the identification of the place where the alleged wrong was done. The court identified Germany as the place of the wrong, where the unsafe system of work was provided, and where the plaintiff suffered injury, rather than in England, where the plaintiff was engaged, the country of residence of either the plaintiff or defendant.⁴³

40 *Distillers* [1971] AC 458; the Privy Council referred with approval to the earlier case of *Jackson v Spittall* (1870) LR 5 CP 542 (Brett J for the court), although that case was one of breach of contract and no doubt arose on the facts of that particular case. Refer for more discussion of the case to Matt O'Brien 'Siting the Locus of a Tort for the Purposes of Determining Jurisdiction' (1996) 3 *Canberra Law Review* 139.

41 *Distillers* [1971] AC 458 at 467–469 (Lord Pearson for the court); see also *Metall Und Rohstoff AG v Donaldson Lufkin and Jenrette Inc* [1990] 1 QB 391.

42 *Johnson v Coventry Churchill International Ltd* [1992] 3 All ER 14.

43 The court eventually applied the law of England to the dispute through the use of the 'flexible exception', however this is not relevant in Australia as the High Court of Australia has rejected its use: *Pfeiffer* (2000) 203 CLR 503 at 538.

The number of these cases will continue to grow in the United Kingdom, following the adoption of the law of the place of the wrong as at least the *prima facie* choice of law rule to be applied.⁴⁴ The law of the place of the wrong remains the default choice of law rule for tort in *Regulation EC 864.2007 on the Law Applicable to Non-Contractual Obligations (Rome II)*, effective from 2009. Article 4(1) states that in determining the place of the wrong, the place where direct damage occurs is determinative, rather than where the indirect consequences might be felt, or where the event giving rise to the damage occurs.

The American cases are of lesser assistance, partly because there has been a move away from the place of the wrong in framing choice of law rules in tort. In the original *Restatement*, the law of the place of the wrong was strictly applied.⁴⁵ The *Restatement Second* embraces the theory of the proper law of the tort, where a range of factors is considered.⁴⁶ Just ten states continued to adhere to the place of the wrong as the determining factor.⁴⁷ There are some suggestions that, as in Canada,⁴⁸ where it is necessary to determine the place of the wrong, the place where damage was suffered will be important. This occurred, for example, in the old case of *Alabama Great Southern Railway v Carroll*,⁴⁹ where the plaintiff was injured in Mississippi allegedly through the defendant's negligence in Alabama in relation to work on a train. The court found the place of the wrong was Mississippi, since while the train was in Alabama no injury had resulted, and no cause of action had arisen.⁵⁰

Recent examples where the law of the place where the accident occurred was applied in employment-related accidents include *Dowis v Mud Slingers Inc*⁵¹ and *Oberson v Federal Mutual Insurance Co.*⁵² These and other cases led a leading American choice of law scholar to conclude that 'most 2005 conflicts cases involving employee injuries applied the law of the state of injury.'⁵³

44 *Private International Law (Miscellaneous Provisions) Act 1995 (UK) s 12(2)*.

45 American Law Institute *Restatement First, Conflict of Laws* at 412.

46 American Law Institute *Restatement Second, Conflict of Laws* (1971); factors include the place where the injury occurred, and the place where the conduct causing the injury occurred.

47 Symeon Symeonides 'Choice of Law in the American Courts in 2006: Twentieth Annual Survey' (2006) 54 *American Journal of Comparative Law* 697; these states are Alabama, Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming.

48 In *Tolofson v Jensen* [1994] 3 SCR 1022, La Forest J concluded that where an act occurs in one place but the consequences are directly felt elsewhere, the consequences would be held to constitute the wrong.

49 *Alabama Great Southern Railway v Carroll* (1892) Ala 126.

50 A detailed discussion of the older United States authorities occurs in P Webb & P North 'Thoughts on the Place of Commission of a Non-Statutory Tort' (1965) 14 *International and Comparative Law Quarterly* 1314; Canadian decisions are discussed at length in Gerald Fridman, above n19.

51 *Dowis v Mud Slingers Inc* 621 SE 2d 413 (Ga 2005), where an employee living in Tennessee was injured in Georgia. In an action against the Missouri employer, the court applied Georgian law to resolve the dispute. This was a court that applies the law of the place of the wrong to resolve such disputes.

52 *Oberson v Federal Mutual Insurance Co.* 126 P 3d 459 (Mont 2005); where both the employer and employee resided in Michigan, the employee suffering injury in Montana. The court applied Montana law as the proper law.

