TORTS IN AUSTRALIAN PRIVATE INTERNATIONAL LAW

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When Dr. Morris first advocated the adoption of a 'proper law of tort' rule as the choice of law rule for English courts in torts cases,[1] his proposal was immediately stigmatised as absurd on the grounds that it would lead to uncertainty and confusion in the application of the law.[2] Much the same criticism of the similar rule of the Sixth Draft of the *Restatement* (2nd) on torts was made by Lord Upjohn in the Court of Appeal in *Chaplin* v. *Boys*[3] and by the members of the House of Lords who subsequently rejected it as a rule which might be adopted in England.[4] In the considerable debate aroused following the decision of the House of Lords in that case sympathy was expressed for this criticism, though more attention was focussed on the difficulty of determining for what proposition the case can be said to stand;[5] the meagre case law[6] which has accumulated since *Chaplin v. Boys*[7] seems to regard the latter point as justifying the courts in refusing to look afresh at the problems which resulted in the divisions in that case. The purpose of this article is first to make a rapid survey of what *Chaplin* v. *Boys* may be said to

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This article is a slightly expanded version of a paper given at a symposium on Torts in the Conflict of Laws at the A.U.L.S.A. conference held in Adelaide during August 1971. This accounts for its title, though the article itself is mainly concerned with personal injuries claims, especially in running down and collision cases.

1 Morris: 'Torts in the Conflict of Laws' (1949) 12 *M.L.R.* 248.

2 Gow: 'Delict and Private International Law' (1949) 65 *L.Q.R.* 313, 316.

3 [1968] 2 Q.B. 1.

4 [1971] A.C. 356.

5 The following selection of comments and articles is representative rather than complete: North and Webb: 'Foreign Torts and English Courts' (1970) 19 *I.C.L.Q.* 24; Karsten, *id.*, p.35; McGregor: 'The International Accident Problem' (1970) 33 *M.L.R.* 1; Shapira: 'A Transatlantic Inspiration: The "Proper Laws of the Tort" Doctrine' (1970) 33 *M.L.R.* 27; Nygh: 'Boys v. Chaplin — The Fortuitous Locus Delicti or The Fortuitous Defendant?' (1970) 1 *A.C.L.R.* 122; 'Boys v. Chaplin or The Maze of Malta' (1970) 44 *A.L.J.* 160; Gerber: 'Tort Liability in the Conflict of Laws' (1970) 7 *U. Qld. L.J.* 40; Graveson: 'Towards an Applicable Law in Tort' (1969) 85 *L.Q.R.* 505; See too the other articles cited in Davis: *Casebook on Conflict of Laws in Australia* (Butterworths 1971) at p. 237; Cheshire and North: *Private International Law* (8th ed., Butterworth's 1970) Ch. 10 esp. at pp. 262ff.; Nygh: *Conflict of Laws in Australia* (2nd ed., Butterworth's 1971) Ch. 16 esp. at pp. 402ff.

6 The most decisive reaction has been from New South Wales: *Joss* v. *Snowball* [1970] 1 N.S.W.R. 426 and *Kolsky* v. *Mayne Nickless Ltd.* (1970) 92 W.N. (N.S.W.) 855. Elsewhere courts have been at pains not to commit themselves on the effect of the case: *Kemp* v. *Piper* [1971] S.A.S.R. 25; *Kerr* v. *Palfrey* [1970] V.R. 825; *Sayers* v. *International Drilling Co. N.V.* [1971] 1 W.L.R. 1176 (C.A.) (though Lord Denning M.R. construes *Boys* v. *Chaplin* as adopting a 'proper law' approach — *id.*, p.1180).

7 [1971] A.C. 356.

have decided and its potential consequences for the law in Australia, and secondly, to discuss the extent to which the fears of uncertainty in the law if the views expressed by Lords Hodson and Wilberforce are acted upon are justified.

It is clear that *Chaplin* v. *Boys* affirms strongly the first branch of the rule in *Phillips* v. *Eyre*[8] — that the wrong must be of such a character that it would have been actionable if committed in England — and, moreover, that it treats the English *lex fori* as a choice of law rule: the rule of the *lex loci delicti*, said Lord Wilberforce, 'can hardly be restored now by anything less than a revolution in thought'.[9] Secondly, a majority of the House interpreted the second branch of the rule that the act must not have been justifiable by the law of the place where it was done — as requiring that 'civil liberty in respect of the relevant claim exists as between the actual parties under the law of the foreign country where the act was done'.[10] These words come from the judgment of Lord Wilberforce; that Lord Guest agrees is a necessary inference from his acceptance of the Scottish authorities, which unequivocally require liability under both the *lex fori* and the *lex loci delicti* in respect of the particular *ius actionis*.[11] The precise view of Lord Hodson is more difficult to discern, but it is clear that, although he considered that the appellant had committed an actionable wrong in Malta, he ultimately held that because the right to damage for pain and suffering is a substantive right, the respondent would fail if the general *Phillips* v. *Eyre* rule were applied to the case.[12] This would imply that 'actionability' is not enough; there must be liability with respect to the particular claim under the *lex loci delicti* as well as under the *lex fori*. This interpretation of the second branch of the rule in *Phillips* v. *Eyre* has the necessary consequence that *Machado* v. *Fontes*[13] is overruled. Apart from these propositions, a majority of their Lordships held that the right to claim damages for pain and suffering should be classified as a matter of substance rather than of procedure, so that the English court could not apply its own law to the issue as to a purely procedural matter;[14] and a further majority expressed themselves as opposed to the adoption by English law of any doctrine resembling that of the 'proper law of the tort'.[15]

It is also worth noting one other point: Lords Hodson and Wilberforce did not accept that the second branch of the rule in *Phillips* v. *Eyre* lays

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8 (1870) L.R. 6 Q.B. 1.
9 [1971] A.C. 356 at p. 386.
10 *Id.*, p. 389.
11 *Id.* at pp. 381-2. The authorities are *Naftalin* v. *London Midland and Scottish Railway Co.* [1933] S.C. 259; *M'Elroy* v. *M'Allister* [1949] S.C. 110; *MacKinnon* v. *Iberia Shipping Co.* [1955] S.C. 20. See too Anton: *Private International Law* (W. Green and Son, 1967) at p. 241ff., esp. at p. 243.
12 [1971] A.C. 356, p. 379.
13 [1897] 2 Q.B. 231.
14 [1971] A.C. 356, 379 (Lord Hodson); 391 (Lord Wilberforce); 394-5, 406 (Lord Pearson).
15 [1971] A.C. 356, 381 (Lord Guest); 383 (Lord Donovan); 404ff. (Lord Pearson).

down a choice of law rule; for Lord Hodson the second branch of the rule is concerned only with 'whether the courts of this country should entertain the action'[16] and for Lord Wilberforce it has the status of a 'condition'.[17] The practical importance of this relates to the burden of proving foreign law: the plaintiff may rest his case wholly on the *lex fori* and leave the question of the *lex loci delicti* to the defendant.[18] Lord Wilberforce, indeed, saw the question of the proof of foreign law as a disadvantage of the *lex loci delicti* as the choice of law rule.[19] This view is confirmed by *Kemp* v. *Piper*,[20] in which the Full Court of the Supreme Court of South Australia affirmed the right of the plaintiff to rely on the *lex fori* alone in his pleadings; it may be concluded, therefore, that on this point *Mackinnon* v. *Iberia Shipping Co.*[21] does not represent the law in either England or Australia, and that their courts will not risk the criticism levelled at the courts in that case and in *Walton* v. *Arabian-American Oil Co.*[22]

The position in Australia is rather different from that outlined above. Since *Anderson* v. *Eric Anderson Radio and T.V. Pty. Ltd.*[23] both branches of *Phillips* v. *Eyre* have the status of 'conditions' or 'threshold' requirements,[24] but the *lex fori* remains the choice of law rule. 'Actionability' by the *lex fori* is poorly defined; of the competing suggestions that of Windeyer J. — that the plaintiff must be able to show that he has, *prima facie*, a good cause of action according to forum law[25] — is preferable to that of Barwick C. J. — that the plaintiff must show that

16 [1971] A.C. 356, 375.
17 *Id.*, p. 387.
18 This does not necessarily follow from the status of the rule as a 'condition'; even if it were a choice of law rule no doubt the presumption that foreign law is the same as forum law would still, however inelegantly, be available. See B. Currie: 'On the Displacement of the Law of the Forum', reprinted in *Selected Essays on the Conflict of Laws* (Duke University Press, 1963) p. 3. Of course, given that the courts of each State must take judicial notice of the laws of the other States (*Territorial Laws and Records Act* 1901-1964, C/W) this may, in the interstate situation, only have practical consequences in matters of pleading.
19 [1971] A.C. 356, 387-8.
20 [1971] S.A.S.R. 25. *Contra*: Nygh: *Conflict of Laws in Australia* at pp. 428-9.
21 [1955] S.C. 20. For criticism see Anton, *op. cit.*, at p. 248. See too *Rodden* v. *Whatlings* [1961] S.C. 132, where a different view is taken.
22 233 F. 2d. 541 (2d. Cir., 1956). For criticism see B. Currie, *loc. cit.*, passim; Kahn-Freund: 'Delictual Liability and the Conflict of Laws' (1968) II *Hague Receuil des Cours* 1, 35.
23 (1965) 114 C.L.R. 20.
24 *Id.*, 23 (Barwick C.J.); 34 (Taylor J.); 40ff. (Windeyer J.). The idea derives from Yntema: 'Review of Falconbridge: Essays in the Conflict of Laws' (1949) 27 *Can. B.R.* 116, 119 and Spence: 'Conflict of Laws in Automobile Negligence Cases' (1949) 27 *Can. B.R.* 661. Its most enthusiastic proponent in recent years has been Gerber: 'Torts in the Conflict of Laws' (1966) 40 *A.L.J.* 44 and esp. 73; for more recent controversy see McLean: 'Torts in the Conflict of Laws' (1969) 43 *A.L.J.* 183, answered by Nygh: 'Boys v. Chaplin or The Maze of Malta' (1970) 44 *A.L.J.* 160. See too Harding: 'Common Law, Federal and Constitutional Aspects of Choice of Law in Tort' (1965) 7 *U.W.A.L.R.* 196, n.3., Nygh: *Conflict of Laws in Australia* pp. 407ff.
25 (1965) 114 C.L.R. 20, 41.

