THE TORT RULE OF PRIVATE INTERNATIONAL LAW— THE CHIMERA INCARNATE?

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I

One may read in classical mythology of a fanciful creature called the Chimera.[1] This fabled beast was reputed to have the head of a lion, the body of a goat and a serpent's tail. If one allows oneself the fancy of preceiving the rules and principles of the law as creatures dwelling in some metaphysical menagerie, could one but consider the tort rule of private international law as a chimera? For if the desire to give justice is a lion, endemic dissention and uncertainty a serpent, and a rule not sired by principle a goat, then surely the classic tort rule is a chimera.

The courts are the keepers of all the creatures, and they are also in many cases, such as the present, their creators. This essay shall look to both the creature and its creator and enquire: is the creature a chimera as one first perceives it, or is it only one's astigmatic vision that conjures forth that fabled beast?

The germ of the problem lies where it has been since 1870; with *Phillips* v. *Eyre*.[2] Of all the observations made in the case by Willes, J. as to the theoretical basis of the English private international law rule for tort, courts throughout the common law world have seized on but a few short lines. They are:

> 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.[3]

Courts warranting the highest respect and enjoying paramount authority have accepted these words as requiring, or so it seems, as much

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[1] The Chimera was vanquished by Bellerophon at the behest of King Iobades of the Lycians a few generations before the Trojan war.

[2] (1870) L.R. 6 Q.B. 1.

[3] *Id.* at 28-29.

respect and deference as the provisions of statutes; yet in none of the leading Anglo-Australian cases has the Court preceived the necessity of testing its devotion to the rule in *Phillips* v. *Eyre* by cold comparison with the other pronouncements of Willes, J.'s speech, let alone with principles of justice, logic or common sense.

The folly of looking to *Phillps* v. *Eyre* for a full statement of the rule is manifest; the defendant succeeded on a demurrer, so whatever statement of the rule which the Court might care to lay down did not have to be applied at a trial of the issues. A rule was laid down but none of its terms defined. One does not yet know for certain whether the rule is merely a statement of a hybrid cause of action;[4] whether the two conditions have a cognate effect or whether one is a condition precedent to the application of the other.[5] There have, of course, been judicial pronouncements which go part way to resolving these uncertainties; but development of the rule has reached a stage where a fundamental alteration to it will have radical consequences.[6] It is the burden of this essay to expound in brief the contents of the rule and examine them to ascertain the extent to which they are mutually consistent, precise, and in accordance with received precepts of justice, logic and common sense.

A critique of the tort rule needs must have a structure; the one that has been chosen reflects the development of the rule since its formulation. There shall be considered first the application of the *lex loci delicti*, then the application of the *lex fori*. Under the first head fall the topics:

(1) What is the *locus delicti*?

(2) When is an "act" "not justifiable"?

(3) The applicability of the rules of the *lex loci delicti* quantifying compensation.

(4) Pleading the foreign law.

Under the second head fall the topics:

(1) The *lex fori* as the *lex causae*.

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[4] By "hybrid cause of action" is meant a cause of action in which the elements which must be established by the plaintiff are drawn from two laws *viz*; the *lex fori* and the *lex loci delicti*. This view was placed before the New South Wales Court of Appeal by counsel for the defendant in *Kolsky* v. *Mayne Nickless* [1970] 3 N.S.W.R. 511 at 513 but rejected by the court.

[5] Both of the limbs of the rule in *Phillips* v. *Eyre* are expressed in identical form as a condition. The case itself does not make it clear how the so-called "conditions" operate. It is apparent from the various interpretations of the rule adopted by the Judges in the High Court in *Anderson* v. *Eric Anderson Radio and T.V. Pty. Limited* (1965) 114 C.L.R. 20 discussed *infra* 152*ff*. that each limb may have an application which differs from that of the other.

[6] The divergence of opinion in the speeches of the House of Lords decision of *Chaplin* v. *Boys* [1971] A.C. 356 is a measure of the difficulty of accommodating the traditional rule to modern perceptions of the requisites of a just rule of private international law for tort.

(2) The cognizance by the forum of the foreign element in the case.

(3) The applicability of statutes of the forum as part of the *lex causae*, with particular reference to statutes of non-sovereign legislatures.

(4) The extension of *Phillips* v. *Eyre* for actions upon statutes of the forum.

This essay does not in any detail deal with the celebrated decision in *Chaplin* v. *Boys*[7] nor the developments in the rule subsequent to that case.[8] The speeches of their Lordships in the House of Lords are so divergent that the case cannot be said to have a clear *ratio decidendi*.[9] The decision to deal with *Chaplin* v. *Boys* in passing only, does not evince a belief in the lack of importance of the speeches in the case: on the contrary, the developments in *Chaplin* v. *Boys* may well be germane to the reformation of the tort rule of private international law.

The reasons for confinement of this discussion to a critique of the classical rule are twofold: first, it is becoming apparent that any reform of the classic rule will probably consist only in the introduction of a "flexible" approach to that rule.[10] In the majority of cases the classic rule will be applied in its present form. It is submitted that the introduction of a flexible approach, if it comes to pass, will give no relief from the tedious imperative of clarifying the principal rule; on the contrary, it will be no less essential to know when a party may rely upon the rule and when he must plead circumstances to warrant departure from the rule. Secondly, there is a danger, as yet little perceived, in the notion of a flexible approach. In Australian jurisdictions at least the *lex fori* has an overwhelmingly preponderant bearing on the outcome of a case *vis-à-vis* the *lex loci delicti*.[11] It will in the course of this essay be submitted that this gross imbalance is unsound. But as long as it is retained there is an inherent danger that it will be much easier for a Court to be flexible and disregard the *lex loci delicti* in an appropriate case than it will be to disregard a rule of the *lex fori*. In the latter case, to achieve the same result of applying only the law to a particular issue which has an interest in the determination of the issue, the Court may have to disregard far more than in the reverse case. There may still be a case for reforming the classic rule, even accepting the advent of flexibility, to create an equilibrium for the operation of the *lex fori* and *lex loci delicti* which will enhance the prospects of a just and rational solution for cases of tort involving an extra-territorial element.

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[7] *Supra* n. 6.

[8] See the cases discussed in P. E. Nygh, "*Boys* v. *Chaplin* in the Antipodes" 4 *Univ. of Tas. Law Rev.* 161 and *Corcoran* v. *Corcoran* [1974] V.R. 164.

[9] See *Kolsky* v. *Mayne Nickless Limited*, *supra* n. 4 at 520.

[10] See *Chaplin* v. *Boys*, *supra* n. 6 at 378 *per* Lord Hodson and at 391 *per* Lord Wilberforce; *cf. Kolsky* v. *Mayne Nickless Limited*, *supra* n. 7 at 520, *Warren* v. *Warren* [1972] Qd. R. 386 at 392 *per* Matthews, J.; and *Corcoran* v. *Corcoran* [1974] V.R. 164 at 170 *per* Adams, J.

[11] See *infra* 169.

II
APPLICATION OF THE LEX LOCI DELICTI

1. What is the Locus Delicti?

As the present consideration is directed at the choice of law rule for tort as it is, not as it should be, it is appropriate at the outset to pass comment on an issue frequently dealt with in some depth by learned commentators.[12] This is the question of what is the *locus delicti*. Various theories are canvassed: is the *locus delicti* the place where the unlawful act was committed? Is it where the last element of the cause of action necessary to constitute the tort occurred? Or is it the place where the tort "in substance" occurred?

The possibility of obtaining different answers to the question: how is the *locus delicti* determined? arises in the following way. A plaintiff in a tort action has a right to compensation for injury done to him by the defendant if certain conditions are fulfilled. For instance, it is usually necessary to prove that the defendant committed at least one act which caused the plaintiff to suffer, but in the case of some torts establishment of a right to compensation might require proof of the occurrence of a number of events, whether related to the acts of the defendant or of the plaintiff. Further, it might be necessary to establish the state of mind or motivation of a party, or prove that the plaintiff suffered damage.[13] Whatever be the requirements in the case of a particular tort, all of the matters which are essential to found a suit are usually called elements in the cause of action. Not all of the elements in a cause of action may occur in the one jurisdiction: if it is necessary to choose one place for the *locus delicti*, then it is necessary to evolve a formula for ascertaining which of the elements is determinative of the *locus delicti*. It is this enquiry upon which the learned commentators have embarked.

Where, as is the case in Australia, the one law, the *lex fori*, is invariably the *lex causae*, then the ascertainment of the *locus delicti* is simplified because one law always specifies the elements in the cause of action. In jurisdictions where the *lex loci delicti* is the *lex causae* it is necessary to ascertain the *locus delicti* before the *lex causae*. The problem in the latter case is thus much more difficult than choosing the determinant element among easily ascertainable elements. How can one know which element determines the *locus delicti*, which determines the *lex causae*, when the *lex causae* determines what are the elements of the tort? A brief consideration of this conundrum is undertaken below, after an examination of the Australian position.

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[12] For example P. E. Nygh, *Conflicts of Law in Australia* (3rd ed. 1976) pp. 273-4; *Dicey and Morris on The Conflict of Laws* (9th ed. 1973) pp. 968-71; J. H. C. Morris, *The Conflict of Laws* (1971) pp. 285-6; R. H. Graveson, *The Conflict of Laws* (5th ed. 1965) pp. 507-9.

[13] For example the tort of deceit: see the elements of the tort listed *Salmond on Torts* (15th ed. 1969) p. 514.

It is submitted that, as in Australian jurisdictions the *lex fori* is the *lex causae*, the only possible operation of any foreign law is expressed in the following condition which must be satisfied before the plaintiff can succeed in the forum: "the *act* (of the defendant) must not have been justifiable by the law of the place where it was done".[14]

This enquiry limits the operation of foreign laws to that of the place where the wrongful act was done, the *locus actus*,[15] and makes it unnecessary to indulge in the further enquiries made by the learned commentators[16] as to which element or combination of elements is determinative of the *locus delicti*. The answer appears to be much more simple than certain commentators allow:[17] the *locus delicti* for the purposes of the private international law tort rule is the place where the wrongful act was done, that is, the *locus actus*. This view is impliedly supported by the decision of the High Court of Australia in *Koop* v. *Bebb*[18] (if not by a dictum in that case discussed below).[19]

The plaintiffs (who failed before Dean, J. in Victoria but succeeded on appeal) sued as children of a passenger in an automobile who died in Victoria as a result of the negligent driving of the defendant in New South Wales; the claim was brought under the Victorian adoption of Lord Campbell's Act.[20] New South Wales had legislation in similar terms.[21] The Court, in ascertaining the *lex loci delicti*, considered only where the defendant committed the negligent act. The Judges in the High Court took no point from the fact that the plaintiff's father died in Victoria, so that the damage suffered by the plaintiff occurred in Victoria, a different State from that in which the defendant acted. In a case in which the various alternative theories clearly were raised, the High Court did not discuss them; it merely applied the condition set out above in its terms.

It is true that in expounding the rule first propounded in *Phillips* v. *Eyre* the majority of the Judges in *Koop* v. *Bebb*[22] use the word "wrong" and not "act" when expressing the second condition, and that "wrong" is an ambiguous word which might mean "wrongful act" or "tort". But,

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[14] *Phillips* v. *Eyre, supra* n. 2 at 28-29 *per* Willes, J.

[15] Although this conclusion may have to be accepted as that dictated by authority, it may not be adequate where the tort is one of nonfeasance and not misfeasance.

[16] Of the commentators referred to *supra* n. 12 Professor Nygh is the only one who writes that the *locus actus* is the *locus delicti* and finds it unnecessary to consider the cases concerning the place of commission of a tort in relation to statutes which extend the jurisdiction of the courts of the forum.

[17] Particularly the learned editors of *Dicey and Morris, op. cit., supra* n. 12 and R. H. Graveson, *The Conflict of Laws op. cit., supra* n. 12.

[18] (1951) 84 C.L.R. 629.

[19] *Id.* at 642 *per* Dixon, Williams, Fullagar and Kitto, JJ.

[20] Wrongs Act, 1928 (Vic.) Part III.

[21] Compensation to Relatives Act, 1897 (N.S.W.).