(i) *In Negligence, Damage is the Gist of the Action*

Some have argued that no hard and fast rule can be made to apply to the full spectrum of torts, and the approach to the question should depend on the particular tort being considered.⁵⁴ In particular, perhaps a distinction should be made between torts that are actionable *per se*, and torts that require damage in order to be actionable. In the context of negligence, an action on the case, it is axiomatic that damage is the gist of the action.⁵⁵ Of all torts, perhaps particularly in negligence cases, we should focus on where the damage to the plaintiff is alleged to have occurred. This is the position reached by Webb and North:

If one accepts that the main object of the tort of negligence is to protect the individual's interest in freedom from negligently inflicted injury to his person ... then the essence of any wrong lies in the damage or harm suffered by such interests. There are myriad duties owed and breaches of these duties every day, but unless there is damage resulting from the breach of duty which would be foreseeable by a reasonable man, there is no civil liability. It is submitted that the consequence in the conflict of laws of such an approach to the tort of negligence is that the locus of the tort should be where the harm is suffered ... (damage) ... lies at the root of negligence.⁵⁶

(ii) *Principles Must be Consistently Applied*

By an analogy with the acknowledged undesirability of forum shopping, it is submitted that principles in this area must be applied consistently, such that the plaintiff cannot, in effect, choose the relevant law by a shrewd framing of their claim. On the current state of the authorities, a leading scholar in this area writes, when discussing the identification of the place of the wrong, that 'much may depend on how the allegation of negligence is expressed'.⁵⁷ While this is no doubt an accurate interpretation of current authorities, it is submitted that it should not be so.⁵⁸ Just as the court has grown to be dissatisfied with the arbitrary results flowing from forum shopping, so it should be dissatisfied with the arbitrary results invited when the above comment reflects practice.

53 Symeon Symeonides 'Choice of Law in the American Courts in 2005: Nineteenth Annual Survey' (2005) 53 *American Journal of Comparative Law* 559 at 598. These comments apply both to jurisdictions in which the law of the place of the wrong is the dominant approach, and those in which the *Restatement (Second)* is applied.

54 See for example Gerald Fridman, above n19; compare Webb & North 'Thoughts on the Place of Commission of a Non-Statutory Tort', above n50.

55 *Sidaway v Board of Governors of the Bethlem Royal Hospital and Maudsley Hospital* [1985] AC 871 at 883; Harold Luntz and David Hambly *Torts: Cases and Commentary* (5th ed, 2006) at 341.

56 P Webb and P North, above n50 at 1357–1358, though it is true these views have not enjoyed strong support in Australia since the *Distillers* decision.

57 Reid Mortensen, above n22 at 435.

58 I do not doubt that in the current state of the authorities, precision in the formulation of the allegation is critical, as evidenced in the *Distillers* case where the plaintiff complained about negligent failure to warn rather than negligent manufacture. My argument is that the identification of the substance of the claim should take priority over consideration of how the claim might be expressed.

The way to avoid such arbitrariness is surely to identify where, in substance, the cause of action the plaintiff pleads arose, regardless of how that allegation might be expressed by the plaintiff's lawyers. Specifically then, if the substance of the allegation is a dangerous working environment in one jurisdiction, the plaintiff should not be able to avoid the possibly plaintiff-unfriendly law in that jurisdiction by framing the action instead as one of a lack of warning, wherever it might be that the failure to warn might be said to have occurred.⁵⁹

9. Conclusion

With respect, the dissenting view of Maxwell P in *Puttick* should be accepted, and the High Court should allow the appeal from the Victorian Court of Appeal decision. The substance of the plaintiff's cause of action occurred where the defendant failed to provide a safe system of work and where Mr Puttick was injured, Belgium and Malaysia. Such a conclusion would be consistent with the comments on this topic by several members of the High Court in other recent decisions in the private international law area. It would be consistent with the rationale for the High Court's adoption of the place of the wrong as the law of the cause in torts cases, and would find support in decisions of the New South Wales Court of Appeal, which were in the author's view correctly decided. It would minimise the opportunities that might otherwise be available for the defendant to 'shop around' for a defendant-friendly jurisdiction in which to engage workers, regardless of where the workers were destined to be working. It would minimise the chances that a plaintiff could, by framing their claim shrewdly, help shape the choice of law to be applied. It would also be consistent with trends in the United Kingdom and United States.

59 It is not entirely clear whether New Zealand's workplace safety legislation would apply to the situation of a New Zealand employer directing a New Zealand employee to visit factories in Belgium and Malaysia. Of course, there is no doubt that New Zealand can enact provisions with extra-territorial effect, see the *Statute of Westminster* 1931 (UK). The *Health and Safety in Employment Act* 1992 (NZ) does not state whether it is intended to be generally applied extra-territorially or not. The definition of 'place of work' includes a place under the control of the employer. It may thus be worth considering evidence in *Puttick* of the extent to which the New Zealand employer controls the relevant workplaces in Malaysia and Belgium. Section 17 requires employers to warn employees of hazards at places of work. This could conceivably include a work site in an overseas nation. It specifically includes workers on ships or aircraft where the employment agreement is governed by New Zealand law. This could be read as an intention that the law be applied extra-territorially, at least in that context. This legislation does not, however, provide for a civil right to compensation for work-related injuries; common law actions are indeed not available in New Zealand for work-related accidents.