someone, though not necessarily himself, has an action[26] — in that it may be of use to the court in the case before it. If a plaintiff cannot state a cause of action known to the forum his case can be dismissed without the trouble and the expense of hearing witnesses; there is no point at all in allowing him to show that a third party might be able to state a cause of action arising out of the same incident if he cannot state one for himself. Secondly, the idea of 'non-justifiability' is in even greater confusion. In *Koop* v. *Bebb*[27] the majority of the High Court referred to the strong criticisms of *Machado* v. *Fontes* made by Cussen J. in *Varawa* v. *Howard Smith Pty. Ltd. (No. 2)*[28] and suggested that it may be the true view that the second branch of *Phillips* v. *Eyre* requires that the act complained of be 'such as to give rise to a civil liability by the law of the place where it was done'.[29] But *Machado* v. *Fontes* has neither been expressly applied nor authoritatively disowned in Australia; hence its status has been appropriately described by Bray C. J. as 'precarious and arguably moribund'.[30] This, however, means that it remains an open question whether the act complained of must be merely 'innocent' by the *lex loci delicti* if the defendant is to escape. Even assuming that the *lex loci delicti* is not given so attenuated a role, however, the requirement that it should provide 'a civil liability' may be very far from the double actionability rule of *Chaplin* v. *Boys*. The phrase was perhaps chosen in the light of the comment by Cussen J. that he would allow recovery under the *lex fori* in a case where the *lex loci delicti* allowed the recovery of compensation by the plaintiff as an adjunct to a penal action against the defendant;[31] he did not require liability in respect of the same *ius actionis* under both laws. Moreover, the phrase does not require that the liability should exist between the parties to the suit in the forum; in the light of the analysis of 'actionability' given by Barwick C. J. in *Anderson's* case one cannot exclude the possibility that the second branch of the *Phillips* v. *Eyre* rule may be satisfied if it appears, for example, that although the plaintiff himself might be defeated by a plea of contributory negligence according to the *lex loci delicti*, another person (*e.g.* an employer) could have succeeded under that law against the defendant for the injury caused to the plaintiff.[32] Lastly, members of the court in *Anderson's* case referred to the defendant's conduct as having been 'actionable' according to the *lex loci delicti*; in fact it would have given rise to liability under that law. But in *Hartley* v. *Venn*[33] Kerr J. seized on the word 'actionable' used in connection with the second branch of the rule in *Phillips* v. *Eyre* and

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26 *Id.*, 23. This is a necessary inference from the citation of *Curran* v. *Young* (1965) 112 C.L.R. 99.
27 (1951) 84 C.L.R. 629.
28 [1910] V.L.R. 509, 525ff.
29 (1951) 84 C.L.R. 629, 643.
30 *Kemp* v. *Piper* [1971] S.A.S.R. 25, 31.
31 [1910] V.L.R. 509, 529.
32 *Cf.* the reference made by Barwick C. J. to *Curran* v. *Young*, noted *supra*, n. 26.
33 (1967) 10 F.L.R. 151.

gave it the meanings it had been given by Barwick C. J. and by Windeyer J. in discussing the first branch of that rule in *Anderson's* case. He thus allowed a plaintiff to succeed in a case although his contributory negligence would have defeated his claim entirely under the *lex loci delicti*. A similar process of reasoning allowed the Full Court of New South Wales in *Kolsky* v. *Mayne Nickless Ltd.*[34] to assert that the contributory negligence of a dead man is irrelevant to a claim brought by his dependants in a Fatal Accidents Act action in New South Wales, despite the fact that his contributory negligence would have reduced their damages by the Victorian *lex loci delicti*. In the result, although it is impossible to assert with confidence what precisely is required by the second branch of *Phillips* v. *Eyre* in Australia, it is possible to assert that State courts interpret it as meaning much less than Lord Wilberforce, for example, would wish; and to say that even if the tenor of the comments in *Koop* v. *Bebb* were opposed to the full *Machado* v. *Fontes* rule the High Court has never pronounced finally on the meaning of the second branch of the rule in *Phillips* v. *Eyre* and may, perhaps, have deliberately left the way open for the adoption of an intermediate position (though in reaching its formulation it cited the Scottish authorities requiring double actionability as well as Cussen J. in *Varawa* v. *Howard Smith (No. 2)*).[35] The most immediately intelligible compromise position might be that so long as the *lex loci delicti* provides for some civil liability between plaintiff and defendant in respect of the acts complained of in the forum, the forum should apply its own law.

In determining which view of the second branch of the rule in *Phillips* v. *Eyre* is to be preferred, one may begin by looking at the purpose that it serves. English and Australian courts found their jurisdiction to hear a case primarily on the fact of personal service;[36] 'Our courts', said Willes J. in *Phillips* v. *Eyre*, 'are said to be more open to admit actions founded upon foreign transactions than those of any other European country.'[37] With this broad basis of jurisdiction, the courts then proceed to apply the *lex fori* to the case presented to it. This obviously puts the plaintiff, who has the initial choice of the forum, at an advantage over the defendant, and immediately gives rise to the possibility of forum-shopping. If this is recognised as a danger that should be guarded against, two possible courses of action are available; the courts may establish a doctrine of *forum non conveniens*, or they may take a foreign rule into account so that the defendant is not unduly disadvantaged or surprised.

34 (1970) 92 W.N. (N.S.W.) 855.
35 (1951) 84 C.L.R. 629, 643.
36 For general accounts see *e.g.* Cheshire and North, *op. cit.*, Ch. 4; Dicey and Morris: *Conflict of Laws* (8th ed., Stevens, 1967) Ch. 10; Nygh: *Conflict of Laws in Australia* Ch. 5.
37 (1870) 6 Q.B. 1, 28.

Although the former alternative has strong advocates,[38] no developed doctrine of *forum non conveniens* exists in either Australian or English law,[39] though courts will of course dismiss an action if it is oppressive or vexatious. Moreover, the principal Australian advocate of this solution, Professor Nygh,[40] has not suggested any principles which would govern the question of whether a forum is convenient or not, and it seems likely that any properly developed principles would be at least as complex as the present *Phillips* v. *Eyre* rules. One may also note the view of Professor Kahn-Freund that, although within a Federation it may be possible to formulate rules governing the assumption of jurisdiction which would be acceptable to all its members so that there is agreement as to the *forum conveniens*, it is impossible to visualise the same being true in a truly international situation.[41] Lastly, the doctrine of *forum conveniens*, if rigidly applied, is capable of causing considerable injustice. In *Kemp* v. *Piper* the defendant had at the time of the accident which took place in Victoria, been resident in South Australia, but by the time of the action he had moved to Western Australia. The plaintiff, a resident of South Australia, managed to effect personal service on him in South Australia; but it is possible that in such a case the only State in which personal service could be effected would be Western Australia. Alternatively, in such a case it may be the plaintiffs who have been compelled to move following the accident and it may be possible for them to effect personal service on the defendant in the State of their new home. In either case it would, it is submitted, be less than reasonable for the forum State to refuse to hear the case at all and to send the

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38 Its principal Australian advocate is Professor Nygh; see esp. 'Boys v. Chaplin or The Maze of Malta' (1970) 44 *A.L.J.* 160, 164. Its principal American advocate is Professor Ehrenzweig: see *e.g. Treatise on Conflict of Laws* (West, 1962) pp. 120-159; *Private International Law* (Oceana, 1967) p. 107ff.; 'A Proper Law in a Proper Forum: A "Restatement" of the Lex Fori approach' (1965) 18 *Okla L.R.* 340; 'The Not-so-proper Law of a Tort: (Pandora's Box)' (1968) 17 *I.C.L.Q.* 1; 'Specific Principles of Private Transnational Law' (1968) II *Hague Receuil des Cours* 178, 216ff.

39 Cheshire and North (*op. cit.*) and Dicey and Morris (*op. cit.*) do not acknowledge the existence of the doctrine in English law; Nygh: *Conflict of Laws in Australia* acknowledges that 'English and Australian courts have not yet worked out a consistent doctrine of *forum non conveniens*' (p. 173). His optimism about the development of the doctrine under the Service and Execution of Process Act 1901-63 (C/W) in the light of *Earthworks and Quarries Ltd.* v. *Eastment and Sons Pty. Ltd.* [1966] V.R. 24 should be tempered by the restrictive views in relation to State rules governing service outside the jurisdiction expressed by Gibbs J. in *Cope Allman (Australia) Ltd.* v. *Celermajer* (1968) 11 F.L.R. 488. Certainly the views of Inglis: 'Jurisdiction, The Doctrine of Forum Non Conveniens and Choice of Law' (1965) 81 *L.Q.R.* 380 seem to go further than the authorities warrant at present.

40 The fullest account of this topic is that of Nygh: *Conflict of Laws in Australia*, Ch. 6. See too Dicey and Morris, *op. cit.*, Ch. 33, Cheshire and North, *op. cit.*, p. 116ff. See too on the question of *lis alibi pendens*, McLean: 'Jurisdiction and Judicial Discretion' (1969) 18 *I.C.L.Q.* 931; and for the Scottish doctrine of *forum non conveniens* see Anton, *op. cit.*, 148ff.