[22] *Supra* n. 18 at 642 *per* Dixon, Williams, Fullagar and Kitto, JJ.

it is submitted, the actual decision in the case, discussed immediately above, and the fact that the Judges gave no reasons for departing from the wording chosen by Willes, J. gives good reason to argue that the expression adopted by the majority was adopted more for convenience by using "wrong" for both limbs, than to effect a substantive change in the law. In fact, the majority in *Koop* v. *Bebb*[23] refers to the *lex loci actus* in lieu of the *lex loci delicti.*

The prevailing rule in the United States of America where, until recently, the *lex loci delicti* was applied as *lex causae* exclusively,[24] gave rise to an ineluctable obligation on the part of the courts to embark upon the theoretical dispute referred to above. In the United States foreign law was not a mere condition: the foreign law was not chosen by reference to the place of occurrence of one of the elements of the cause of action under the *lex fori* as is the rule in Australian cases. There the foreign law actually determined the elements of the cause of action, and it was necessary to choose the foreign law first. When events occur outside of the forum which lead to injury being caused to the plaintiff, there will in many cases be no jurisdiction which immediately presents itself as the obvious choice as the *locus delicti*, for events which may be elements in a cause of action under the different laws of a number of jurisdictions may occur in many jurisdictions. In selecting the *lex causae* all the forum can do is to scan all relevant jurisdictions until it finds one or more where, according to the law of that jurisdiction, there is a completed tort; that is, all of the elements of the cause of action required by that jurisdiction may be proved. Unlike the Australian rule, where there is only one *lex causae* in every case, the *lex fori*, by the time of the trial in an American case there may be a number of jurisdictions according to whose laws a cause of action in tort may be proved. In such cases the forum must actually choose between competing *loci delicti*.[25]

2. When is an "act" not justifiable?

It appears that the only effect given to a foreign law by the tort rule as presently adopted lies in the requirement that the second condition laid down by Willes, J. in *Phillips* v. *Eyre* be satisfied. The formulation of a satisfactory definition of the requirements of the condition has hitherto proved an intractable problem. It is not yet certain whether the condition is satisfied by proof that the defendant's conduct is "not innocent" under the *lex loci delicti*; that is, that criminal liability alone,

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[23] *Id.* at 644.

[24] *Slater* v. *Mexican National Railroad Company* (1904) 194 U.S. 120 at 126 *per* Holmes, J.

[25] See Restatement of the Conflicts of Laws 2d §146 for the American position. Unless another State has a more significant relationship with the recurrence and the parties as to the particular issue involved, the local law of the State where the injury occurred will govern.

without any civil liability is sufficient.[26] It is not established whether it is necessary to show an indefeasible cause of action under the civil law of the *locus delicti*. Here, the plaintiff must be able to prove all the elements of his cause of action and there must be no defence available to the defendant.[27] There have even been, as shall be shown below, suggestions of an intermediate position requiring only proof by the plaintiff of a cause of action against the defendant under the *lex loci delicti* irrespective of whether there is a defence available to the defendant.[28]

The merits of the several positions outlined above have been considered at length by the Courts and it appears that that requiring civil liability under the *lex loci delicti* may be adopted.[29] The only one of the various interpretations of the second condition formulated by the courts which shall be discussed here is that propounded in *Hartley* v. *Venn*[30] by Kerr, J. (as he then was). Although, it is respectfully submitted, there are serious doctrinal inadequacies evident in the learned Judge's judgment, the case has escaped condemnation, and has been cited with approval by Professor Nygh.[31] The facts upon which Kerr, J. was called upon to deliberate were simple: in a sense they are the converse of those which gave rise to *Anderson* v. *Eric Anderson Radio & T.V. Pty. Limited*.[32] In *Anderson's Case* the plaintiff unsuccessfully sued in New South Wales (where contributory negligence was a complete bar) in respect of a negligent injury suffered in the Australian Capital Territory (where contributory negligence merely reduced the amount recoverable); although he might have obtained some damages in the Australian Capital Territory, his contributory negligence was fatal to his case in New South Wales. In *Hartley* v. *Venn* the plaintiff successfully sued the defendants for damages for negligence committed by the defendant in New South Wales. Kerr, J. found the plaintiff guilty of contributory negligence. At the time that the accident took place the law in both New South Wales and the Australian Capital Territory, which was the forum, was the same as it stood at the time of *Anderson's Case*.

The defendant in *Hartley* v. *Venn* could not argue that the first condition laid down by Willes, J. in *Phillips* v. *Eyre* was not satisfied.

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[26] *Machado* v. *Fontes* [1897] 2 Q.B. 231; *contra Varawa* v. *Howard Smith Co. Limited* (*No.* 2) [1910] V.L.R. 509 at 523 *per* Hodges, J. and at 526-33 *per* Cussen, J. See also *Koop* v. *Bebb*, *supra* n. 18 at 643 *per* Dixon, Williams, Fullagar and Kitto, JJ.

[27] This may be what was meant by the reference to "civil liability" by the majority in *Koop* v. *Bebb*, *supra* n. 18 at 643 although the issue must be regarded as uncertain: see *Hartley* v. *Venn* (1967) 10 F.L.R. 151.

[28] *Hartley* v. *Venn*, *supra* n. 27 at 155 *per* Kerr, J. See also Nygh, *op. cit.*, *supra* n. 12 at 264.

[29] This will depend on the interpretation which the High Court places on the expression "civil liability" as used in *Koop* v. *Bebb*, *supra* n. 18 at 643.

[30] *Supra* n. 27.

[31] Nygh, *op. cit.*, *supra* n. 12 p. 265.

[32] *Supra* n. 5.

The issue before the Court was whether Willes, J.'s second condition had been satisfied: was the defendant's act justifiable in New South Wales by virtue of the fact that the plaintiff's contributory negligence barred his action in New South Wales in this sense; *viz*, the defendants could plead a defence which would defeat the plaintiff, even if he established his cause of action?

In holding that the second condition was satisfied Kerr, J. drew support from two High Court decisions, *Koop* v. *Bebb* and *Anderson's Case*. By applying the principles which he deduced from these cases to the facts before him, Kerr, J. arrived at the conclusion that the second condition could be satisfied in at least one situation where there was neither criminal nor civil liability by the *lex loci delicti*.

The first proposition upon which Kerr, J. based his reasoning was gleaned from *Koop* v. *Bebb*. His Honour interpreted that case as requiring that the second condition would only be satisfied where "the conduct in question is such as to give rise to a civil liability under the law of New South Wales".[33] His Honour acknowledged that the High Court found it unnecessary to decide the point conclusively in *Koop* v. *Bebb*:

> The dictum in *Koop* v. *Bebb* was rather a prediction about what the law might turn out to be than a positive statement, even by way of dictum, of what it is . . . in these circumstances a judge of this Court must do his best with the traditional test, instructed by the judgments in *Anderson's* case.[34]

The requirement of "civil liability" would by itself tend to support the defendant's argument that the second condition was not satisfied because the plaintiff could not establish a cause of action which could not be defeated by the defendant. It is submitted that the unexpressed premise of Kerr, J.'s reasoning is an acceptance of the view that the statement made by the majority in its judgment is a test of "double actionability", that is, that "not justifiable" or "civil liability" in the second condition means the same as "actionable" in the first condition. This position is supported in Professor Nygh's writings[35] but, it is submitted finds no basis in the High Court decision.

The proof that Kerr, J.'s reasoning is based on the unexpressed premise lies in his next step: he ascertains the meaning of "actionability" as used in the first condition.[36] The final step is the application of this concept of "actionability" in the context of the second condition (even

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[33] *Koop* v. *Bebb, supra* n. 18 at 643.

[34] *Hartley* v. *Venn, supra* n. 27 at 155.

[35] Nygh, *op. cit., supra* n. 12 p. 265.

[36] The majority in *Koop* v. *Bebb, supra* n. 18 at 642 tentatively interprets the second condition as requiring some element of civil liability under the *lex loci delicti*; they do not equate or even compare the various expressions of the degree of culpability found in each condition. In *Anderson's Case, supra* n. 5 the High Court was called upon to consider the meaning of "actionable" in the first condition; no Judge in that court directed his attention in any explicit sense to the second condition.

though, of course, it is only stated in his Honour's judgment as requiring "civil liability"). Kerr, J.'s conclusion in this regard is as follows:

> *Anderson's* case leads to the conclusion that where negligence is committed in New South Wales and the defendant is sued in the Australian Capital Territory and contributory negligence of the plaintiff is proved, the second condition in *Phillips* v. *Eyre* as normally expressed, is satisfied, either because the conduct is actionable in New South Wales and hence not justifiable or because, on the view of Kitto, J. even though it is not actionable it is not justifiable.[37]

The bifurcated justification for Kerr, J.'s conclusion reflects the difference of opinion of the Judges in *Anderson's Case*.[38] Kerr, J. interprets the majority, Barwick, C.J., Taylor, Menzies, and Windeyer, JJ. as holding that, for the purposes of the first condition, the tort of negligence, the relevant wrong, was actionable in the forum even though there was a complete defence of contributory negligence: the plaintiff satisfied the first condition if he established his cause of action.[39]

The majority of the Judges in *Anderson's Case*[40] laid down that the term "actionable" which appears in the first condition has a meaning akin to "give rise to a cause of action".[41] The majority in *Koop* v. *Bebb*[42] used the term "civil liability" when interpreting the probable requirements of the second condition: they did not use the term "actionability". It is true that there are references in the cases to "actionable" in relation to the second condition[43] and even statements that that condition required

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[37] *Hartley* v. *Venn*, *supra* n. 27 at 154.

[38] *Supra* n. 5.

[39] Windeyer, J., in *Anderson's Case*, *supra* n. 5 at 41, speaks specifically of the plaintiff's cause of action under the *lex fori*: "That a plaintiff has a good cause of action in this sense does not mean that no matter exists that would answer or defeat it." His Honour appears to treat a plea of contributory negligence as in the nature of a plea of confession and avoidance. *Semble*, the establishment of the plea operates as a defence to a good cause of action; it does not destroy an element in the plaintiff's cause of action. The Chief Justice, *Anderson's Case*, *supra* n. 5 at 23 does not refer to the plaintiff's cause of action, but states only that: " . . . a negligent act, though damages for its consequences may in the result be denied because of the plaintiff's lack of care for his own safety, remains an actionable wrong . . .". The judgment of Taylor, J., *Anderson's Case*, *supra* n. 5 at 34-5 is to a similar effect to that of the Chief Justice.

[40] *Supra* n. 5 at 23 *per* Barwick, C.J., at 34-5 *per* Taylor, J., at 39 *per* Menzies, J. (Menzies, J. stated: ". . . it was necessary for the plaintiff to show that what was actionable in New South Wales was not justified by the law of the Australian Capital Territory. . .".) See especially at 41 *per* Windeyer, J.

[41] For definition see *Read* v. *Brown* (1888) 22 Q.B.D. 128 *per* Lord Esher, M.R. and see *infra* 158-160.

[42] *Supra* n. 18 at 643.

[43] *Anderson's Case*, *supra* n. 5 at 23 *per* Barwick, C.J. "A negligent act causing damage is not only not justifiable but actionable in the Australian Capital Territory"; the Chief Justice also used the term "justifiable" at 24. See also at 34-5 *per* Taylor, J.: ". . . the wrong alleged was of such a character that it would have been actionable if it had been committed in New South Wales and it was also actionable in the Australian Capital Territory". *Cf. Kemp* v. *Piper* [1971] S.A.S.R. 25 at 27 *per* Bray, C.J.

proof of a cause of action by the *lex loci delicti*.[44] Kerr, J. did not rely upon these dicta in his judgment nor does he even cite them. It is respectfully submitted that Kerr, J. should have looked more closely than he did at the requirements of each condition before holding that "actionability" was required in both cases and that the term has the same meaning in each case. The cases which give apparent support to his Honour's conclusion do not advert to the possibility that "actionable" used in the context of the first condition might receive the restricted interpretation placed upon it by the majority in *Anderson's Case*. The cases are not in themselves sufficient authority to establish the proposition that, provided the plaintiff has a cause of action under the *lex loci delicti*, he will pass the threshold of the second condition even if the defendant has an effective defence under that law.

It is submitted that the majority in *Anderson's Case* could lay down their interpretation of "actionable" in the first condition *because* they treated the conditions as threshold *and* they would apply the whole of the *lex fori* as the *lex causae* if the threshold was passed. It was not necessary to consider defences in relation to the first condition because, if they existed, they would, as part of the *lex causae*, ultimately lead to the defeat of the plaintiff.

Kitto, J., the other member of the High Court who considered this issue, reached the same conclusion as the other Judges but by different reasoning. The learned Judge's conclusions on the issue of the actionability of the plaintiff's case in the forum are set out clearly:

> The reason is that breach of a duty of care is not actionable unless it is a cause of injury to a person to whom the duty was owed, and a plaintiff's contributory negligence is considered to make the defendant's negligence not relevantly operative as a cause of the damage to which they both contributed. It is because this is the nature of actionable negligence that at common law contributory negligence might be set up under a plea of the general issue . . . .[45]

As one of the elements of the tort of negligence is proof that the defendant's act caused harm to the plaintiff, a successful plea of contributory negligence can be seen, in the opinion of Kitto, J., to attack

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[44] *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1882-83) 10 Q.B.D. 521 at 536-7 *per* Brett, L.J. In an *obiter dictum* commenting upon *The M. Moxham* (1876) 1 P.D. 107 his Lordship, in distinguishing that case from the case at bar held: "In that case, whatever the cause of action was, it arose entirely in Spain, and the action was an action in tort, and the well-known rule applies that for any tort committed in a foreign country within its own exclusive jurisdiction an action of tort cannot be maintained in this country unless the cause of action would be a cause of action in that country, and also would be a cause of action in this country". Even though Brett, L.J., as Lord Esher, M.R., decided *Read* v. *Brown, supra* n. 41, it is submitted that by "cause of action" his Lordship may have meant "right of action". In any case interpretation of the dictum involves difficulties as does the rule in *Phillips* v. *Eyre* itself.