41 Kahn-Freund: 'Delictual Liability and the Conflict of Laws' (1968) II *Hague Receuil des Cours* 1, 60.

plaintiff elsewhere.[42] But should the forum State hear the case, it might equally be unjust for it to apply only its own law without regard to the law of either of the other States. It is submitted, therefore, that the advantages of the *forum conveniens* method of solving the difficulty of forum-shopping have yet to be fully made out, and that in any event there might still be cases in which a forum should assert jurisdiction to hear a case and, nevertheless, take account of foreign law. The conclusion is that the courts have been right to concentrate on the alternative method of discouraging the forum-shopper.

Primarily, then, the function of the second condition in *Phillips* v. *Eyre* is to protect a defendant from being unjustly disadvantaged by the plaintiff's choice of the forum, and it does this by enabling him to take refuge in the protective provisions of a foreign law. The law chosen in pursuance of this function is the *lex loci delicti*, and it is not proposed at this stage to discuss whether this is the appropriate law for the task. It should be evident, therefore, that the interpretation of the 'non-justifiability' rule depends on the extent of the protection to which it is felt the defendant should be entitled; the *Machado* v. *Fontes* rule of 'innocence' provides him with much less protection than the rule that has become established in the courts of Scotland. Clearly enough, the extent of the disadvantage suffered by the defendant may, in one sense, be defined as the extent to which the forum allows for recovery beyond the limits allowed for by the foreign law which has been deemed the appropriate measuring stick — for the moment, the *lex loci delicti*. So it would be wrong to allow a defendant to be compelled to submit to a forum which would subject him to a liability which would not be admitted by the *lex loci*. This premise would seem to lead to two consequences: first, that where the forum allows for a civil liability which the *lex loci delicti* does not the plaintiff should not be permitted to succeed in his suit under that claim; and secondly, that where the *lex loci delicti* offers the defendant a valid defence to the action against him that defence should be allowed in the forum. The latter point should be too clear for argument: the language of 'non-justifiability' itself indicates a concern for the defences available under the *lex loci delicti*; and the former derives support from the other much cited sentence from the judgment of Willes J.: 'The civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law.'[43] Without accepting the vested rights overtones inherent in this dictum, it should be apparent that, if the argument just developed be approved, *Hartley* v. *Venn* was wrongly decided and *Kolsky* v. *Mayne Nickless* very probably so (there has been such general condemnation of *Machado* v. *Fontes* that it scarcely seems worthwhile to reassert it). In *Hartley* v. *Venn* the second branch of the *Phillips* v. *Eyre* rule was restated in such

42 The problem would not be dissimilar from that arising from Lord Pearson's view of the forum-shopping problem (*Boys* v. *Chaplin* [1971] A.C. 356, 406). He too would seek a solution in a choice of law rule (the law of the 'natural forum') rather than dismiss the case.

43 (1870) 6 Q.B. 1, 28.

a way as to remove all consideration of the defences available under the *lex loci delicti;* this defeats the whole purpose of the rule to such an extent that, on one line of the reasoning employed in that case, *Phillips* v. *Eyre* was itself wrongly decided![44] *Kolsky* v. *Mayne Nickless* is more difficult in that the Victorian contributory negligence legislation purports only to reduce damages, and might therefore be regarded as a procedural matter going to the measure of damages only; but in the light of the fact that the reduction must take account of the 'claimant's share in the responsibility for the damage'[45] and the interpretation put on that phrase in *Pennington* v. *Norris*[46] it is apparent that the provision reflects the view that each party to the accident should take responsibility for damage caused in accordance with his fault and should be regarded as the substantive implementation of the moral principle at the base of liability for fault. On this view, either the partial defence should be admitted as such under the 'non-justifiable' rule or the matter should fall to be decided under the principles shortly to be mentioned.

The problem which remains is whether or not the above reasoning ought also to apply to cases in which, although both laws allow for recovery, the forum allows for greater recovery than the *lex loci delicti.* This may be the case because, as in *Chaplin* v. *Boys* and *Kemp* v. *Piper* the forum allows claims in respect of heads of damage unknown to the *lex loci delicti;* because, as in *Kolsky* v. *Mayne Nickless* the *locus delicti* provides for a partial defence to the action (perhaps analogous are the many American cases where the *lex loci delicti* provides for a limitation on damages in respect of a particular claim);[47] or for a genuinely procedural reason, such as that the forum provides for jury trial while the *lex loci delicti* does not. The last case is the simplest: the forum will obviously adopt its own procedures and not those of any other State. So far as the other cases are concerned the unrestricted application of the *lex fori* will continue to subject the defendant to a disadvantage despite the fact that he may have no control over the choice of the forum; he therefore still requires the protection of a rule enabling him to free himself of that disadvantage. This tends to support the rule of double liability and to suggest that *Kolsky* v. *Mayne Nickless* was wrongly decided. The adoption of the rule of double liability in respect of the relevant claim is, therefore, the solution which best fulfils the purpose of protecting the defendant from the disadvantage he suffers from the power of the plaintiff to select the forum. As against this the rule may create

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44 The plaintiff was able to state his cause of action in trespass to the person; the Act of Indemnity operated by way of defence.

45 *Wrongs Act* 1958 (Vic.) s. 26 (1).

46 (1956) 96 C.L.R. 10. The moral principle is, of course, that which measures culpability in terms of the degree of divergence from the standard of care of the reasonable man rather than any more subjective principle.

47 *E.g. Kilberg* v. *North-East Airlines* 172 N.E. 2d, 526 (New York 1961); *Griffith* v. *United Air Lines* 203 A 2d 796 (Pennsylvania, 1964) *Reich* v. *Purcell* 432 P2d 727 (California, 1967); *Gore* v. *North-East Airlines* 373 F2d 717 (2d, Cir., 1967) Contrast: *Tramontana* v. *Empresa de Viacao Aerea Rio Grandense* 350 F2d 468 (D.C. Cir., 1965); *Ciprari* v. *Serviers Aercos Cruzeiro* 245 F. Supp. 819 (S.D.N.Y., 1965).

practical problems for the court: in particular, the problem which arose in *Chaplin* v. *Boys* and which was solved so disastrously in *Slater* v. *Mexican National Railway Co.*[48] where the *lex loci* limits the damages but provides for later recourse to the court (a procedure which the common law court will not follow). Here the double liability rule will subject the plaintiff, rather than the defendant, to a disadvantage and, if one had to choose between Lord Upjohn's answer of applying the *lex fori*[49] or Holmes J's answer of dismissing the action altogether[50] one would prefer the former. Yet it is submitted that in an Australian context the double liability rule is preferable. Most conflicts problems in the field of torts in Australia are interstate, rather than international, problems; and this particular difficulty is therefore unlikely to be a serious one here. And although *Chaplin* v. *Boys* points to a major disadvantage of *Slater* v. *Mexican National Railway Co.*, since both parties were British residents who had returned from their National Service and were unlikely to return to Malta, it remains true that the plaintiff, having the choice of forum, has the opportunity to know in advance of the consequences of his choice. Moreover, the decision in *Chaplin* v. *Boys* indicates that there are ways in which the plight of a deserving plaintiff may be alleviated. Especially in Australia, therefore, the objection based on the possible divergence in the nature of the remedies available is not compelling.

At this point it should be possible to say that since there is no decisive Australian authority on the point, and since the purpose of the second branch of the *Phillips* v. *Eyre* rule is best fulfilled by defining it as a rule of double liability while the problems raised by extension to the specific *ius actionis* do not seem likely to prove unduly inconvenient, Australian courts should adopt this definition of the rule. But before one makes this assertion it would be wise to take account of the reasons why various courts in the common law would have chosen to interpret the rule as meaning something less than this. On the assumption that the parties concerned were Brazilian, *Machado* v. *Fontes* is inexplicable — an abuse of the rules in *Phillips* v. *Eyre* and a blatant example of forum-shopping according to Lord Donovan[51] and a 'forum-shopper's charter' according to one of the commentators on *Chaplin* v. *Boys*.[52] But apart from this courts which have interpreted the rule of non-justifiability as less than double liability have inevitably allowed the law of the forum a more considerable application than the rule of double liability would, *prima facie*, countenance. In Australia its principal use has been to allow the forum to ignore the contributory negligence rule of the *lex loci delicti* when that law has been less favourable to the plaintiff than the forum rule; hence in *Hartley* v. *Venn* the forum applied its comparative negligence rule in place of the common law rule of the *locus delicti* and in

48 194 U.S. 120 (1904).
49 [1968] 2 Q.B. 1.
50 *Slater* v. *Mexican National Railway Co.* 194 U.S. 120 (1904).
51 [1971] A.C. 356, 383.
52 Karsten: 'Chaplin v. Boys: Another Analysis' (1970) 19 *I.C.L.Q.* 35, 44.

Kolsky v. *Mayne Nickless* the forum applied its rule which left the claim of the plaintiff intact against the comparative negligence rule of the *lex loci delicti*. Outside Australia the *Machado* v. *Fontes* rule has been used to defeat a host-guest immunity imposed by the *lex loci delicti*: in *McLean* v. *Pettigrew*[53] the Supreme Court of Canada held, in a situation which has since become all too well known, that the immunity which obtains between a driver and his gratuitous passenger in Ontario did not defeat a claim in the courts of Quebec by a Quebec domiciliary against a Quebec driver when the host-guest relationship had arisen in Quebec, although the accident took place in Ontario. The *Machado* v. *Fontes* rule, therefore, has enabled the forum to ignore the full terms of a foreign law so as to provide a remedy by the law of the forum; it is difficult to say that it has enabled courts to apply what they consider to be a 'better law' (since Kerr J. in *Hartley* v. *Venn* suggested that he might have applied the contributory negligence rule of the *lex loci delicti* had the case been argued differently) or that it has enabled them to apply the law having the most significant relationship to the occurrence and the parties (the report of *Hartley* v. *Venn* does not even mention the residence of the parties, and in *Kolsky* v. *Mayne Nickless* the court held not only that a plea asserting that both parties to the accident were residents of Victoria, where the accident occurred, was bad in law, but also that a replication asserting that the plaintiffs were at all relevant times resident in New South Wales, the forum, was similarly bad). The result is that although the decisions in the respective cases might have been perfectly proper (no one would quarrel with the outcome in *McLean* v. *Pettigrew* and we know insufficient of the circumstances of *Hartley* v. *Venn* and *Kolsky* v. *Mayne Nickless* to make any worthwhile judgment) the rule applied in them is one which may be applied quite indiscriminately so as to place a defendant at a totally unfair disadvantage. In its terms, the rule would have been applicable in *McLean* v. *Pettigrew* if the parties had been residents of Ontario rather than of Quebec and the court in *Kolsky* v. *Mayne Nickless* make it clear that their decision would have been the same even if all the parties had been residents of Victoria. The latter result has been stigmatised as 'absurd and nonsensical'[54] and it is difficult to see any justification for it: even Professor Ehrenzweig might displace the *lex fori* in the circumstances.[55] The conclusion from all this should be that the cases that have just been discussed show that the double liability rule may produce its own disadvantages, but that these are not to be reduced simply by a different definition of the second branch of the rule in *Phillips* v. *Eyre;* something more subtle is required.

Since it is open to them to do so, Australian courts should thus accept

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53 [1945] 2 D.L.R. 65 (Supreme Court of Canada).
54 (1971) *A.L.J.* 688, 689 (P.G.).
55 Ehrenzweig: *Treatise on the Conflict of Laws* (West, 1962) p. 572. But his more recent writings cast doubt on this: see especially 'The Not-so-Proper Law of a Tort: Pandora's Box' (1968) 17 *I.C.L.Q.* 1; 'Specific Principles of Transnational Law' (1968) II *Hague Receuil des Cours* 178, Ch. 7 esp. p. 319.

the definition of the 'non-justifiability' rule as requiring liability in respect of the relevant claim between the same parties according to the *lex loci delicti*. But having adopted this statement of the *Phillips* v. *Eyre* rules as representing the law other practical problems arise; the defendant is now commonly assured of fair treatment, but the plaintiff may have been seriously inconvenienced thereby. Rigid application of the rule would have led to the plaintiffs being defeated in *McLean* v. *Pettigrew*, *Chaplin* v. *Boys* and *Kemp* v. *Piper*, and there is general agreement that in all these cases the plaintiff rightly succeeded. Unless some other major objective of the law is seriously affected by so doing, the rule should have exceptions or should be applied flexibly. The objective which is threatened by such an approach is obviously that of certainty in the application of the law, and it is hoped that it will be demonstrated later in this article that this threat is one which is frequently over-estimated. Assuming for the moment, therefore, that there is no insuperable problem at this point, it should be a corollary of the rule of double liability that there should be some escape mechanism for use in particular cases. The argument of the court in *Kolsky* v. *Mayne Nickless* is on this matter thoroughly unconvincing: it said[56] that 'The established law of this country in the present respect is on the side of certainty rather than flexibility.... It is established not only by long-standing decisions of State courts but also by decisions of the High Court which are binding on us and one of which we regard as virtually indistinguishable from the present case.' From what has been said already it should be apparent that there has been no agreed interpretation of the 'non-justifiability' rule in the State courts and no decision on the point by the High Court; and that, apart from *Kemp* v. *Piper*, which is inconclusive on the point, the only court in Australia which has rejected the 'flexibility' approach is the Court of Appeal of New South Wales in *Kolsky's* case itself, since no other Australian courts have been asked to introduce it — certainly the High Court has never had to consider the matter.[57] Lastly, the High Court decision referred to is *Anderson* v. *Eric Anderson*, and it can only be a source of amazement that a decision which was confined to the interpretation of the first branch of *Phillips* v. *Eyre* could be regarded as 'virtually indistinguishable' from a case which raised a problem relating to the true scope of the second branch. This argument, therefore, should not militate against the provision of an escape device.

In seeking such a device, it should be remembered that the function of the second branch of *Phillips* v. *Eyre* is to prevent unfairness to the defendant. It follows, therefore, that it ought only to be applied to the extent necessary to achieve that purpose. Looked at in this light, the rule raises several questions: first, why the initial reference should be to

56 (1971) 92 W.N. (N.S.W.) 855, 865.

57 It was not asked to do so in *Anderson* v. *Eric Anderson Radio and T.V. Pty. Ltd.* (1965) 114 C.L.R. 20. It is possible that *Joss* v. *Snowball* [1970] 1 N.S.W.R. 426 might also amount to a rejection of *Boys* v. *Chaplin* (it has been so construed: see 45 *A.L.J.* 99 (P.G.) and Nygh: *Conflict of Laws in Australia* 406).

the *lex loci delicti* and whether reference to some other foreign law should be equally permissible: secondly, the form of the mechanism that ought to be adopted to achieve this objective; and thirdly the extent to which one may expect some agreement on the way in which the rule will be applied in particular situations. It may also be noted that, if the *lex loci delicti* is taken as a starting point for the purpose of the second branch of *Phillips* v. *Eyre* the other two problems arise in much the same form as they do for those commentators who prefer to ignore the *lex fori* and to select the *lex loci delicti* as their basic choice of law rule, so that in the ensuing discussions it will be possible to take account of the views of such writers as Professors Rheinstein and Kahn-Freund and Dr. McGregor as well as those of the *Restatement*[58] and of other American contributors to the recent controversies on choice of law methodology.

Once the world of the *'obligatio'* theory and of vested rights has been cast aside, the basic reason given for their choice by protagonists of the *lex loci delicti* is that it is the law which the parties would, in general, expect to be applied and that its application therefore best meets their expectations.[59] Other reasons given are that the *locus delicti* is usually, if not invariably, easy to ascertain and that it gives certainty to the law. The latter reason can be, at best, subsidiary, since the same is true of *lex fori* alone or as Professor Brainerd Currie once suggested, to the law of a State chosen alphabetically[60] (which would also assist in fulfilling the impractical ideal of the case being decided the same way in any forum). This notion of the expectations of the parties gives some colour to the general idea of fairness: the forum, in order to be fair to the defendant, ought not to expose him to a liability beyond that which he legitimately expects to arise out of the occurrence. Obviously this does not amount to an *a priori* postulate from which specific rules may be drawn; it is no more than a statement of the general objectives that the specific rules should seek to promote. But it is possible to say that in a torts case the *lex loci delicti* is likely to be the law which the parties, and especially the defendant, will expect to set the limits of his liability, though there may be some cases in which this will be generally untrue and rather more in which it will be partly untrue. This is, of course, to adopt the distinction drawn by Professor Kahn-Freund between cases in which the *lex loci delicti* should be displaced *in toto* and cases in which the *lex loci*

58 *Restatement* 2nd: Conflict of Laws (American Law Institute, 1971).

59 See especially Rheinstein: 'Ehrenzweig on the Conflict of Laws' (1965) 18 *Okla. L.R.* 238, 241; Kahn-Freund, *loc. cit.* p. 43ff. McGregor, *loc. cit.* p. 15. Contra: *Rest.* (2d) s. 145 comment (b), and perhaps Ehrenzweig: 'The Not-so-Proper Law of the Tort: Pandora's Box' 17 *I.C.L.Q.* 1. See too Hancock: *Torts in the Conflict of Laws*, (Callaghan, 1942) p. 54ff., where a similar argument to that employed here is used to support another conclusion.

60 B. Currie: 'The Verdict of Quiescent Years' in *Selected Essays on the Conflict of Laws*, p. 609; supported by D. Currie: 'Comments on Reich v. Purcell' (1968) 15 *U.C.L.A. Law Rev.* 595, 605. But the older Professor Currie became disenchanted with the idea as one for practical application: 'The Dis-interested Third State' (1963) 28 *Law and Contemporary Problems* 754, 776 n. 86.

delicti may have to be displaced with respect to some issues but not with respect to others.[61] The task then becomes, once such situations are identified, to find a method of dealing with them so as to determine which law should be applied.