[45] *Supra* n. 5 at 28.

directly the plaintiff's cause of action: the plaintiff will have failed to establish his cause of action. On Kitto, J.'s view the "defence" of contributory negligence is in a special position. The defence of *volenti non fit injuria* might have been regarded by Kitto, J. in the same manner as contributory negligence, as the former defence amounts to an assertion that the defendant's duty of care to the plaintiff has been suspended by the plaintiff's own action.[46] These so-called defences may be compared with such defences as self-defence, necessity and legal authority[47] which relieve the defendant from the obligation to compensate the plaintiff when the latter has established a cause of action; that is, he has proved all of the elements or ingredients of the tort.

Kerr, J. states that his conclusions are supported even by the judgment of Kitto, J. in *Anderson's Case*: stating that Kitto, J. held:

> . . . there was, nevertheless, a wrongful act, one that is "tortious", in the sense of being legally unjustifiable, because done in breach of a duty . . . . Although Kitto, J. used the language of "non-justifiability" he did not say in so many words that conduct of this kind would be sufficient to satisfy the condition in an appropriate case that the conduct must not be justifiable in the place where it is committed.[48]

Kerr, J. seems to be saying no more than that, although Kitto, J. did not agree with the majority's interpretation of "actionable" in the context of the first condition, this disagreement should not be taken as precluding Kitto, J.'s agreement to the application of the majority's interpretation of "actionable" to that term translated to the second condition. While this may be an acceptable proposition, it is not equivalent to the positive assertion that Kitto, J. held directly or otherwise, that the majority's meaning of "actionable" applied to the second condition. Kitto, J. should not have on this evidence imputed to him adherence to the "double-actionability" doctrine.

All Kitto, J. held in *Anderson's Case* was that the plaintiff's case was not actionable in the forum because the defendant's successful plea of contributory negligence defeated the plaintiff's cause of action under the *lex fori*. On this issue Kitto, J. appears to differ from the majority. Even if it is assumed that the majority's statements as to the operation of contributory negligence regarding "actionability" under the first condition apply in a congruent fashion to "non-justifiability" under the second condition, it is difficult to see why Kitto, J. would not have differed from the majority as to the interpretation of the second condition no less that he did for the first. It is at least arguable, contrary to the position taken by Kerr, J., that Kitto, J. would have held, assuming as Kerr, J. did in *Hartley* v. *Venn* that the requirements of both conditions

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[46] See J. G. Fleming, *The Law of Torts*, (4th ed. 1971) p. 239.

[47] Fleming, *id* pp. 81-3, 91-5 and 97-101.

[48] *Hartley* v. *Venn*, *supra* n. 27 at 153-4.

were the same that the second condition was *not* satisfied in *Hartley* v. *Venn* because by the law of New South Wales, the *locus delicti*, there was no civil liability nor even a cause of action which could be established against the defendant. It is respectfully submitted that Kerr, J. should have elected to follow either the majority or Kitto, J. Kerr, J. seems content to rest on the conclusion that either:

(a) (i) the majority view of "actionable" in *Anderson's Case* is correct *and* (ii) "actionable" in the first condition means the same as "not justifiable" in the second; or

(b) (i) Kitto, J.'s view that proof of contributory negligence defeats the plaintiff's cause of action so that the defendant's act is not actionable, is correct *and* (ii) his Honour's interpretation of the first condition does not amount to an interpretation of the second condition. Thus Kerr, J. contrives to look for support to Kitto, J.'s statement that

> . . . there is a wrongful act, one that is "tortious" in the sense of being legally unjustifiable because done in breach of a legal duty.[49]

Obviously, as the *lex loci delicti* on the principle established by the High Court, forms no part of the *lex causae*, if defences of the *lex loci delicti* are excluded from application in the second condition, the defendant will never be able to rely upon them;[50] this position compounds the dangers inherent in the classic rule that the defendant might be prevented from relying on rules of the *lex loci delicti* which both parties might fairly be expected to regard as having some influence on the outcome of the case. Nonetheless, Professor Nygh embraces the "double actionability" approach:

> It is submitted that the "double actionability" interpretation is a suitable compromise for those who want to avoid the anomaly of *Machado* v. *Fontes* and yet wish to maintain consistency with the clearly established principle that it is the *lex fori* which determines the substantive obligation of the parties.[51]

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[49] *Supra* n. 5 at 29. It is important to note that Kerr, J. did not justify the second step i.e. (ii) in relation to either of the alternatives. If (a) (ii) is substituted for (b) (ii) and vice versa, the result is obtained that the majority in *Anderson's Case* could not be held to have passed upon the second condition at all, and it would follow from Kitto, J.'s conclusions that the second condition was not satisfied in *Hartley* v. *Venn*, because an essential element of the plaintiff's cause of action under the *lex loci delicti* could not be established. It is submitted that the only proper approach is to apply (b) (ii) to both of (a) and (b). This would leave *Anderson's Case* completely inconclusive with respect to the second condition and it would be necessary to return to *Koop* v. *Bebb*, and consider anew the expression "civil liability" used by the majority in that case in respect of the second condition. See *Dicey and Morris op. cit., supra* n. 12 p. 961.

[50] Kerr, J. in *Hartley* v. *Venn, supra* n. 27 at 156 raises the possibility that defences of the *lex loci delicti* may be given some effect as part of the *lex causae*. This statement is completely inconsistent with the accepted Australian rule that the *lex fori* is exclusively the *lex causae*, although it presages in a way the speech of Lord Wilberforce in *Chaplin* v. *Boys, supra* n. 6 at 389. It is submitted that as long as the Australian doctrine prevails, the "double-actionability" approach is not appropriate.

[51] Nygh, *op. cit., supra* n. 12 p. 265.

Professor Nygh's support is thus based on conciliation between opposed factions and not logic or convenience: it ignores the genesis of "double actionability" which appears, at least in *Hartley* v. *Venn*, to be both spontaneous and unconscious. Further it disregards the following considerations regarding the concept of a cause of action. The operation of the *lex loci delicti* is not governed by any view of whether the plaintiff would win or lose under that law; rather it depends simply on the accident of how much the plaintiff is called upon to establish at the outset to allow him to succeed provided that the defendant does not act to defeat him.

It must be noted that "cause of action" is a concept of the forum; it appears to be the *ratio decidendi* of *Hartley* v. *Venn* that if the plaintiff can prove those facts which under the *lex loci delicti* are sufficient to sustain a civil right of action against the defendant (without looking to the issue of a possible defence), then the defendant's act will not be justifiable within the meaning of the second condition whether or not the defendant is able to establish facts which would afford him a good defence under the *lex loci delicti*. It is indeed strange that even this limited operation of the *lex loci delicti* is governed by a concept of the forum which arises for procedural purposes in the forum. For instance, if by the *lex loci delicti* it was part of the cause of action that the plaintiff prove that he had not been guilty of contributory negligence, then the plaintiff would not have succeeded in *Hartley* v. *Venn*, even given the minimal influence of the *lex loci delicti* permitted by Kerr, J. The inappropriate use of the concept of "cause of action" (as being only those elements in the whole case which the plaintiff must establish at the outset) has its most ludicrous result in extreme cases where the *lex loci delicti* requires only that the plaintiff prove that he has suffered damage caused by the act of the defendant. The cause of action would require proof only of injury and the second condition would be satisfied even where there was demonstrably no negligence or other culpable behaviour on the part of the defendant.

Professor Nygh[52] concludes his discussion of the "double actionability" interpretation of the rule in *Phillips* v. *Eyre* with the statement:

> It follows that the *lex loci delicti* can only be invoked as a defence if it justifies the defendant's act as the Jamaican Act of Indemnity did justify Governor Eyre's action in suppressing a rebellion on that Island or the plea of fair comment does in defamation: *Gorton* v. *Australian Broadcasting Commission*[53] . . . .

With respect to the Professor, it is submitted that he does not make it clear how the distinction between a defence which is a justification and one which is not, relates to the distinction between a plea which disproves an ingredient in the plaintiff's cause of action and one which raises a

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[52] *Id.* pp. 265-6.

[53] (1973) 22 F.L.R. 181.

separate legal principle which defeats the plaintiff. Kerr, J.'s decision in *Hartley* v. *Venn* is, as Professor Nygh agrees,[54] based on the second distinction mentioned above. *Phillips* v. *Eyre* perhaps can be reconciled with *Hartley* v. *Venn* on the basis that the Act of Indemnity and Oblivion in the former case extinguished the plaintiff's right of action. If the Act in a case similar to *Phillips* v. *Eyre* merely made it lawful to commit a particular trespass or false imprisonment, it appears that a plea by the defendant resting on the Act would be a defence which would, if Kerr, J. is correct, be excluded from consideration in relation to the issue of whether the second condition was satisfied. Professor Nygh refers to *Gorton's Case*[55] in which the plaintiff alleged that a defamatory broadcast had been published by the defendant in the Australian Capital Territory and each of the six states. Fox, J., sitting in the Supreme Court of the Australian Capital Territory, noted that both parties accepted that all defences available to the defendant in the place of publication should be available to the defendant in the forum. These defences would be in addition to those of the forum. His Honour held:

> It would seem to me to be absurd that a defendant, who does not select the forum, should be liable here when he could not be made liable in the State of publication.[56]

Fox, J. did not explain how this principle operates within the framework of the rule in *Phillips* v. *Eyre*. However, it appears that his Honour was prepared to give effect to all defences of the *lex loci delicti*, whether or not that defence went to an ingredient of the plaintiff's cause of action. Professor Nygh refers to the defence of fair comment as being a justification. One must note, whether or not this submission has any doctrinal significance, that proof that the defendant's publication was not fair comment is not an ingredient of the tort of defamation. The plaintiff may establish the necessary ingredients but nonetheless be defeated by the defence.[57] It is true that Fox, J. did not consider *Phillips* v. *Eyre* in detail, but it is strongly arguable that his Honour's decision is inconsistent with that of Kerr, J. in *Hartley* v. *Venn*. The latter case would require the defence of fair comment to be disregarded as it did not affect the plaintiff's cause of action.

If Professor Nygh has correctly analysed the "double-actionability" doctrine, then it appears to result in the second condition being satisfied:
(a) if the defendant's plea under the *lex loci delicti* disproves one or more elements in the plaintiff's cause of action under that law (whether or not the plea is of a "justification"); or
(b) if the defendant's plea, while it does not challenge any element in a cause of action, is nonetheless a "justification" and not a defence *simpliciter*.

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[54] Nygh, *op. cit., supra* n. 12 at 264.
[55] *Supra* n. 53.
[56] *Id.* at 183.
[57] Fleming, *op. cit., supra* n. 46 pp. 468-83.

It is respectfully submitted that if the acceptance of the "double-actionability" doctrine requires a concomitant acceptance of the twofold distinction alluded to above, then in the interests of simplicity and clarity the doctrine should not be adopted. The distinction between a plea challenging the cause of action and one which does not is a technical distinction which should have no influence on this aspect of private international law. Further, the distinction between "justifications" and "defences" (if it is not the same as that raised in *Anderson's Case*) is based on tenuous theoretical grounds.

3. Application of Rules of the Lex Loci Delicti which Quantify Compensation

On the present state of the authorities the only effect of the foreign law is to establish a condition precedent to the operation of the *lex fori*.[58] Not all of the rules of the *lex loci delicti* applicable to the circumstances are invoked in the establishment of the condition precedent. The confinement of the forum's regard to only limited aspects of the *lex loci delicti* is invariably justified only on the basis of a suggested interpretation of the second condition propounded by Willes, J. The Courts have not proffered any justification based on sound analysis of the *lex loci delicti*; no Court has revealed the reason why effect is given to certain aspects of the *lex loci delicti* but not others.

The so-called "double-actionability" doctrine has been considered in relation to *Hartley* v. *Venn*: this doctrine appears to discount certain defences available to the defendant under the *lex loci delicti*. Even if the second condition envisages full civil liability under the *lex loci delicti*, and thus gives effect to all defences available to the defendant, it takes no cognizance of rules of the *lex loci delicti* which quantify the amount of compensation to which the plaintiff is entitled.