Rather than embark on the mammoth task of cataloguing all the methodologies which have been canvassed and which may be useful at this stage in the enquiry, it is proposed to return to the judgments of Lords Wilberforce and Hodson in *Chaplin* v. *Boys*, less because of any claim that they constitute the *ratio* of the case[62] than because they constitute the only significant enquiry into the problem in English and Australian courts. They do, however, lead to an investigation of some of the major (and divergent) views which have been pressed by commentators in recent years. Lord Wilberforce sought his solution to the problem 'through segregation of the relevant issue and consideration whether, in relation to that issue, the relevant rule ought... to be applied. For this purpose it is necessary to identify the policy of the rule, to inquire to what situations, with what contacts, it was intended to apply; whether not to apply it, in the circumstances of the instant case, would serve any interest which the rule was designed to meet... The general rule must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from what other rule, should be preferred.'[63] He did not specify what 'other rule' should be adopted, but he approved in principle the formulation of the *Restatement* that (within the framework of the application of the *lex fori* under the first branch of *Phillips* v. *Eyre*) 'the local law of the State where the injury occurred determines the rights and liabilities of the parties, unless with respect to the particular issue some other State has a more significant relationship with the occurrence and the parties, in which event the local law of the other State will be applied'.[64] Lord Hodson dispensed with the first stage in this process and directly adopted the *Restatement* rule.[65] The two stages of the process outlined by Lord Wilberforce must be examined separately, since at first sight they reflect the two of the basic approaches to choice of law problems which have received most currency. The first stage involves that process of 'construing and interpreting' the law with a view to determining whether or not a conflict really does exist between the respective laws of the forum, the *locus delicti* or

61 *Loc. cit.* Chapters 3-4. See esp. pp. 86-87.
62 Contrast Karsten, *loc. cit.*
63 [1971] A.C. 365, 391.
64 *Id.* pp. 390-391. Lord Wilberforce referred to the Eighth Tentative Draft of May 1st, 1968. See now *Rest.* 2d. ss. 6, 145, 146. The citation is now to s. 146.
65 [1971] A.C. 365, 380.

any other State;[66] it quite evidently requires the court to examine the content of the foreign rule. The second stage demands application of the law of a *State* having the most significant relationship with the occurrence and the parties; in its terms, therefore, it is a jurisdiction-selecting rule.[67] It is true that the *Restatement* includes among the factors which lend significance to a rule 'the relevant policies of other interested states and the relevant interests of those states in the determination of the particular issue';[68] but this will have been done at the first stage of construction and interpretation of the *lex loci delicti.* If at this stage it is apparent that the *lex loci delicti* extends to cover the facts of the case under review then, under the scheme outlined by Lord Wilberforce, the forum will either continue to apply that law or have to consider whether it should be displaced and perhaps replaced by another law which, *ex hypothesi,* extends to cover the case following construction and interpretation of its provisions. Hence within that framework it is hard to see how the 'most significant relationship' rule would operate other than as a jurisdiction-selecting rule.

There is an evident immediate attraction about the stage of construction and interpretation of the foreign rule. At one level it seems clear enough that there is little point in courts creating difficulties for themselves; if the *locus delicti* would regard its rule as inapplicable to the international or interstate case the forum need not construct rules to cope with a conflict.[69] And, of course, in such a case no legitimate expectation of the defendant would be sacrificed by ignoring the foreign rule. But this is not all that is extended; the process goes further than a mere restatement of the problems of *renvoi* and *desistement.*[70] In *Chaplin* v. *Boys* Lord Wilberforce did not investigate whether or not the Maltese rule limiting damages would have applied if the case had been heard in Malta; he merely asserted that 'Nothing suggests that the Maltese state has any interest in applying this rule to persons resident outside

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66 On 'construction and interpretation' see B. Currie: *Selected Essays on the Conflict of Laws, passim:* 'the Disinterested Third State' (1963) 28 *Law and Contemporary Problems* 754; Cavers *The Choice of Law Process* (University of Michigan Press, 1965) *passim,* esp. Ch. IV, Ehrenzweig: *Private International Law* p. 94ff.; Von Mehren and Trautmann: *The Law of Multistate Problems* (Little, Brown and Co., 1965) Ch. 3; Hancock: 'Torts Cases in the Conflict of Laws Solved by Statutory Construction: The Halley and Other Older Cases Revisited' (1968) 18 *University of Toronto L.J.* 331. See too the literature cited by Cavers, *op. cit.* pp. 91-2. Where it is found that no conflict exists the court will apply its own law — the conflict has been determined to be 'false'. See the works just cited and Leflar: *American Conflicts Law* (Bobbs Merrill, 1968) s. 103 and literature there cited.

67 Cavers: 'A Critique of the Choice of Law Problem' (1937) 47 *H.L.R.* 173. For other explanations see Hancock: *Three Approaches to the Choice of Law Problem: The Classificatory, the Functional and the Result Selective in Twentieth Century Comparative and Conflicts Law* (Sythoff, 1961) pp. 365-379: Leflar: *op. cit.* s. 102.

68 *Rest.* 2nd. s. 6 (2) (a), specifically brought into sections 145 and 146.

69 See footnote 66, *supra* for references to some of the literature on false conflicts.

70 For the effect of recent theories on these questions see Kelly: 'Localising Rules and Different Approaches to the Choice of Law Process' (1969) 18 *I.C.L.Q.* 249 esp. at 270ff.

it'[71] (nothing suggests that the United Kingdom would have any 'interest' in applying its own rule about pain and suffering to two Maltese whose cars collide in London, but the courts would nevertheless apply the rule). This points at once to one of the fundamental problems raised by Lord Wilberforce's judgment: what precisely is it that is being construed and interpreted and how should the process be undertaken? In a strict sense it is not the rule itself, but the 'policy' behind the rule. In an international, as distinct from an interstate, situation it would often be quite impossible to expect the courts of the forum to 'construe and interpret' the statutes of, for example, civil law countries, where even the process of construction and interpretation themselves differ from those of the common law. Professor Kahn-Freund suggests the process of identifying the policies behind a rule would be a 'hopeless undertaking' with respect to civil law countries, and even doubts its possibility in the United States.[72] Here, then, is a basic criticism of the rule, though it is one which has less force in Australia than even for the United States: the States of Australia share the common law and its distinctive techniques, and the conflicts rule for Australia should emphasise the interstate, rather than the international, aspects of the problem. But there is no conclusive answer to the criticism. If one consults the seminal articles of Professor Brainerd Currie on the process of 'construction and interpretation' it is immediately apparent that he did not examine the policies behind even a statutory rule in a particular State; his views on the function and policies of provisions restricting the contractual capacity of married women[73] or of provisions restricting recovery against the estate of a deceased tortfeasor[74] are quite general and are applicable to any such rules in the law of any State. Given a relic from the past, such as the rule restricting the contractual capacity of married women, all he could do was search for the most rational reason for a State continuing to adhere to such a rule.[75] A similar tendency is discernible in the reasons given by the New York Court of Appeals in the line of cases concerning accidents in other States which had rules conferring an immunity on a host driver against a guest passenger. In *Babcock* v. *Jackson*[76] there was a cursory reference to a law review note on the introduction of the rule[77] and in *Dym* v. *Gordon*[78] the policies commented on were wholly general. This process

71 [1971] A.C. 356, 392.
72 *Loc. cit.*, pp. 60-61.
73 'Married Women's Contracts: A Study in Conflict of Laws Method', *Selected Essays in The Conflict of Laws*, Ch. 2.
74 'Survival of Actions: Adjudication versus Automation in the Conflict of Laws', *Selected Essays in the Conflict of Laws*, Ch. 3.
75 *Selected Essays in the Conflict of Laws* pp. 81, 85.
76 191 N.E. 2d. 279 (New York, 1963).
77 Survey of Canadian Legislation: (1936) 1 *U. Toronto L.J.* 358, 366, cited 191 N.E. 279, 284, *Cf.* B. Currie: *Selected Essays in the Conflict of Laws* p. 724.
78 209 N.E. 2d. 792. 'The protection of Colorado drivers and their insurance carriers against fraudulent claims, the prevention of suits by ungrateful guests, and the priority of injured parties in other cars in the assets of the negligent defendant.' *per* Burke J. at p. 794. No authority was cited to suggest that these policies were unique to Colorado, though see Cavers: *The Choice of Law Process* p. 297 n. 10.

culminated, in *Tooker* v. *Lopez*,[79] in Fuld C. J. laying down some perfectly general rules to govern this kind of case. Reasoning at this level of generality seems to take us far away from the process outlined by Lord Wilberforce, despite his claim that the technique 'appears necessary and even inevitable'.[80] Nevertheless in the Australian situation at least it is likely that the process of construction and interpretation can be carried out with sufficient sensitivity to be useful at this stage in the process of solving the overall problem to identify at least some of the simpler situations where the *lex loci delicti* should not be applied; it helped to lead to the decisions in *Chaplin* v. *Boys* and *Kemp* v. *Piper*; in the hands of an experienced and admired conflicts judge in Traynor C. J. it has led to decisions which have won general approval;[81] the experience of the New York courts suggests that it can be used to solve the host-guest questions; and it is capable of guiding one to those cases — involving special environments such as ships and cases turning on a special relationship between the parties — in which Professor Kahn-Freund advocates the total displacement of the *lex loci delicti*.[82] There is sufficient value in this to justify the adoption of the method.

The foregoing discussion also indicates that one common criticism of the technique of construction and interpretation of rules has been overstated. Professor Brainerd Currie asserted roundly that 'we would be better off without choice of law rules;'[83] and that if the process of construction and interpretation (which should be carried out, so far as the forum law is concerned, in a restrained and moderate way[84]) could not solve the problem of conflicting laws the forum should apply its own law. Stated in this extreme form with all conflicts 'rules' gone, any of the virtues of certainty and fairness to the defendant are lost, and the very power of Professor Currie's argument may have led some critics to reject it too quickly. Yet the very fact that the process can only be carried out at such a level of generality makes it inevitable that the courts will treat cases involving similar domestic rules in similar ways. So Professor Cavers, who also advocates use of the technique, commented that 'however earnestly a court sought to follow Professor Currie's counsel, it would inevitably be led to produce choice of law rules'.[85] The curious fact that the very case in which the New York Court of Appeals

79 249 N.E. 2d. 394.
80 [1971] A.C. 365, 391.
81 *Grant* v. *McAuliffe* 264 P. 2d. 944 (1953); *Emery* v. *Emery* 289 P. 2d 218 (1956); *Reich* v. *Purcell* 432 P. 2d 727 (1967). See too R. Traynor: (1971) 49 *Tex. L.R.* 239-242.
82 *Loc. cit.*, Ch. 3.
83 'Notes on Methods and Objections in The Conflict of Laws', *Selected Essays on The Conflict of Laws* 177, 183. See too: Comment on *Babcock* v. *Jackson* (1963) 63 *Col. L.R.* 1233, 1241
84 See especially 'The Disinterested Third State' (1963) 28 *Law and Contemporary Problems* 754. This refinement (a speciality of Traynor C. J. — see *Bernkrant* v. *Fowler* and *Reich* v. *Purcell* 360 P. 2d. 906 (California, 1961) and *supra* n. 81) is irrelevant under the double actionability system espoused in *Boys* v. *Chaplin*.
85 *The Choice of Law Process*, p. 74. See too Weintraub: 'Comment on Reich v. Purcell' (1968) 15 *U.C.L.A. Law Rev.* 556, 558-9.

most unequivocally adopted an 'interest' analysis was also the case in which Fuld C. J. (its leader in pioneering conflicts cases) was impelled to state rules governing host-guest statutes tends to bear out this prophecy.[86] It thus appears that the process of construction and interpretation of statutes (even of foreign statutes only) tends to merge with that of formulating and defining a rule and that where it is capable of producing solutions to particular problems it will ultimately do so by evolving a rule. This in turn means not only that criticisms of the process based on its extreme uncertainty go too far, but also that the process itself, when consistently and successfully applied, tends to reduce the area in which it may be usefully employed since the newly formed 'rule' takes over from the original process. Hence a New York court applying Fuld C. J.'s rules for host-guest cases as formulated in *Tooker* v. *Lopez* would not bother to look further at the 'policies' behind such statutes. It is noteworthy in this connection that when Professor Cavers first introduced his 'principles of preference' for deciding cases he emphasised that they were to be applied only where the process of construction had shown that the conflict was not 'false',[87] but it did not take long for him to change his position to the extent of saying that 'in determining whether a conflict is false or avoidable recourse to the principles may be helpful'.[88] In the result it emerges from this discussion not only that the process of construction and interpretation has a role to play in determining the extent to which the forum should take account of the *lex loci delicti*, but also that its use will result in the evolution of concrete rules which will assist in that task. The preceding paragraph also indicates that there is the possibility that general agreement on the content of some of these rules already exists, a point which will be amplified later.

Most advocates of the technique of construction and interpretation recognise that it has limits.[89] Even at a very general level, it may be

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86 *Tooker* v. *Lopez* 249 N.E. 2d. 394 (1969). The majority opinion is based firmly on governmental interest analysis; the concurring opinion of Fuld C. J. (the author of the opinions in *Babcock* v. *Jackson*, and a dissentient in *Dym* v. *Gordon*) suggests the following rules to cover host-guest cases (p. 404):
1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.
2. Where the driver's conduct occurred in the state of his domicil and that state does not cast liability on him for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the victim's domicil. Conversely, when the guest was injured in the state of his own domicil and its law permits recovery, the driver who has come into that state should not — in the absence of special circumstances — be permitted to interpose the law of his state as a defence.
3. In other circumstances, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purpose without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.

87 *The Choice of Law Process* pp. 113, 137.

88 'The Value of Principled Preferences' (1971) *Texas L.R.* 211, 220-21.

89 The most penetrating discussion remains that of Cavers: *The Choice of Law Process*, Chapters 3-4.

impossible to discern sufficient of the legal, social and economic policies behind the foreign rule to know whether it should be displaced. There is also the possibility of the converse situation, where too many such policies, leading to different results, may be seen. And even if one accepts that the *lex loci delicti* should be displaced in a given case the process gives no information as to whether or how the courts should seek an alternative foreign law to protect the reasonable expectations of the defendant. Hence there is need for a final stage in determining a conflicts case in the field of torts, and Lords Hodson and Wilberforce respectively adopted and discussed the *Restatement* rule that the law which they should seek should be that of the State having 'the most significant relationship to the occurrence and the parties'.[90] This, evidently, is a wide and sweeping principle—so wide, indeed, that Professor Ehrenzweig refers to it as a 'nonrule'[91] and even its framers acknowledge that it is no more than a guideline that the courts should bear in mind in dealing with an area in which no precise rules may yet be stated.[92] It is, in fact, no more than a starting point for the analysis of particular problems, and almost certainly represents no more than a description of what courts have always tried to do with conflicts cases — to find the rule most appropriate to the class of dispute concerned in a case. But there is one crucial difference — the class of case is now to be defined in terms of the precise issue before the court and not within any such general category as 'torts'. The adoption of this change, which reflects the almost unanimous opinion of commentators over a period of many years,[93] is one which ought no longer to require advocacy; it is one of the most important points to emerge from the judgments of Lords Hodson and Wilberforce.

In the result, therefore, the chief difficulty arising out of the application of the *Restatement* principle is that by defining problems in terms

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90 *Rest.* 2d. ss. 6, 145.

91 'The Not so Proper Law of Tort: Pandora's Box.' (1968) 17 *I.C.L.Q.* 1, 8; *Specific Principles of Private Transnational Law* at p. 319.

92 *Rest.* 2d. s.6, comment (c): 'In other areas, such as Wrongs ... the difficulties and complexities involved have as yet prevented the courts from formulating a precise rule, or series of rules, which provide a satisfactory accommodation of the underlying factors in all of the situations which may arise. All that can presently be done in those areas is to state a general principle, such as the local law of the state of the most significant relationship, which provides some clue to the correct approach but does not furnish precise answers.' *Cf.* Reese: 'Conflict of Laws and The Restatement Second' (1963) 28 *Law and Contemporary Problems* 679, esp. at 680-1, 699 and Reese: 'Recent Developments in Torts Choice of Law Thinking in the United States' (1969) 8 *Col. Jo. of Transnational Law* 181, 190: 'This approach is at best a process which the courts should use in developing actual rules of choice of law.'

93 The point is implicit in Lorenzen: *Selected Articles on the Conflict of Laws* (Yale U.P., 1947) Ch. 13 and in the treatment of his subject by Hancock, *op. cit. supra*, n. 59: It is made quite explicit in *e.g.* Morris: 'The Proper Law of a Tort' (1951) 64 *H.L.R.* 881, and Stroemholm: *Torts in the Conflict of Laws* (Norstedt, 1961) and Rheinstein: 'How to Review a Festschrift' (1962) 11 *Am. Jo. Comp. Law* 632, 658ff. It is, of course, central to any 'interest' approach and to any system involving the construction and interpretation of a particular rule. See too on this point Graveson: 'Towards an Applicable Law in Tort' (1969) 85 *L.Q.R.* 505.

of issues rather than of wide legal categories it automatically requires answers to a whole range of questions to which there has formerly been a blanket solution. It is because of this, rather than of anything inherent in the idea of 'the most significant relationship' that uncertainty may be introduced into the law: Lords Hodson and Wilberforce have raised new problems without pointing to new solutions. Still, apart from Professor Ehrenzweig[94] and the staunchest disciples of the severity of Professor Brainerd Currie,[95] it is now generally recognised that the courts and practising lawyers will require rules to be evolved and formulated if the law is to be practical, and a great deal of discussion has taken place not merely as to the nature but also as to the content of such rules. Before examining the debates as to the content of the rules, however, it would be as well to dispose of the methodological dispute which exists as to their nature. According to Professor Hancock, such rules may be classified as 'jurisdiction selecting', 'rule selecting' or 'result selecting'.[96] Rules of the first class specify a particular connecting factor for each issue which arises in any given case: thus the problem of the 'host-guest' immunity might be solved by application of the law of the 'seat of the relationship'. Its principal recent adherents have been Professors Rheinstein[97] and Kahn-Freund[98] and Dr. McGregor,[99] and these would apply the 'seat of the relationship' rule regardless of whether the law of that State granted or withheld the immunity (and, of course, regardless of the law of the forum). Hence to Professor Kahn-Freund *Kell* v. *Henderson*[100] (in which two residents of Ontario crashed while on a visit to New York and New York applied its own rules and ignored the Ontario immunity) is a thoroughly unprincipled decision. Rules of the second class tend to specify that in a given situation the rule to be applied is that which specifies a higher or a lower standard of care in that situation; their chief proponent is Professor Cavers,[101] though Professor Reese may also be joining him.[102] Hence Professor Cavers specifies as his fourth 'principle of preference' that if the law governing the seat of the relationship has imposed a higher standard of care on the parties than that required by the *lex loci delicti* it should be applied[103]

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94 This perhaps does less than justice to Professor Ehrenzweig, who, of course, accepts the existence of both 'formulated' and 'non-formulated' rules. See his works cited *supra*, n. 38.

95 See *e.g.* Baade: 'Counter-Revolution or an Alliance for Progress?' (1967) 46 *Texas L.R.* 141; 'Comments on Reich v. Purcell' (1968) 15 *U.C.L.A. Law Rev.* 552, 584 (Kay) and perhaps 563 (Scoles).

96 Hancock: *Three Approaches to the Choice of Law Problem: The Classificatory, The Functional and the Result-Selective* in *Twentieth Century Comparative and Conflicts Law* (Sythoff, 1961) pp. 365-379. See too the other works cited *supra*, n. 67.

97 *E.g.* Rheinstein: 'How to Review a Festschrift' (1962) 11 *Am. Jo. Comp. Law* 632, 658ff.

98 *Loc. cit.*

99 'The International Accident Problem' (1970) 33 *M.L.R.* 1.

100 270 N.Y.S. 2d. 552 (1966). Kahn-Freund, *loc. cit.*, pp. 74-5.

101 'A Critique of The Choice of Law Problem' (1933) 47 *H.L.R.* 173; *The Choice of Law Process, passim.*

102 'Recent Developments in Torts Choice of Law Thinking in the United States' (1969) 8 *Col. Jo. of Transnational Law* 181, esp. at 190-195.

103 *The Choice of Law Process* p. 166.