In order to facilitate a consideration of the appropriateness of the alternative doctrines, discussed briefly above, the notion of an aspect of a right of action shall be invoked. However, it is not submitted that the concept of an aspect of a right of action has any basic juridical significance: in fact it will be submitted that a right of action is a unitary concept and its aspects merely dimensions of the one legal right. The various aspects of a right of action have evolved from the process by which legal rules are applied to determine the existence and nature of the right. It will be submitted that the various doctrines propounded in relation to the operation of the *lex loci delicti* focus on one aspect only of a right of action in tort, and, unaccountably, dismiss an equally significant aspect.

There are at least two aspects of all legal actions: the first is the type of remedy available; the second is the right of the plaintiff to have that remedy. The latter aspect is an absolute concept — the plaintiff has

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[58] See *infra* 170.

a right to the remedy or he has not. Examples of remedies which have only these two aspects are declarations, decrees of specific performance, orders for ejectment and injunctions.[59] However, some actions may contain another aspect, that of quantum. In the case of remedies such as damages at common law, or an account of profits in equity, the remedy itself, although essentially an indivisible concept has two aspects — does the plaintiff have an indefeasible right to the remedy? If so, what is the quantum or amount of the remedy?

There are perhaps sound reasons for holding that the forum cannot grant a remedy which of its nature is unavailable in the forum; in all probability the forum will not have the procedural mechanism for enforcing the remedy. On some views at least[60] the absolute aspect of whatever right of action the plaintiff may have under the *lex loci delicti* can be a complete determinant of the plaintiff's chance of success in the forum. Thus, on the "civil liability" by the *lex loci delicti* approach, the plaintiff must have under the law of the *locus delicti* an indefeasible, absolute right to some civil remedy before the threshold is passed. But not even the most generous to the defendant of the classical views gives any effect to the rules of the *lex loci delicti* governing quantum of the remedy. No reason has ever been given for the dichotomy of approach — a dichotomy based on severance into two aspects of a concept which is essentially inseverable, indivisible and unitary.

It is submitted that this rule is manifestly unsound; it is not supported by any consideration of justice, logic or common sense. It is, lamentably, an entrenched principle of our law.[61] Need one look further than the New South Wales case of *Kolsky* v. *Mayne Nickless Limited*[62] for evidence of the folly of this rule? The relevant facts of the case, which, it is respectfully submitted, was properly decided in accordance with the rule as presently established, were these: M. was killed in an accident in Victoria which was alleged to have been caused by the negligence of a servant of the defendant. The plaintiff, M.'s executor, alleged that both he and the persons for whom he sued were domiciled and resident in New South Wales. The defendant, on the other hand, alleged that it was a company incorporated, resident and carrying on business in Victoria, and that the vehicles involved in the collision were registered there. The deceased appeared to be domiciled in New South Wales but resident in Victoria. The defendant alleged that the deceased had contributed to his injury by his own negligence. The plaintiff's action was

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[59] It may be consistent with the approach adopted here to assert that orders for specific performance and an injunction themselves have a third aspect; that represented by the terms of the direction made to the defendant. The acceptance of this argument does not prejudice the conclusions reached in this essay as existence of a third aspect of such orders is irrelevant to the discussion.

[60] See Nygh, *op. cit., supra* n. 12 at 262-4.

[61] See *infra* 170.

[62] [1970] 3 N.S.W.R. 511.

brought under the Compensation to Relatives Act, 1897 (N.S.W.) section 10(4) of which provided that the deceased's contributory negligence should not lead to a reduction of the damages payable to the executor under the Act. Section 26(4) of the corresponding Victorian Act, the Wrongs Act 1958 (Vic.) Pt. III, provided for apportionment of responsibility and consequent reduction of damages.

The New South Wales Court of Appeal held, after deciding that earlier decisions of the High Court of Australia precluded it from following any aspect of *Chaplin* v. *Boys*, that the plaintiff would, if the relevant allegations were proved, be entitled to compensation equal to one hundred per cent of the damage suffered by the deceased's relatives. The two conditions in *Phillips* v. *Eyre* were clearly satisfied: contributory negligence was no defence at all in the forum and led only to a reduction of damage under the *lex loci delicti*; it was not a defence there and did not extinguish the plaintiff's cause of action. Thus, in a case where the defendant might have expected its servant's acts to be regulated by Victorian law, the quantitative aspect of the *lex loci delicti* relating to reduction in damages because of the contributory negligence of the deceased was given no effect.

The significance of this result for present purposes lies not only in the circumstance that the New South Wales Court did not apply the law in accordance with which the defendant might expect its servant to act. The interesting feature of the apportionment rule is that the defendant's responsibility for the damage may, in theory, range from one hundred per cent to nothing. Under Victorian law, the defendant's liability will increase in indirect proportion to the extent to which the deceased was the author of his own harm. The New South Wales private international law rule allows its Courts no flexibility to measure its remedy by reference to the Victorian remedy, so the New South Wales Court must continue to award one hundred per cent damages as the responsibility of the defendant slips down from twenty per cent to ten per cent to five per cent and so on. It is only when the defendant is relieved entirely from responsibility for the accident that the amount recoverable in the forum changes from one hundred per cent to nothing, because here the defendant has a complete defence and the second condition in *Phillips* v. *Eyre* is not satisfied. The significance of this argument lies in the assertion, demonstrated by the consideration of the foregoing case, that a right of action is a unitary concept; it is defined by reference to a number of aspects, but it is only intelligible if one always considers at once both its absolute and quantitative aspects. The cognizance which the tort rule has of one aspect, but not the other, foreshortens in an arbitrary manner the ability of the rule to encompass all of the rules of the *locus delicti* which should have a bearing on the determination of the case.

To recapitulate, it is by no means established that the operation of the *lex loci delicti* will be so wide as to require proof of an indefeasible cause of action under that law. But, it is submitted, the High Court in

Koop v. *Bebb* said much to lead us to expect at least proof of "civil liability" will be required. It has been the burden of this discussion of the proper ambit of the *lex loci delicti* to show that, once it is established that the absolute aspect of a right of action under the *lex loci delicti* must be proven, it is difficult to justify not giving a like effect to the quantitative aspects of the laws of the *locus delicti*. Or, conversely, the justification for giving effect to the absolute aspects of the *lex loci delicti* applies no less cogently to that law's quantitative aspects. The law should take heed of all those laws or none.

What would be the consequences of including in the general private international law rule for tort requirements founded on the quantitative aspects of the *lex loci delicti*; that is, those laws, not being strictly procedural, which quantify the amount of compensation due to the plaintiff? One is faced with a dilemma which is not apparent with the rule in its present form. At present only absolute aspects of the *lex loci delicti* are enforced: does the plaintiff have a right of action under that law or does he not? There is no problem if one requires only an indefeasible cause of action under both laws as a precondition to a successful suit by the plaintiff in the forum. The plaintiff will fail if there is no cause of action in both jurisdictions or in one but not the other. Whatever the permutations of the answer to the question: does the plaintiff have an indefeasible cause of action in this jurisdiction? the result will be, simply, that the plaintiff either does or does not have a cause of action in the forum. In looking to quantitative aspects of the *lex loci delicti* one first assumes that the plaintiff does have an indefeasible cause of action in both jurisdictions. The problem is that in applying two quantitative laws — one of the forum and one of the *locus delicti* — to the one cause of action, one may end up with two different quantities of compensation for the one cause of action. For example, in an action for damages for personal injury the heads of damage recoverable in the forum may not correspond to those in the *lex loci delicti*.

Thus, if the law takes heed of the quantitative rules of the *locus delicti*, the problem of evolving an appropriate tort rule ascends to a higher level of complexity. Must one always choose the most appropriate quantitative law and disregard the other? Should one apply the rules cumulatively one after the other? Or should one give the greater or lesser quantum? That this is not a purely fanciful problem may be seen if one considers the speech of Lord Willberforce in *Chaplin* v. *Boys*.[63] His Lordship quite specifically states that in some cases it may be necessary to give effect to the quantitative laws of the *locus delicti*. It does not follow from the statement that the *lex loci delicti* should be applied in some cases that in those cases the *lex fori* will never apply. Both laws may have a sufficient interest for both to be applied. For example, consider the case where the defendant injures the plaintiff in such a

[63] *Supra* n. 6 at 389.

fashion as to enable the plaintiff to establish an indefeasible cause of action by the *lex fori* and *lex loci delicti*. The plaintiff may have contributed to his own harm by his own negligence equally with that of the defendant. By a rule of the forum damages in such cases are apportioned by reference to the respective responsibility of each party. The *lex loci delicti* allows, say, damages under all the heads recognised by the forum except that of pain and suffering. In a case where it is necessary to apply the *lex loci delicti* but there is no sufficient reason to disregard the *lex fori,* does one first disregard the pain and suffering caused to the plaintiff and then reduce his damages by fifty percent as a result of his own negligence? Or does one allow him the greater or lesser amount of the damages he would have received under one of the laws?

It is submitted that, while the absolute aspects of the laws of both jurisdictions may be applied cumulatively, the quantitative laws should not.[64] The plaintiff should as a general rule be awarded the lesser of the damages he would receive under the two laws. If a flexible approach is adopted[65] then if the application of one of the laws is not appropriate, the plaintiff will receive the full compensation awarded by the other. The result of the general rule suggested is that the plaintiff will never receive more than he would receive under the law in its present form by application of the *lex fori* as sole *lex causae*. But the defendant will receive the benefit of rules of the *locus delicti* which reduce the plaintiff's compensation below that awarded by the *lex fori*. The parties may be protected by a suitably flexible application of the rule, which in the form suggested, will give effect to the following two propositions which, it is submitted, should govern the general case: (a) the law most interested in the determination of the substantive issues will in general be the *lex loci delicti*;[66] (b) the forum should not be obliged without good reason to award damages for a foreign tort according to a foreign rule where equivalent damages or more would not be awarded for a like tort committed within the forum. The latter principle may be justified on the basis of the punitive or quasi-penal nature of civil tort rules.

4. Pleading the Foreign Law

One aspect of the classic private international law rule for tort has

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[64] This is largely a matter of opinion. The principal determinant of the conclusion reached is the consideration that there is no reason why the plaintiff should be awarded less than he would receive under either the *lex fori* or the *lex loci delicti*. Neither jurisdiction will have an interest in achieving this result. A discussion of this kind is relevant only once it is accepted that quantitative aspects of the *lex loci delicti* require some application.

[65] The likelihood of such an approach being adopted is, of course, very problematical in Australia at the present time.

[66] This statement is not a reversion to the now discredited *obligatio* theory: See *Anderson's Case, supra* n. 5 at 45 *per* Windeyer, J. There is no doubt that any obligation imposed upon the defendant is created by the *lex fori*; but this does not preclude the formulation of a tort rule by which the incidents of the obligation created by the *lex fori* is determined by another law; *cf.* the law relating to the proper law of a contract.

now been considered: the examination has been directed to the substantive content of the rule. It will be asserted in the third part of this essay that the inflexible adoption of the *lex fori* as the law governing the case may work great injustice on the defendant. There is, however, a procedural aspect of the tort rule which also appears to work to the disadvantage of the defendant; this is the rule governing the pleadings in a tort case with a foreign element, and is dealt with here as it relates to a disadvantage suffered by the defendant in having to prove the foreign law.