(so *Babcock* v. *Jackson* is right), but he reserves his position as to the rule when it is the *lex loci delicti* which demands the higher standard[104] (so *Kell* v. *Henderson* may nevertheless be right too). Moreover, while the proponents of jurisdiction-selecting rules would want *Kell* v. *Henderson* to be decided the same way in both New York and Ontario courts, Professor Cavers would acknowledge that the courts of each State or Province might apply its own law, since reversal of the 'law-fact pattern' influences the considerations of which each court must take account.[105] Thirdly, the 'result-selective' approach would require application of the 'better law' in each case; despite one important decision which made use of it[106] few commentators advocate its use as a principal tool, though most would think it impossible to discount its influence on judges entirely. Presumably adherents of this approach would always ignore the immunity rule. Nevertheless, it would be impossible to advocate that this approach be adopted.

The dispute, therefore, revolves around the choice of jurisdiction-selecting rules as against rule-selecting ones. In determining which approach should be adopted it is first of all noteworthy that despite the apparent gulf between them the two approaches have much in common. A common criticism of the jurisdiction selecting approach is that it takes insufficient account of the policies behind different types of rule. But this has often been part of the reaction against the extreme rigidity of the scheme of the First *Restatement*,[107] and this charge has often been pressed very much too hard. In the words of Professor Rheinstein: 'The application of the classificatory approach . . . is by no means mechanical and devoid of considerations of policy. Quite the contrary. Without intensive and searching investigation of legal policy, no classification can ever be made of legal problems. In cases of routine character, such investigation has been made by generations of scholars and judges: in novel cases it has to be made anew.'[108] Secondly, the problem of the reversal of the law-fact pattern is very unlikely to cause difficulties to Australian courts, largely owing to the first rule in *Phillips* v. *Eyre*. Since the *lex fori* will invariably be applied, the problem only arises when the

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104 *Id.*, p. 177 *et seq.* See too Cavers: 'Comment on Babcock v. Jackson' (1963) 63 *Col. L.R.* 1219, 1224-6.

105 This has long been a central part of Professor Cavers' treatment of choice of law. See especially 'A Critique of the Choice of Law Problem' (1933) 47 *H.L.R.* 173 and 'Comment on Reich v. Purcell' (1968) 15 *U.C.L.A. Law Rev.* 647 as well as the works cited *supra* n. 104.

106 *Clark* v. *Clark* 222A 2d 205 (New Hampshire, 1966). See too the cases cited by Cavers: 'The Value of Principled Preferences' (1971) 49 *Tex. L.R.* 211, 214 n. 11. Although Cavers is often regarded as having been the originator of this approach in 'A Critique of the Choice of Law Problem' (1933) 47 *H.L.R.* 173 he has since tried to spell out his very limited view of its scope: *The Choice of Law Process* pp. 84-87; 'The Value of Principled Preferences' (*supra*) pp. 212-215. The principle has the support of Leflar: *American Conflicts Law* (Bobbs Merrill, 1968) s. 110, though it is only one of his choice-influencing considerations. It is opposed by Kahn-Freund, *loc. cit.*, pp. 61-2 and by Rheinstein (*loc. cit.*)

107 See especially Hancock, *loc. cit. supra* n. 96.

108 Rheinstein: 'How to Review a Festschrift' (1962) 11 *Am. Jo Comp. Law* 632, 659.

forum is neither the *locus delicti* nor the other State whose law is sought to be applied to the case, and where forum law and the latter law concur in offering a wider recovery to the plaintiff than the *lex loci delicti*. Such a situation, though not impossible, would be very rare. Thirdly, there is a very strong tendency for 'rule selecting' rules to become bilateral, and when this happens they become jurisdiction-selecting. Hence Professor Cavers' first principle of preference requires the law of the place of the injury to be applied if it imposes a higher standard of conduct than any competing law[109] and his second (subject to a qualification) requires the same law to be applied if it imposes a lower standard.[110] In relation to the standard of conduct, therefore, the law of the place of the injury has become a jurisdiction-selecting rule. Moreover, at least one of the rules put forward by Professor Reese in one of his more recent contributions to the literature is a straight jurisdiction-selecting rule,[111] as is one of the rules put forward by Fuld C. J. in *Tooker* v. *Lopez*.[112] It appears that the practical difference between the approaches is much less important than the theoretical one, a point which is further borne out by the problems encountered by the different commentators when they came to discuss specific points. In theoretical terms it may be that a rule-selecting approach, which ensures that the court enters on its task with its eyes wide open is preferable; but since the protagonists of each approach are trying to find the most suitable rule for different issues and in practice they try to take into account most of the 'choice-influencing factors' mentioned in the *Restatement* or by Professor Leflar,[113] the practical consequences of choosing a system of jurisdiction-selecting rules may be comparatively unimportant — at least as an interim measure.

It may be reassuring that it may be expected that, whichever methodology is used to provide the flexibility that the second branch of *Phillips* v. *Eyre* requires, it will eventually produce rules which may be applied in concrete cases. Nevertheless, it has already been conceded that the issue by issue approach advocated by Lord Wilberforce and many commentators will require the formulation of many such rules, and, while the rules do not yet exist courts have to decide cases and counsel and insurance adjusters have to advise clients and resolve claims. It is therefore of major significance that a great deal of debate has taken place on the content of what such rules should be and that a surprising measure of agreement has been reached by commentators and courts on specific issues despite the variety in their starting points and their approaches. Nevertheless, perhaps the most important principle that is emerging is

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109 *The Choice of Law Process*, p. 139.
110. *Id.*, p. 146.
111 Rule 5: 'Whether one spouse is immune from tort liability to the other spouse will be determined by the law of the state of the common domicil.' 'Recent Developments in Tort Choice of Law Thinking in the United States' (1968 8 *Col. Jo. of Transnational Law* 181, 194.
112 *Supra* n. 86. Rule 1.
113 Leflar: *American Conflicts Law* (Bobbs Merrill, 1968) Ch. 11, esp. ss. 105-110. *Rest.* 2d. s. 6 See too Yntema: 'The Objectives of Private International Law' (1957) 35 *Can. B.R.* 721; Cheatham and Reese: 'Conflict of Laws and the Restatement 2d.' (1963) 28 *Law and Contemporary Problems* 679.

that the initial presumption in favour of the *lex loci delicti* should be fairly strong: to revert to Lord Wilberforce 'the general rule must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from what other rule, should be preferred'.[114] This expresses a view adhered to by Professor Kahn-Freund[115] and Dr. McGregor[116] and one which is consistent with the general approach of both Professor Reese [117] and of Professor Cavers[118] (who somewhat ruefully acknowledges the 'territorialist bias' in his principles of preference).[119] It is also at the basis of the proposals for conventions to govern traffic accidents which have been made in Europe;[120] the proposal of the *Institut de Droit International*,[121] for example, lays down the *lex loci delicti* as the basic rule but allows for its replacement by way of exception in certain cases. This principle would again suggest that *Kolsky* v. *Mayne Nickless* was probably wrongly decided, since it is hard to see what 'clear and satisfying grounds' existed for effectively displacing the *lex loci delicti* against a resident of the State in which the accident occurred. Indeed there is some agreement that this is the sort of case in which the *lex loci* should not be displaced: Professor Reese nominates as one of his principles that: 'A person will not be held liable for a greater measure of damages than that provided by the law of the state where he was domiciled, where he acted and where the injury occurred';[122] and Professor Cavers,[123] Dr. McGregor[124] and Professor Kahn-Freund[125] agree. These commentators would also agree that a provision of the *lex loci delicti* which is favourable to the plaintiff should not be displaced if he is a resident of the State in which the tort was

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114 [1971] A.C. 356, 391.
115 *Loc. cit.* Chs. 3-4. See especially pp. 64, 87.
116 *Loc. cit.* p. 15ff.
117 'Recent Developments in Torts Choice of Law Thinking in the United States' (1969) 8 *Col. Jo. of Transnational Law* 181 (hereafter 'Recent Developments'). See too *Rest.* 2d. ss. 145 and 146; s. 146 in particular gives prominence to the local law of the State where the injury occurred.
118 See especially his first and second principles of preference: *The Choice of Law Process* pp. 139, 146.
119 *The Choice of Law Process* pp. 134-136.
120 Draft convention on the Law Applicable to Traffic Accidents 1967 (Hague Conference on Private International Law) Articles 3 *et seq.* (Reprinted 1968) 16 *Am. Jo. Comp. Law* 588); (1969) 18 *I.C.L.Q.* 664; Benelux Treaty Concerning a Uniform Law on Private International Law, 1969, Article 14 (English translation by Nadelmann printed in (1970) 18 *Am. Jo. Comp. Law* 406); Institute of International Law: Resolution on Delictual Obligations in Private International Law adopted at Edinburgh, 1969 (Reprinted (1971) 19 *Am. Jo. Comp. Law* 4). See too Conditionally approved Draft of a Uniform Conflict of Laws (Traffic Accidents) Act, 1970 (Uniform Law Section of the Conference of Commissioners on Uniformity of Legislation in Canada) Articles 3 *et seq.* (Reprinted (1971) 19 *Am. Jo. Comp Law* 36).
121 Article 1 reads: 'On principle delictual liabilities are governed by the law of the place at which the delicit is committed.' Article 3 lays down the exceptions. The pattern of the other Conventions referred to in the preceding note is similar.
122 *Recent Developments*, p. 193 (Rule 4).
123 *The Choice of Law Process* p. 146ff, esp. pp. 148-9. Principle of Preference No. 2.
124 *Loc. cit.*, p. 16.
125 *Loc. cit.*, pp. 93, 95, 117-8, 124. The same result would be reached under all the Conventions mentioned *supra*, n. 120.

committed,[126] but this point is, in the scheme of double actionability, endangered more by the application of the *lex fori* than by anything else.