The only case of which the writer is aware which deals with the doctrinal basis of the pleading rule is *Kemp* v. *Piper*[67] decided by the Full Court of the Supreme Court of South Australia: the examination of the rule is to be found in the judgment of Bray, C.J.[68] Before noting the course of the pleadings in *Scott* v. *Lord Seymour*,[69] *Phillips* v. *Eyre*, *Machado* v. *Fontes*,[70] and *Koop* v. *Bebb* the Chief Justice states:

> But as a matter of pleading it seems to me that it has always been regarded as sufficient to allege the cause of action in the terms of the *lex fori* and to leave it to the defendant to plead the *lex loci* when he relies upon it.[71]

The Chief Justice offers as an explanation for this rule the following proposition:

> Perhaps the explanation of this lies in the presumption that the foreign law is the same as the *lex fori* until the contrary is proved: see *Halsbury* 3rd ed. vol. 7, p. 176 par. 315; *Dicey and Morris, Conflict of Laws* 8th ed. (1967) p. 945. Hence it may be that the reason why it is unnecessary to plead actionability or lack of justification by the *lex loci* is that there would be a prima-facie presumption of this when there was actionability by the *lex fori*.[72]

The Chief Justice went on to hold that the rule as to pleading which he had enunciated applied notwithstanding that the *lex loci delicti* was the law of another state or territory of Australia and the Courts of the forum have judicial notice of the laws of that State and territory.[73]

A perusal of the passage in *Dicey and Morris* cited by the Chief Justice confirms that in the editors' view:

> A party who relies on foreign law must plead, and, if necessary, prove it. In the absence of an allegation that foreign law is applicable, the court will apply [the *lex fori*]. It follows that a plaintiff suing for damages by reason of a tort committed abroad can rely on [the *lex fori*], and leave it to the defendant to allege that foreign law applies

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[67] [1971] S.A.S.R. 25.
[68] *Id.* at 27.
[69] (1862) 1 H. & C. 219.
[70] [1897] 2 Q.B. 231.
[71] *Supra* n. 67 at 27.
[72] *Id.* at 28.
[73] *Ibid.*

> and to prove how it differs to his advantage from [the *lex fori*] . . . it is then for the defendant, as the party hoping to gain from the application of foreign law, to make the point that *the act was justifiable according to the lex loci delicti.*[74]

Moreover, the learned editors specifically state[75] their view that "great difficulties may arise from the adoption of the view that the plaintiff has the burden of proof". It must be noted that *Dicey and Morris* goes beyond simply requiring that the defendant rebut the presumption that the *lex loci delicti* is the same as the *lex fori* in all material respects: he must go further to establish affirmatively that his act was justifiable under the *lex loci delicti.*

If the plaintiff pleads that all the material facts occurred within the forum, and this plea is not traversed by the defendant then the forum will apply the local law of the forum to the case exclusively; that is, without regard to the private international law of the *lex fori.* However, if the plaintiff pleads the facts accurately it will appear from the face of his statement of claim (as it did from the counts in the plaintiff's declaration in *Phillips* v. *Eyre* itself) that the tort was committed out of the forum. The *lex fori*, of course, will again govern the determination of the case but, unlike a purely local action, the private international law rules of the forum will also apply. On the classical view, the forum will not apply the local *lex fori* to the case unless the conditions established in *Phillips* v. *Eyre* are satisfied; that is:

> . . . in order to found a suit in [the forum] for *a wrong alleged to have been committed abroad*, two conditions must be fulfilled.[76]

There is no express suggestion in these words that the plaintiff is automatically entitled to relief *unless* the defendant can prove that the conditions are not fulfilled. While the passage may, perhaps, be neutrally worded, it is submitted that it envisages that the plaintiff establish the conditions. Certainly there has been no explicit statement in the cases that, as a matter of law, the defendant is obliged to prove the conditions do not obtain. On the contrary, it is suggested by Bray, C.J. in *Kemp* v. *Piper* that the plaintiff is relieved of his burden in relation to the second condition by the happy coincidence that it is the defendant who will wish to rely on the foreign law, and there is a presumption in the plaintiff's favour.

The source of this boon to the plaintiff is said to be as follows: although the plaintiff is obliged to establish the second condition in *Phillips* v. *Eyre* it is presumed that the *lex loci delicti* is in all material respects the same as the *lex fori.* The plaintiff cannot avoid proving his

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[74] *Dicey and Morris on the Conflict of Laws* (8th ed. 1967) p. 945 (italics supplied). In the latest edition, *op. cit., supra* n. 12 p. 968, the learned editors have replaced "not justifiable" in the last line of the quotation by "not actionable".

[75] *Id.* p. 947, this statement is not included in the 9th edition.

[76] *Supra* n. 2 at 28 (italics supplied).

cause of action by the *lex fori*, but, if the defendant is unable to rebut the presumption as to the content of the *lex loci delicti*, in satisfying the first condition the plaintiff will prove facts sufficient to satisfy the second condition — that relating to the *lex loci delicti*.

However, one must be careful here to distinguish between:
(a) The terms of the *lex loci delicti* (which are determined in the forum as an issue of fact) relevant to the facts which occurred; and
(b) The non-justifiability of the defendant's act by the law of the place where it was done.
Although the latter may be a question of law, it is determined by applying the legal rules of the *locus delicti* — determined as a matter of fact — to the facts of the case. To establish alternative (b) involves not only proof of alternative (a), but also, perhaps, new facts which are not relevant to the determination of whether the first condition in *Phillips* v. *Eyre* is satisfied. It is said that the presumption which favours the plaintiff in relation to the proof of (a) makes it unnecessary for the plaintiff to plead the extra facts which may be necessary to establish (b). But surely the presumption itself only obliges the defendant to prove that the *lex loci delicti* is different to the *lex fori*. If the defendant establishes that the *lex loci delicti* is different, the facts pleaded by the plaintiff to establish his case under the *lex fori* might be equivocal as to whether there existed the appropriate degree of culpability on the part of the defendant according to the *lex loci delicti*.

Consider the following examples. Under the *lex fori* in an action for tort, contributory negligence by the plaintiff may be no defence at all: but it may be a complete defence under the *lex loci delicti*. In pleading his case as required by the *lex fori* — and relying on the presumption that the two laws are the same — the plaintiff will allege nothing in relation to contributory negligence. However, if the defendant proves the true content of the *lex loci delicti*, there is a possibility (depending on the meaning of the second condition which is adopted) that the second condition has not been satisfied; it will depend on whether or not there was contributory negligence. It might be considered fair that the defendant be obliged to plead and prove contributory negligence, as this is usually thought of as a defence, but consider the following illustration where the fact left unproven would normally be part of the plaintiff's cause of action. An action for defamation might lie in the forum without proof of special damage suffered by the plaintiff: however, special damage may be an element of the cause of action under the *lex loci delicti*. Once the defendant has proved that the *lex loci delicti* requires proof of special damage, must he then go on to *prove that the plaintiff did not suffer special damage*? This would surely be a Herculean task, although the editors of *Dicey and Morris*[77] would willingly commit him to it.

[77] *Op. cit., supra* n. 74 pp. 945-6. The learned editors do not dissent from this proposition in the latest edition, *op. cit., supra* n. 12, but they realistically note that it is the practice in England for the plaintiff to allege in his statement of claim that the defendant's act was wrongful by the *lex loci delicti*.

It is submitted that there is nothing in the presumption that the foreign law is the same as the *lex fori* that compels the conclusion, in the face of the expression of the rule in *Phillips* v. *Eyre*, that the defendant is obliged to prove, not only the content of the foreign law, but also that its application to the facts results in failure to satisfy the second condition. If the plaintiff does not plead the foreign law and all appropriate facts in his statement of claim, and the defendant pleads that the two laws are different in such a way that, on the facts otherwise pleaded, the question whether the second condition is satisfied is left open, then the plaintiff should be obliged in his reply either to traverse the defendant's allegations as to the foreign law or to admit them and plead new facts to demonstrate that the second condition is nonetheless fulfilled.

But will this not be unfair to the plaintiff? May he be called upon to demonstrate that all possible defences available to the defendant under the *lex loci delicti* do not avail the defendant in the circumstances of the case? It is not possible at this stage in the development of the private international law tort rule to answer this question. As yet it is uncertain whether the second condition is satisfied by the existence of criminal liability alone by the *lex loci delicti*; whether the plaintiff need establish only a cause of action under the civil law of the *lex loci delicti*; or whether the plaintiff must establish that there was a cause of action which could not be defeated by any defence available to the defendant.[78] If criminal liability is sufficient, it would be strange if the defendant was called upon to establish his innocence by the *lex loci delicti*, and perhaps no less strange if the forum presumed the criminal law of the *lex loci delicti* to be the same as that of the forum. If, on the other hand, a civil cause of action alone need be established, surely it is no less harsh to require the defendant to rebut all possible causes of action than it is to require the plaintiff to avoid all possible defences. It is submitted that the plaintiff should carry the burden of establishing his cause of action under the *lex loci delicti*. And if the requirements of the second condition extend to insisting that there be an indefeasible right of action, by the *lex loci delicti*, then the plaintiff's obligation to establish his cause of action under that law should not vary. But the defendant should be called upon to prove any defences available to him, together with the facts necessary to support the defence. It must always be remembered that the defendant will carry the perhaps unwarranted burden of having to prove the terms of the foreign law. Further, to avoid any requirement of the defendant that he defeat all possible causes of action in the *locus delicti* in advance, it would always be necessary to allow the defendant to make a suitable response to the plaintiff's reply.

There is a further point raised by Bray, C.J. in *Kemp* v. *Piper* that repays consideration here. The Chief Justice said:

It is, of course, true that it is our duty to take judicial notice of

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[78] See *Nygh, op. cit., supra* n. 12 pp. 261-6.

> the law of the other States of the Commonwealth, including the law of Victoria, and including presumably what that law does not contain as well as what it does contain: *Koop* v. *Bebb* at pp. 644-645. But this does not in my view alter the rules of pleading so as to require the statement of claim in the case of an action founded on a foreign tort, even a tort committed in another Australian State, to allege the provisions of the *lex loci* or the rules of private international law.[79]

With respect to the Chief Justice, this statement of principle is no doubt correct, but it must be accepted on the following basis: first, the fact that the Court has judicial notice of the foreign law relieves the defendant from the burden of rebutting the presumption as to the coincidence of the two laws. Secondly, the fact of judicial notice of the *lex loci delicti,* does not remove from the plaintiff (or the defendant) the burden of proving sufficient facts to show that the second condition is (or is not) satisfied as the case may be. Finally, it may be noted that a party is never required to plead principles of law: insofar as the *lex loci delicti* is a matter of fact the defendant must make the necessary pleadings in the area of the operation of the presumption, but, where the court has judicial notice of the *lex loci delicti,* as stated by Bray, C.J., there is no need for either party to plead the foreign law. But this does not relieve the parties from the need to prove the other material facts relevant to the operation of the foreign law. In *Koop* v. *Bebb* itself, because the *lex fori* and *lex loci delicti* were in all material respects the same, there was no necessity to prove special facts relevant to the operation of the *lex loci delicti.* In *Kemp* v. *Piper* the *lex fori* was not the same as the *lex loci delicti,* but the facts pleaded to establish that the first condition in *Phillips* v. *Eyre* was satisfied were themselves sufficient to show that, under the classical rule, the second condition was not satisfied: it was not necessary for the defendant to adduce evidence of further facts.

Finally, it may be noted in passing that the *Phillips* v. *Eyre* conditions are sometimes expressed to be "jurisdictional". It is obvious that they cannot truly go to the Court's jurisdiction, otherwise, the Court could not allow the parties to connive either at presenting the case as having arisen entirely within the forum or at allowing the Court to presume that the *lex fori* and the *lex loci delicti* are the same, when the parties know that the truth is otherwise. The conditions are in fact part of the substantive law of the forum.

III

APPLICATION OF THE LEX FORI

1. The First Condition in Phillips v. Eyre

It has been shown that in the classic exposition of the ambit of the *lex loci delicti,* the second condition in *Phillips* v. *Eyre* is said to define and delimit the operation of that law: the second condition, though

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[79] *Supra* n. 67 at 28.

lamentably ill-defined, is truly a threshold over which the plaintiff must pass.[80] The first condition, that "the wrong be of such a character that it would have been actionable, if it had been committed in the forum"[81] is expressed no less like a simple threshold condition than the second condition: but in Australia we have high authority that the first condition is either a choice of law rule — by which the *lex fori* is chosen as the *lex causae*[82] — or though a threshold condition itself, its application is always preliminary to the application of the *lex fori* as *lex causae*[83] by a separate rule not enunciated in *Phillips* v. *Eyre*. In that case, of course, the plaintiff could not satisfy the second condition so that the demurrer by the defendant to the plaintiff's pleadings succeeded and the Court of Exchequer Chamber was not called on to pass upon the application of the *lex causae* at a trial of the issues between the parties to achieve a verdict. *Phillips* v. *Eyre* thus left a hiatus which the High Court of Australia has filled.[84]

One must consider the classic rule on the basis that it is well established that the *lex fori* is the *lex causae* in cases arising out of the jurisdiction. Although fully aware of the authority with which this proposition has been laid down, one may be forgiven for making a number of comments in passing on the justification for the rule.

The author is not aware of any case in which there has been a concerted attempt to justify the rule that the forum will award a remedy for a tort committed elsewhere according to its own tort rules, except, perhaps, the cases which consider the application of the English rule to a defendant who is a high official in an English colony,[85] or to suits between two Englishmen.[86] There are, nonetheless, a number of statements in the cases which warrant the conclusion that the rule is based on precedent.[87]

The rule appears to have been fairly well established in England by the time of *The Halley*:[88] it may be surmised that the rule sprang from an ancient disinclination to apply any foreign law in an English court and a firm conviction that English law was of a superior nature to all others.

While there may indeed be *some* cases where the *lex fori* is the

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[80] *Supra*

[81] *Phillips* v. *Eyre*, *supra* n. 2 at 28-29.

[82] *Anderson's Case*, *supra* n. 5. See also *Chaplin* v. *Boys*, *supra* n. 6 at 386 *per* Lord Wilberforce.

[83] *Anderson's Case*, *supra* n. 5 at 41 *per* Windeyer, J.

[84] *Koop* v. *Bebb*, *supra* n. 18 and *Anderson's Case*, *supra* n. 5.

[85] For example see the celebrated cases of *Mostyn* v. *Fabrigas* (1774) 1 Cowp. 161; *Wey* v. *Rally*, 6 Mod. 194.

[86] *Scott* v. *Lord Seymour*, *supra* n. 69 at 234 *per* Wightman, J.; *Wey* v. *Rally* *supra* n. 85.

[87] For example *Koop v. Bebb*, *supra* n. 24 at 644 *per* Dixon, Williams, Fullagar and Kitto, JJ.; *contra* McTiernan, J. at 649; *Anderson's Case*, *supra* n. 8 at 41-46 *per* Windeyer, J.

[88] (1868) L.R. 2 P.C. 193.

appropriate law, it is surely strange, and even presumptuous, that the forum should apply its own law in *all* cases. The choice of the *lex fori* as the *lex causae* has this result. One of the basic rules of our legal system is that every person who appears before the courts is conclusively presumed to know the law: this rule only extends to the *lex fori*. Not even the Judges are presumed to know foreign law; in fact such laws must be proved in each case, although there is a presumption that they are the same as the *lex fori*. Just as subjects of the forum are not presumed to know the content of foreign laws, the subjects of foreign States should not be presumed to know the content of the *lex fori*. In applying the *lex fori* as the *lex causae* in all cases, the forum will often apply a law to the acts of a person who did not know, nor could be presumed to know, the rules of that law.

Every person throughout the world may one day be made subject to the laws of the forum; if he contemplates the possibility of ever entering the forum, then he would be wise to govern his actions by the tort rules of the forum. But he must not only comply with the forum's laws. The choice of law rule is a common law rule, so it applies far beyond the limits of one forum and extends to each common law jurisdiction. Each common law jurisdiction may, however, have different tort rules. The inevitable consequence of applying the *lex fori* to all cases is that every person in the world — and all persons are potential defendants — must act in accordance with the laws of all common law jurisdictions. This task is impossible and its imposition on the defendant manifestly unjust.

Can the inequity of this rule be alleviated by a resort to the public policy of the forum? It has been said that where the plaintiff sues in a jurisdiction whose laws will afford him a more advantageous remedy than those of the *locus delicti* he is "forum shopping", and that where a plaintiff indulges in this reprehensible practice, the forum may invoke public policy to decline to try the case instigated by the plaintiff.[89] The difficulty with this approach is that it is an attempt to mitigate an injustice connected with the expectations of the defendant by manipulating the behaviour of the plaintiff; it is not designed to ensure that the defendant's just expectations are fulfilled. It is not difficult to imagine a situation where the defendant injures the plaintiff while the plaintiff is visiting or otherwise residing in the defendant's usual residence. Not only will the *locus delicti* have a great interest in regulating the defendant's acts, but the defendant, at least, will look to that law to determine his obligations to the plaintiff. The plaintiff may return to his home in the forum, or perhaps migrate there to settle permanently. If the plaintiff is then able to invoke the jurisdiction of the forum over the person of the defendant, it could hardly be said that he will be forum shopping

[89] *Chaplin* v. *Boys, supra* n. 6, at 383 *per* Lord Donovan and at 406 *per* Lord Pearson.

in all cases where the *lex fori* is more advantageous to the plaintiff than the *lex loci delicti*. The plaintiff may have good reason to sue in the forum and it may even be highly impracticable for him to sue in the *locus delicti*. The rule based on public policy is simply not adaptable enough in itself to enable the Court to do justice in this situation; the Court is obliged to send the plaintiff away, so doing an injustice to him, or try the case, to a greater or lesser extent ignoring the *lex loci delicti* — especially those rules which quantify compensation — and do an injustice to the defendant.

2. The Application of the Lex Fori — Cognizance of the Foreign Element

There is a further aspect of the rule that, the threshold passed, the *lex fori* in its entirety is applied as the *lex causae*, which must be considered. It arises from the following statement in the judgment of Windeyer, J. in *Anderson's Case*:

> But when the two conditions are fulfilled — when the act is wrongful by the law of the forum and in the place where it occurred — what then? The case is one that the court will entertain, but by what law is it to judge it? *Is it to deal with it as if everything that in fact happened outside the country of the forum had happened within it?* Or is it, in determining whether the defendant is liable and what is the measure of his liability, to have regard to the law of the place where those things actually happened?[90]

His Honour appears to admit of two possibilities:—

(a) the forum pretends that all of the facts happened in the forum and applies the *lex fori* as the *lex causae*; or

(b) the forum applies the *lex loci delicti* to the facts as they occurred in the *locus delicti*.

There is, it is submitted, a third possibility which is not explicitly stated by Windeyer, J., namely, that the forum applies the tort rule of the *lex fori* to the facts, cognizant of the circumstance that they have taken place in the *locus delicti*. Neither Barwick, C.J., Taylor, J. nor Menzies, J., who support Windeyer, J.'s view of the operation of the *Phillips* v. *Eyre* conditions, passes upon the actual mode of application of the *lex fori* in the same explicit sense as does Windeyer, J.

Windeyer, J. in succeeding passages of his judgment held that on the balance of authority the *lex fori* is the *lex causae*. This may give credence to the conclusion that his Honour adopted proposition (a) above. What does this proposition, literally interpreted, mean? It is submitted that it requires a notional translocation of all of the facts relevant to the case before the Court to the forum. Moreover, it will often be found that, because of idiosyncrasies of the general legal system of the forum and *locus delicti*, some facts translocated from one jurisdiction to the other will have to be transformed in the following sense. Particular

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[90] *Supra* n. 5 at 41 (italics supplied).

local rules of the *lex loci delicti* may require behaviour on the part of the defendant which, if not carried out, is evidence that the defendant has broken a common law duty to the plaintiff recognised by the forum. However, the corresponding local rule of the *lex fori* might prescribe the very conduct which is prohibited by the *lex loci delicti*: obvious examples include driving on different sides of the road and different speed limits in the two jurisdictions.

Assume that for a particular condition of road the *lex loci delicti* lays down a speed limit of 40 K.M. per hour and for a similar road the limit in the forum is 60 K.M. per hour. The accident for which the plaintiff sues in the forum occurred when the defendant was driving on such a road in the *locus delicti* at 55 K.M. per hour. If all of the relevant facts were translocated to the forum, the court would be in a quandary as to whether or not the speed at which the defendant was travelling should in some fashion be transformed to give it a value above that of the speed limit prescribed by the *lex fori*. This question will, of course, only be relevant if in the forum it is considered that the defendant's exceeding the speed limit is evidence of his negligence. The second view, that requiring application of the *lex loci delicti* by the forum to facts occurring in the *locus delicti*, and discarded by Windeyer, J., would not require either transformation or translocation of the facts; nor would either process be required if the tort rules of the forum were selected only to apply to the facts as they occurred in the *locus delicti*.

It is respectfully submitted that in elucidating two of the three propositions set out above and, apparently, choosing the first, Windeyer, J. whilst not doing so expressly must be taken impliedly to have accepted the third. First, it may be commented that in no case has a judge appeared overtly to have carried out the process of translocation and transformation considered above. Secondly, we may consider the following potential effect of a literal application of the first proposition (*viz*, application of the *lex fori* to the facts as if they had occurred in the forum). If any statute of the forum explicitly creates a rule which applies only to acts committed in the forum,[91] then the translocation of all relevant facts from the *locus delicti* to the forum will bring the facts within the ambit of the statute and will leave the court with a conundrum as to the effect of the statute.

In any case the first alternative is not supported by authority; on the contrary there is high authority which supports the third position; that not alluded to by Windeyer, J. In the celebrated case of *Mostyn* v. *Fabrigas*[92] Lord Mansfield, C.J. explicitly rejected the proposition that in considering the plaintiff's allegation that the defendant's acts were committed in, say, Cheapside, the Court was bound to assume that the acts were in fact committed there when such an assumption would be

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[91] For an example see *infra* 181-83.

[92] *Supra* n. 85 at 179.

contrary to the facts: any statement in the pleadings that the facts occurred in the forum was made only to give the court jurisdiction to raise a jury to try the case locally.

Secondly, the case upon which Willes, J. bases his first condition *viz. The Halley*[93] itself refutes the first alternative. Selwyn, L.J. in delivering the judgment of the Judicial Committee of the Privy Council laid down:

> And as in the case of a collision on an ordinary road in a Foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English Court admits the proof of the Foreign law as part of the circumstances attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established . . . .[94]

Thus, it is submitted, the expression in Willes, J.'s first condition that "the wrong must be of such a character that it would have been actionable if committed in the forum", means no more than that the character of facts committed in the *locus delicti* is such that they constitute a tort under a rule of the *lex fori*. It is acknowledged that this position appears to vary the sense of the words actually used by Willes, J. But, it is submitted, it is necessary, especially if the first condition is held to be a choice of law rule.

How can laws of the forum apply to foreign facts if there is not first made a translocation and transformation of those facts to the forum? It is submitted that in the case at least of common law rules of the forum the reason lies in their nature: For those rules have no spatial qualification. The various duties of care may not properly be rendered: A has a duty to do (or not to do) act B *in the forum*. The rules may properly be expressed without the spatial qualification. Why is it then that the forum's common law rules do not apply invariably to all acts wherever committed throughout the world? In practice the rules will in many cases not be applicable to acts committed out of the forum because the jurisdiction rules of the forum, dependent as they are on presence within the forum, submission, or some connection between the forum and the circumstances of the case, preclude suits in the majority of cases. The jurisdiction rules are a very real practical qualification to the spatial universality of common law tort rules.

On their face the common law tort rules speak universally. The legal restriction of the spatial reach of the forum's tort laws does not lie in implied qualifications to the rules themselves but in other rules

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[93] *Supra* n. 88.

[94] *Id.* at 203-204.

that are no less a part of the *lex fori*; they are the private international law rules. These rules, it is submitted, regulate the application of the forum's rules to foreign events in this way; they restrict the operation of rules which on their face have universal application by giving effect to foreign rules instead of the forum's rules. One does not start with local rules limited to a local operation which are then extended by the private international law rules to a foreign operation; rather the reverse is the case. This is supported by the fact that if the parties plead foreign facts but not the foreign law the rule of the *lex fori* will suffice without extension.[95] Further, if the parties wish to plead and accept that facts, truly foreign, occurred within the forum, the forum can use its own rule, unaltered, to solve the case.

3. Non-Sovereign Legislatures — Particular Problems in the Application of Statutes of the Forum

It is settled in Australia that the *lex fori* is the determining law in actions in tort involving a foreign element. The writer has expressed a view that an administration of the *lex fori* must involve the application of the forum's tort rules to the facts as they occurred in the *locus delicti*.[96] This does not involve the application of rules, limited in expression to internal events within the forum, to extra-territorial events. Rather the rules, which have no territorial restriction in their expression are freed to decide the issue of tort liability by the forum's rules of private international law. In essence this means that the *lex fori* in its entirety is not chosen as *lex causae*, but that the tort rules of the *lex fori* are chosen to decide the issue of tortious liability.

What is the effect on the view of the operation of the classical rule expressed herein of the existence of constitutional requirements that statutes of the forum possess a sufficient territorial nexus with the forum where the legislature of the forum is a non-sovereign legislature?[97] Our consideration of this problem shall lead us to two important Australian cases, namely: *Koop* v. *Bebb* decided by the High Court and *Schmidt* v. *G.I.O. of New South Wales*,[98] a decision of the New South Wales Court of Appeal. Between them the two cases (taking into account the first instance decision of Dean, J. in *Koop* v. *Bebb*[99]) suggest that there are four distinct modes by which statutes of the forum may operate in the context of extra-territorial torts. They are as follows:

(A) *The statute may apply only to acts which are committed in the forum*: This may appear on the face of the statute or result from a reading down of the statute to inhibit its extra-territorial operation.

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[95] *Dicey and Morris op. cit., supra* n. 12 p. 968 n. 10.

[96] See *supra* 171-75.

[97] *Koop* v. *Bebb, supra* n. 18 at 640 and cases there discussed.

[98] [1973] 1 N.S.W.L.R. 59.

[99] Dean, J. assumed that the words "within Victoria" had to be implied into the section and directed his attention to where the insertion should be made.

Dean, J. took this view of the Wrongs Act, 1928 (Vic.) in *Koop* v. *Bebb* at first instance but was reversed by the majority of Judges in the High Court on appeal. We shall not consider this mode further as statutes of this forum will not found a right of action in respect of an extra-territorial tort because the statutory rule will not in its terms apply to external events.

(B) *The statute may be part of the general law of the forum and apply without territorial qualification wherever an application of the rules of private international law establishes the lex fori as the lex causae.* The first of the alternate grounds for the decision of the majority in *Koop* v. *Bebb*[100] is an example of this mode. As has already been noted, in this case the claim was made under the Victorian equivalent of Lord Campbell's Act in respect of the death in that State of a parent injured in New South Wales which had a statute in like terms; the plaintiffs succeeded in the High Court on two grounds. The first is that considered here, the second that under (C). In answer to the defendant's argument that Part III Wrongs Act 1928 (Vic.) could not found a right of action in the plaintiffs in Victoria in respect of the defendant's wrongful act in New South Wales (because to hold such would be to give the Victorian Statute an excessive and invalid extra-territorial operation) the majority held:

> It is true that Part III. contains no words expressly confining its operation to Victoria, and it is also true that its provisions cannot operate, and should not be construed as operating, beyond the borders of the State.[101]

and then:

> Section 15 should therefore be considered as enacting a rule of the law of Victoria, to be applied in the Victorian courts, and to be applied as it stands, without textual emendation. Its effect in relation to a case which includes an extra-Victorian element depends upon the application of the rules of private international law which form part of the law in Victoria.[102]

These passages are a fairly clear statement that where a statute enacts a rule of the general law of the forum, even in the case of an external tort, the statute *will have no external operation*, and thus it is unnecessary to consider contitutional implications of the Statute. This view appears inconsistent with the opinion expressed in this essay[103] as to the operation of the *lex fori* in tort cases where the *locus delicti* is not the forum. The view expressed would have it that only where the tort rule of the forum *does have a universal application* will it, applied to a

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[100] *Supra* n. 18 at 641-2.

[101] *Id.* at 640.

[102] *Id.* at 641.

[103] See *supra* 174-75.

foreign act of the defendant, yield the plaintiff a remedy. It is true that the Victorian statute does not operate beyond the borders of the State in this sense: it is a direction to the Victorian Courts alone to give a remedy (subject to the rules of private international law) for extra-territorial acts. That a statute is a direction to the Courts of the forum alone does not always relieve the court from searching for a sufficient territorial nexus, is shown by the judgments of both the majority[104] and Hardie, J.A.[105] in *Schmidt's Case*. There each Judge considered the constitutional validity of Section 16B Married Persons (Property and Torts) Act 1901 (N.S.W.). That Section, which was exclusively directed to the New South Wales Courts — though not part of the law of New South Wales in the sense discussed in *Koop* v. *Bebb* — allowed spouses to sue for wrongs caused by the other spouse by the use of a registered motor vehicle *wherever* the accident occurred.

It is submitted that the resolution of this conflict may be found in the following passage of the majority's judgment in *Koop* v. *Bebb*:

> *The connection of its operation with the State* of Victoria is inherent in its nature; for, taken as it stands, it purports only to enact a rule to form part of the general body of the law of Victoria relating to civil liability for wrongful acts, neglects and defaults . . . .[106]

Thus, while the Victorian statute in that case did not have an extra-territorial operation in the limited sense discussed above, in its application it might give a remedy in respect of extra-territorial events. But there *was* a sufficient territorial nexus with Victoria because the rule could only have an extra-territorial operation in the same fashion as the ordinary common law tort rules of Victoria. The statute operated within the limits prescribed by Victoria's private international law rules; and it is well accepted that the common law rules of a non-sovereign jurisdiction may have an extra-territorial operation.

Thus, although the section of the Victorian Wrongs Act is in its terms universal in application, it is only part of the local law of the forum. Accordingly, unless the contrary is stated in it, the statute does not supplant the common law rules of private international law, but is regulated by those rules no less than the local common law rules of the forum. This appears to be a question of interpretation governed, in the present instance, by the circumstance that the statute was obviously designed to fill a lacuna in the common law.[107] It seems to follow from the majority's comments on this aspect of the case that wherever a tortious right of action is created by statute, provided it is intended to operate subject to the rules of private international law, it will be constitutionally

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[104] *Schmidt's Case, supra* n. 98 at 69 *per* Moffitt, J.A. (with whom Reynolds, J.A. agreed).

[105] *Id.* at 71.

[106] *Supra* n. 18 at 640-1 (italics supplied).

[107] *Id.* at 641.

valid. This will be so although, up to the limits governed by the private international law rules, the statute gives the plaintiff a remedy in the forum in respect of an extra-territorial act where, absent the statute, the plaintiff would have no relief.

But a statute of the forum may in terms grant the plaintiff a right of action *where the common law, including the private international law rules, would not avail him.* If such a statute is to be supported, then a different territorial connection must be established such as the one found by the majority in *Schmidt's Case.* In that case, as a result of his negligent driving in Victoria, S was killed and his wife injured. She commenced in New South Wales an action against the G.I.O. pursuant to statute rendering it liable, as insurer of the motor car, if S would have been liable to the plaintiff had he lived. Under Victorian law the common law immunity between spouses remained; in New South Wales it had by statute been removed in respect of injury caused by use of "a registered motor vehicle".[108] The fate of the G.I.O. as defendant was thus to be judged by looking at the liability of the husband, S, to his wife. Hardie, J.A. dissented. He applied *Phillips* v. *Eyre* and found that the wife could not have shown that the act was not justifiable by the *lex loci delicti.* Moffitt and Reynolds, JJ.A. found for the wife, for reasons given by Moffitt, J.A. They were said by him to be twofold:

(i) The conduct of the husband would in Victoria constitute negligence in respect of a person not his spouse; Section 16B gave an action in New South Wales where, if they had not been married, the husband would have been liable to the plaintiff, whether such action was purely local or sustainable by reason of *Phillips* v. *Eyre.*

(ii) Section 16B applies to the use of a New South Wales registered motor vehicle anywhere and by its own force and without reliance upon the rules of private international law.

A striking paradox arises where the forum's legislature greatly widens the territorial ambit of the *lex fori,* including statutes of the forum, by altering the common law private international law rules: e.g. by abolishing the second condition in *Phillips* v. *Eyre.* Thus if the statements in *Koop* v. *Bebb* represent a general rule, the parliament of the forum can escape assertions that its statutes are constitutionally invalid by first, and separately, amending those rules. This may be an unavoidable consequence of the circumstances discussed above, that even in jurisdictions with non-sovereign legislatures, the common law rules may in fact give remedies for external acts.

(C) *The Statute may vest a right of action in the plaintiff wherever a condition relating to the existence of another right of action by the lex fori is established.* Two examples spring to mind. Dependants will have a right of action under the statute where their deceased relative had (under

[108] For definition see s. 16B(1) Married Persons (Property and Torts) Act, 1901 (N.S.W.) as amended.

the general law of the forum including private international law rules) a right of action against the defendant at his death: *Koop* v. *Bebb*.[109] A spouse may have a right of action against the other spouse if, had they not been married, a right of action would have existed: *Schmidt's Case*.[110]

This mode represents the second ground in *Koop* v. *Bebb*[111] and supposedly, the first in *Schmidt's Case*.[112] It has been surmised above that the majority in *Koop* v. *Bebb* did not mean that the Victorian statute did not operate on extra-Victorian events, but that it had a demonstrably sufficient nexus with Victoria: it was part of Victorian law for application by its Courts within the limits imposed by Victoria's private international law rules.[113] There is no doubt that the majority were of the opinion that, either the second alternative ground had no extra-territorial operation, or, if it did, it had the same nexus as the first ground and was therefore just as obviously constitutionally valid. This was therefore just as obviously constitutionally valid. This view seems to be shared by Moffit, J.A., in *Schmidt's Case*[114] who did not consider the constitutional validity of the statute in relation to the first ground of his decision.

(D) *The statute may validly apply (because of a sufficient territorial nexus) of its own force to give an action in respect of acts committed outside the forum.* Thus a right of action may arise even though the plaintiff would otherwise be left without remedy by the rules of private international law. A clear example is the construction given to Section 16B by Moffitt, J.A. as his second ground in *Schmidt's Case*.[115] This may be compared with Section 6E(1) of the Compensation to Relatives Act, 1897 (N.S.W.), which stated that the statute applied "whether the subject-matter of the complaint arises within or outside New South Wales and whether the wrongdoer, person whose death was caused, or any other person was or is a British subject or not". In *Kolsky* v. *Mayne Nickless Limited*[116] the New South Wales Court of Appeal treated this as an attempt to confer by its own force and without the aid of the rules of private international law (as in mode (B)) a remedy enforceable in the State in respect of a wrong committed outside it: the mere bringing of an action in the State did not give a sufficient territorial connection with the State, and so the section was beyond legislative power and no right described in mode (D) could arise. We should note that the nexus with the forum necessary to support laws having this operation will not be the nexus discussed in *Koop* v. *Bebb* in relation to mode (B); here the statute in no way draws upon the private international law rules, whilst the first ground in *Koop* v. *Bebb* hinges upon them.

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109 *Supra* n. 18 at 641-2.
110 *Supra* n. 98 at 65.
111 *Supra* n. 18 at 641-2.
112 *Supra* n. 98 at 65.
113 See *supra* 176-77.
114 *Supra* n. 98 at 65.
115 *Id.* at 69.
116 *Supra* n. 62.

To what extent is mode (C) distinct from mode (D)? Assume that in both *Koop* v. *Bebb* and *Schmidt's Case* the act of the defendant was justifiable by the *lex loci delicti* in the sense that it did not give rise to civil liability against the defendant in favour of the plaintiff under that law. Indeed, this was the fact in *Schmidt's Case* where the plaintiff would have been thwarted by the common law rule of inter-spousal immunity in Victoria. In *Koop* v. *Bebb*, of course, the existence of a Lord Campbell's Act in New South Wales[117] allowed the plaintiffs to satisfy the second condition in *Phillips* v. *Eyre*. However, absent the New South Wales statute, the plaintiffs in *Koop* v. *Bebb* would have had to rely on mode (C); mode (B) would not have been a valid alternative, because the second limit of *Phillips* v. *Eyre*, made vital here, would have been failed for want of "non-justifiability" under the *lex loci delicti*: for present purposes we shall assume that Lord Campbell's Act had not been adopted in New South Wales at the relevant time. If a statute operates in mode (C) it might afford a remedy to the plaintiff in cases where the plaintiff would have no remedy were the statute simply a part of the general law of the forum and applied subject to the forum's rules of private international law: examples of this are the second ground for the decision in *Koop* v. *Bebb* (if the assumption stipulated above is made) and the first ground for the decision in *Schmidt* v. *G.I.O.* A consideration of the nexus between the relevant State and the remedy afforded by the statute for an extra-territorial act was not undertaken in either case, yet the requisite nexus could not be that considered in relation to mode (B) above. The answer to the question posed above may be elicited from an analysis of the form of the putative rule in each of the cases:

(i) *Koop* v. *Bebb*

X has a right of action against Y *if Z had a right of action, apart from the statute, against Y.*

(ii) *Schmidt* v. *G.I.O.*

X has a right of action against Y *if X would have a right of action against Y were their status not of a specified character.*

It thus becomes apparent that in both cases X has a right of action against Y (where this would not be so under the rules of private international law) if a certain condition is satisfied. In both cases the fulfilment of the condition depends on the application of private international law rules: in the first case *to parties other than those engaged in the action*; and in the second to the parties to the proceedings *but assuming they had a status which they admittedly do not have.* It is submitted first, that in both of the examples of mode (C) here discussed the statute is applying of its own force to give the plaintiff an action against the defendant where there would be no such action at general law and secondly, the statute is not simply part of the general law of the forum which can give a remedy to the plaintiff simply by application

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[117] Compensation to Relatives Act, 1897 (N.S.W.).

of the statute and the unaltered rules of private international law applied between the plaintiff and the defendant. Mode (C) is in fact the same as mode (D) with this difference only: its operation to create an action in tort in respect of an act committed out of the forum is conditional upon the occurrence of a certain circumstance. It is true that in the two cases the condition itself involved an application of general law principles, but, it is submitted, the formal analysis (and legal effect) of a rule conditional upon some event *not* concerning private international law rules is the same as in the two cases before us: e.g. the statute in *Koop* v. *Bebb* may have given the plaintiffs a right of action if their father *was Victorian.* Thus, it is submitted, mode (C) is, despite the attempts in *Koop* v. *Bebb* and *Schmidt* v. *G.I.O.* to give it an independent existence, an illusory alternative to mode (D).

Where the statute operates in mode (B), its sufficient territorial nexus will always be found in the reasons propounded by the majority in *Koop* v. *Bebb.* But in mode (C) the statute and the private international law rule alone are not sufficient. This is because the private international law rule operates between the parties to the action; not, say, between the defendant and the plaintiff's father. If the second ground in *Koop* v. *Bebb* is correct it is so, not because the statute interpreted in that fashion was part of the general law of Victoria which would grant a remedy to the plaintiffs after application of the Victorian rules of private international law, but because the condition specified — concerning the availability of an action to the plaintiff's father — had itself a sufficient (and distinct) nexus with Victoria. This is the reason upon which the majority's reasoning may be supported. It is unfortunate that they failed to express it. The majority in *Koop* v. *Bebb,* in its second alternative reason for its decision directly applied a statute in relation to an act occurring out of the forum without considering its constitutional validity. The majority was thus incorrect in professing to avoid the issue of whether the Victorian Act could constitutionally apply of its own force to a wrongful act committed in New South Wales. Further, Moffitt, J.A. assumed in *Schmidt* v. *G.I.O.* that constitutional considerations only affected his second ground. In truth, the problem affected both grounds.

4. The Extension of the Rule in Phillips v. Eyre to Actions Founded on Statutes of the Forum

Another interesting question is the extent to which the rule enunciated by Willes, J. in *Phillips* v. *Eyre* applies to statutory rights of action in general. It applies at least to actions such as those under Lord Campbell's Act; but these according to the majority in *Koop* v. *Bebb* are actions created by statute to fill a *lacuna* in the common law of tort. Does the rule apply to all actions, whether common law or statutory, which are not contractual or quasi-contractual?

The expression used by Willes, J., the neutral word "wrong" is wide enough to embrace both common law and statutory actions. In

Koop v. *Bebb* the *Phillips* v. *Eyre* rule was applied to a statutory action created by the Victorian Wrongs Act, 1928, a statute founded on Lord Campbell's Act. However, in *Meth* v. *Norbert Steinhardt and Son Ltd.*[118] Fullagar, J. who heard the case at first instance expressed the view that the principle adopted in *Koop* v. *Bebb* could not be applied to give an action in Australia for the infringement of an English patent. This is so even although the terms of the corresponding sections granting the patentee a monopoly of the use of the invention are essentially similar in the two jurisdictions. His Honour here dissented from the view propounded by A'Beckett, J. in *Potter* v. *Broken Hill Proprietary Co. Ltd.*[119] that the first condition is satisfied wherever the forum has a right of action — for example, negligence or patent infringement — which is of the same nature as a right of action created by the *lex loci delicti.*

How is it that the two types of statute differ so that in one case the rule in *Phillips* v. *Eyre* is applicable and it is not in the other? It is submitted that the answer lies in the consideration that, in the case of *Koop* v. *Bebb* the relevant statute was not, on the view of the majority, expressed with any territorial limitation. And the patent statute considered by Fullager, J. did have a territorial limitation for it gave the patentee a monopoly only to make, use, exercise and vend the invention in Australia. It is submitted that the difference does not arise because in the former case the statute in essence simply corrected a defect in the common law of tort while in the latter the statute created a universe of discourse where there was none at common law.

We have seen when dealing with the proper interpretation of the phrase "as if committed in the forum" in the first condition of *Phillips* v. *Eyre* that a full translocation and transformation of all relevant facts to the forum is not required. Further, wherever the relevant rule of liability of the forum has no expressed or implied territorial limitation it is capable of application to facts taking place out of the forum. A statute may or may not be expressly or impliedly limited in spatial effect: Lord Campbell's Act is not but on the view of Fullagar, J. the Patents Act only proscribes infringement of the patent within the jurisdiction of the legislature which enacted the statute. It can thus easily be seen how the various results were reached in *Koop* v. *Bebb* and *Meth* v. *Norbert Steinhardt and Son Ltd.* The different result arises not, it is submitted because *Phillips* v. *Eyre* applies to actions under one of the statutes, but on the basis that, applied to one case it allows recovery by the plaintiff but, applied in the other case, it does not. In *Koop* v. *Bebb* the requirements of the second threshold condition being satisfied by the existence of Lord Campbell's Act in New South Wales, then the Victorian Lord Campbell's Act as *lex fori* and thus *lex causae* could be applied to the acts of the defendant committed in New South Wales to give success

[118] (1960) 105 C.L.R. 440; reversed on other grounds (1962) 107 C.L.R. 187.
[119] [1905] V.L.R. 612 at 634.

to the plaintiffs. The Act applied on its face to all relevant acts throughout the world and was not ousted by the relevant conflicts of law rule. However, the monopoly given by the Australian Patents Act was infringed only by acts perpetrated in Australia: thus even though the second condition applied to the facts in the *Norbert Steinhardt Case* was satisfied — the act committed in England was an infringement under the English Patents Act — the plaintiff would still not succeed. He could not succeed for this reason; all of the defendant's acts are not under the rule translocated to Australia and thus the statutory prohibition of infringement in Australia does not apply.

IV

The quality of the classic tort rule of private international law which has made it perenially attractive to the Courts is its elemental simplicity. But it has been shown that this simplicity extends no further than to the expression of the rule, and not to its meaning or application. The following is a synopsis of the principal conclusions arrived at in this essay:—

(i) The only law which qualifies the application of the *lex fori* is the *lex loci actus* — the law of the place where the wrongful act of the defendant took place. It is deceptive to speak of the *lex loci delicti*, although this is almost the invariable practice of the Courts and commentators. In truth the *lex loci delicti* is the law of the place where the tort occurred, and as proof of a tort normally involves the establishment of a number of elements, if it were the *lex loci delicti* and not the *lex loci actus* which applied, there would be some scope for applying a law other than the law of the place where the act occurred (for example, the law of the place where damage was suffered) where it was thought that the other law was more appropriate: the present law leaves no scope for such an approach.

(ii) The meaning of the words "not justifiable" as used by Willes, J. in his second condition is uncertain. But a definition involving no more than proof of a cause of action under the law of the place where the act was done is not the proper solution.

(iii) None of the interpretations of the second condition in *Phillips* v. *Eyre* proposed before *Chaplin* v. *Boys* has given any effect to the laws of the *locus delicti* which quantify the amount of compensation to which the plaintiff is entitled. If the concept of "flexibility" introduced in *Chaplin* v. *Boys* is not adopted in Australia, the forum may not take cognizance of such laws even where the *locus delicti* is the only law interested in regulating the defendant's actions, and where both parties would be expected to look to the *lex loci delicti* to govern their rights *inter se*. The rules of the *locus delicti* governing the proof of a right to compensation — as opposed to its extent — may on one view be a complete determinant of the plaintiff's right to compensation in the forum. If the forum takes cognizance

of the one aspect of the *lex loci delicti*, it should not be precluded from taking cognizance of the other.

(iv) The *lex loci delicti* as applied under the present rule operates only as a condition to the application of the *lex fori*; if its requirements are satisfied, then the *lex fori* will be applied; and if they are not, then the plaintiff thereby fails. But cognizance of the quantitative rules of the *lex loci delicti* (even if this principle were accepted by the High Court) may lead to two different quanta of compensation. It has been submitted that the plaintiff should only be entitled under the general rule to the smaller of the amounts awarded to him by the two laws. This would give effect to the principle, not yet accepted by the courts, that in the general case the *lex loci delicti* will be the appropriate law to determine the rights of the parties, but, because of the quasi-punitive nature of tort rules, the forum should not be obliged to award more in damages than it would for the same act committed within its borders. This general rule might be applied flexibly by disregarding one of the two laws in appropriate cases.

(v) The presumption that foreign law is the same as the *lex fori* may oblige the defendant to prove the contents of the *lex loci delicti* when he intends to rely upon a variance between that law and that of the forum. But this presumption does not require the defendant to plead and prove any facts which must be established to ascertain whether the second condition in *Phillips* v. *Eyre* is satisfied. The burden of proving such facts is uncertain, as the meaning of the second condition is uncertain. But, if the second condition requires proof of a cause of action, then the plaintiff should have the burden of proving the requisite facts, and if the second condition requires that the cause of action should not be subject to a defence, then the defendant must establish the defence.

(vi) The rule that the *lex fori* is the *lex causae* for all torts no matter where they are committed and who the parties are is manifestly unjust because in the great majority of torts committed (although perhaps not cases in the forum) the *locus delicti* will have the greatest interest in regulating the defendant's acts and it will be to that law that both parties look for protection.

(vii) The suggestion made in *Chaplin* v. *Boys* that injustice flowing from the application of the *lex fori* as *lex causae* may be avoided if, as a matter of public policy, the forum refuses to exercise its jurisdiction where the plaintiff is forum shopping, is singularly inadequate. Many cases may be envisaged where the *lex loci delicti* is the appropriate law, yet the plaintiff, having *bona fide* taken up residence in the forum, may have a good right to sue there.

(viii) The rule that the *lex fori* is the *lex causae* means no more than that the local tort rules of the forum are applied to the acts of the defendant as they occurred in the *locus delicti*. All of the relevant facts are not translocated to the forum.

(ix) The forum's tort rules apply to extra-territorial acts because they are

universal in their statement; they apply to actions wherever they occur unless the private international law rule of the forum proscribes their application.

(x) The classic tort rule may be applied to purely statutory rights of action under the *lex fori*, and the plaintiff may succeed if on its proper construction, the statute is not limited in its application to acts perpetrated within the forum.

(xi) There are particular problems associated with the application of the rule in *Phillips* v. *Eyre* to statutory rights of action created by a non-sovereign legislature. It appears that where the statute enacts a rule which is part of the general law of the forum, applicable to a foreign act only within the area prescribed by the forum's private international law rules, then the statute will have a sufficient territorial nexus with the forum to make it valid. However, if the statute grants the plaintiff a right of action in circumstances where he would not succeed upon an application of the statutory rule as part of the general law, and the forum's private international law rules, then the nexus of the statute with the forum must be scrutinized and its adequacy for constitutional purposes established.

After careful study of the classic tort rule, one must conclude, alas, that it is a chimera. The Chimera of antiquity, which breathed fire and blasts of searing heat, was bringing ruin upon Lycia[120] at the time of its death at the hands of the heroic Bellerophon. If one upholds the ideal of a rule of law as being just and rational, then one must also slay the chimera. Some of the propositions made in this essay may be capable of assimilation into the classic tort rule without undue disruption; however, one would be naive to suppose that an assertion at this late stage that it is the law of the *locus delicti* that is most appropriate in general to determine cases of tort committed out of the jurisdiction of the forum, will readily be accepted by Australian Courts; an acceptance of this proposition would require the High Court to depart from principles it has laid down in two celebrated cases decided by very strong benches.[121]

One thus appears impotent and unable to vanquish the chimera. But even Bellerophon could not slay the Chimera without the aid of the gods who took pity on him. Athene supplied him with a golden bridle so that he could ride the winged horse Pegasus which had never before borne a mortal rider on its back. As Pegasus rode the wind, Bellerophon killed the Chimera with an arrow. One may perhaps find Pegasus in the House of Lords decision of *Chaplin* v. *Boys*; the speeches of their Lordships recognize at last that there are many defects in the classic rule; and the High Court may now take the opportunity to reconsider the private international law rule for tort and reformulate it.

But there is a moral in the myth of Bellerophon and the Chimera which one should heed. Bellerophon grew insolent and proud because

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[120] A country in ancient Asia Minor.

[121] *Koop* v. *Bebb, supra* n. 18 and *Anderson's Case supra* n. 5.

he possessed the winged horse, and, though he was a mortal, he tried to ride it up to Olympus, the home of the gods. But, the divine horse rebelled against Bellerophon's command, reared, and threw him to the earth. Thereafter Bellerophon wandered through the land, depised by the gods and shunned by men. When one rides Pegasus may one not also risk a fall like that of Bellerophon? Lord Guest apart, their Lordships in *Chaplin* v. *Boys* propounded two approaches to remedy the defects of the classic rule; one enlisted public policy as a justification for the forum's declining to exercise its jurisdiction where the plaintiff was "forum shopping".[122] The other, a much more ambitious proposal, allowed the forum in certain circumstances to apply that law to the case which it considered to have the greatest interest in its outcome, even if this involved applying the *lex loci delicti* in its quantitative aspect.[123] Which proposal should be chosen?

It follows from the consideration expressed above, that the *lex loci delicti* will in many cases be the appropriate law with which to decide the case, that the author would counsel that the second, the more ambitious proposal, be adopted. There is, perhaps, an oracle from which one may seek guidance in the dilemma created by the fundamental divergence of opinion in *Chaplin* v. *Boys*. If one looks to Pegasus itself, does not one find in the speech of Lord Hodson[124] the statement:

> I am conscious that to resort to public policy is to mount an "unruly horse".

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122 *Supra* n. 9 at 383 *per* Lord Donovan and at 406 *per* Lord Pearson.

123 *Id.* at 380 *per* Lord Hodson and at 391-2 *per* Lord Wilberforce.

124 *Id.* at 378.