The most general of the principles as to which agreement exists is probably that which asserts that the *lex loci delicti* should usually govern the standard of conduct required of the parties:[127] even Professor Brainerd Currie was prepared to give hesitating recognition to the principle that the traffic regulations of any State are intended to apply to all vehicles and drivers within it.[128] Again, in the framework of double actionability this rule is in practice only applicable when the *lex fori* is more stringent than the *lex loci delicti*; where it is less stringent the plaintiff will usually fail under the 'actionability in the forum' branch of the rule. And again this principle militates against the decision in *Kolsky* v. *Mayne Nickless*, for the comparative negligence rule is a rule about conduct rather than a rule about compensation[129] and the plaintiff as well as the defendant should abide by local rules of conduct. To this general proposition there are two exceptions: the *lex loci delicti* should not govern the standard of conduct as between spouses domiciled in another State, nor when the action concerns a one-car accident and the parties come from the State of the car's registration. These propositions should be free from difficulty, but neither is. Professors Currie [130] and Cavers[131] would dissent from the former, asserting that it is correct when the law of the domicil permits actions between spouses and the *lex loci delicti* does not, but that it is wrong when the laws are reversed. Their reasons, however, depend exclusively on the need to ensure that expensive hospital and medical bills are paid and seem to depend very largely on the problems of obtaining medical attention in America without risking bankruptcy thereby. Shorn of this consideration, the rule becomes — whether because it deals with matrimonial property or not — a

126 Reese: 'Recent Developments', p. 193 (Rule 3): McGregor, *loc. cit.*, p. 16, Kahn-Freund, *loc. cit.* pp. 93, 95, 117-8, Cavers: *The Choice of Law Process* p. 139ff. Principle of Preference No. 1. The same result would be reached under all the conventions mentioned *supra* n. 120.

127 Cavers: *The Choice of Law Process* pp. 139, 146: Principles of Preference Nos. 1 and 2; Reese, 'Recent Developments' p. 142 (Rules 1 and 2); Kahn-Freund, *loc. cit.* pp. 91-2; McGregor, *loc. cit.*, pp. 16-17; *Rest.* 2d. s.146 comment (d). The Conventions have this effect except in special cases; The Hague Draft, Article 7 seems merely to confirm the *datum* effect of the rules of the place of the accident.

128 B. Currie: 'Comment on Babcock v. Jackson' (1963) 63 *Col. L.R.* 1233, 1241.

129 See *Reich* v. *Purcell* 432 P. 2d. 727, 730-1, *per* Traynor, C. J. (California, 1967). The statement has already been made use of by Kahn-Freund, *loc. cit.*, 117.

130 B. Currie: 'Comment on Babcock v. Jackson' (1963) 63 *Col. L.R.* 1233, 1237-8.

131 Cavers: Comment on Babcock v. Jackson' (1963) 63 *Col. L.R.* 1219, 1222-25, *Choice of Law Process* p. 177ff; 'The Value of Principled Preferences' (1971) 49 *Tex. L.R.* 211, 218-219.

general one in favour of the law of the domicil.[132] The one-car accident case raises more curious and complex difficulties. The framers of the recent conventions on international traffic accidents have agreed that where the parties are usually resident in the State in which the car is registered the law of that State should displace the *lex loci delicti*,[133] and this appears to be an eminently sensible rule. Yet both Professor Cavers[134] and Professor Kahn-Freund[135] find difficulties here. Professor Cavers first encounters the same difficulty with this case that he meets in the interspousal immunity case: if the *lex loci delicti* demands a higher standard of care than the '*lex stabuli*'[136] then the interests of local creditors may require its retention as the governing law. Hence he approves *Kell* v. *Henderson*, a decision which Professor Kahn-Freund finds unprincipled. This difficulty, however, is one which need not be regarded as decisive in Australia. Secondly, both commentators prefer to say that the law which should govern the case should be the law of 'the seat of the relationship' between the parties and both appear to define that law largely in terms of the law of the State in which the relationship was formed.[137] Hence both have, at various times, approved the decision in *Dym.* v. *Gordon*,[138] where the Court of Appeals for New York applied the law of Colorado to confer an immunity on a New York driver against his passenger, also habitually resident in New York, when the host-guest relationship between them arose in Colorado where the accident took place. In the terms of the analysis of Lord Wilberforce in *Chaplin* v. *Boys*, however, this conclusion is difficult to accept: what interest of the State of Colorado was concerned in denying one New York resident a remedy against another? The only plausible reason for applying the law

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132 *Rest.* 2d. s.169; Reese: 'Recent Developments' at p.194 (Rule 5); Kahn-Freund, *loc. cit.* pp.62-68; McGregor, *loc. cit.*, pp.16-17, 20. It may be inferred that Rheinstein would agree from his discussion in 'How to Review a Festschrift' (1962) 11 *Jo. Comp. Law* 632, 660. Support may also be derived from the Benelux Convention, Art. 14 and the Resolution of the Institute of International Law, Article 3 (a) though these do not, of course, use the common law language of domicil. This would also be the result reached in very nearly all cases according to the Hague Draft Convention and the Canadian Draft. But the views of Currie and Cavers are supported by the *Motor Vehicles Act* (S.A.) 1959-1971, s.118 (as amended by *Motor Vehicles Amendment Act* (S.A.) No. 10 of 1970) which reads (s. 118 (3)): 'A right of action conferred by this section is exercisable, notwithstanding any law to the contrary — (a) where the injury was caused or inflicted in the State.' The language used in *Emery* v. *Emery* 289 P. 2d. 218 (California, 1956) supports this too — 'the law of the family domicil' — but it was an early case and the decision may not have been 'ideally articulated'. (*Cf.* Traynor: 'Is This Conflict Really Necessary?' (1959) 37 *Texas L.R.* 657).

133 Hague Draft Convention Article 4 (a); Canadian Draft Article 4; Benelux Convention Article 14; Resolution of the Institute of International Law Article 3 (b).

134 See *supra*, n. 131. *The Choice of Law Process* pp.173-176; 293-312 esp. at 301-304.

135 *Loc. cit.*, p. 63ff. See especially the treatment of *Dym* v. *Gordon* at pp.71-2.

136 The phrase seems to have been the invention of Professor Kahn-Freund as editor of the chapter on Torts in Dicey and Morris, *op. cit.*, at p.918. See too Ehrenzweig: 'The Not-so-Proper Law of Tort: Pandora's Box' (1968) 17 *I.C.L.Q.* 1 and McGregor, *loc. cit.*, p. 18.

137 See *supra* nn. 134, 135.

138 *Id.*

of the 'seat of the relationship' in these cases is that it is likely to be the law that best meets the expectation of the parties, but it is far from clear that this is necessarily true, especially in a situation in which the insurance position plays an important part.[139] In his more recent writings Professor Cavers has been prepared to acknowledge that considerable significance should be attached to the law of the common domicil[140] so that his view of *Dym* v. *Gordon* may have changed; and in *Tooker* v. *Lopez* the New York Court of Appeals abandoned the position it had taken in *Dym* v. *Gordon* in favour of applying New York law. It appears that the weight of opinion now favours the displacement of the *lex loci delicti* by the law of the State of common residence and of registration and it is submitted that this is the correct choice.

This discussion leads to the question of which law applies where the parties to an action are habitually resident in the same State but there is no pre-existing relationship between them. Here, of course, both *Chaplin* v. *Boys* and *Kemp* v. *Piper* have applied the law of the common residence at the expense of the *lex loci delicti*, so that the question may be answered on authority. It is especially important that there has been a measure of judicial assent on this point, since it is one which the academic commentators admit to be of great difficulty. Professors Cavers[141] and Kahn-Freund[142] both favour a solution which would allow the law of the common domicil to govern the question of damages provided that the *lex loci delicti* would allow an action for something. This approach, though consistent with the decision in *Chaplin* v. *Boys*, would make that case depend on the fact that special damages were recoverable under Maltese law, and this in turn would be inconsistent with the conclusion, reached earlier, that the double actionability rule is one which applies to all heads of damages. In both *Chaplin* v. *Boys* and *Kemp* v. *Piper* the common domicil provided for greater recovery than did the *lex loci delicti*, but it seems clear enough that if the law-fact patterns of the cases were reversed a Maltese court would be justified in not awarding general damages and a Victorian one in not awarding *solatium* (Professor Cavers would object to this on the ground that the higher award of damages in the State of the injury is an integral part of the deterrent function of the tort remedy,[143], but in the spheres of industrial and traffic accidents and of products liability this seems to over-estimate the deterrent function of the law of torts). It would appear, therefore, that it is possible to acknowledge agreement that where there is no prior relationship between the parties, but the parties nevertheless

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139 Kahn-Freund, *loc. cit.* p. 44; McGregor, *loc. cit.* p. 15.
140 'Comment on Reich v. Purcell' (1968) 15 *U.C.L.A. Law Rev.* 647, 650.
141 *The Choice of Law Process* pp. 157-159.
142 *Loc. cit.*, pp. 76-80; 121-128. More precisely, Professor Kahn-Freund argues for the application of the law of the domicil of the victim in non-fatal cases.
143 *The Choice of Law Process* pp. 139-146 (Principle of Preference No. 1); 'The Value of Principled Preferences' (1969) 49 *Tex. L.R.* 211, 218-9. The Conventions favour the result of *Boys* v. *Chaplin* — see Hague Convention Articles 4 (b) and (c); Benelux Convention Article 14. The Resolution of the Institute of International Law does not deal with the matter.

habitually reside in the same State which is not the State of the injury the law of the residence should govern the question of the extent and the heads of damages recoverable (this being a more restricted rule than the suggestion by Professor Kahn-Freund of the law of the domicil of the victim);[144] and to suggest tentatively that the requirement of double actionability in respect of the specific *ius actionis* gives rise to the possibility that the existence of any liability at all may depend on the same law.

Other potential problems, however, have been much less discussed, and in relation to these there is a need for a wider debate. Problems of the transmission of claims and obligations on the death of either party should almost certainly be regarded as matters of succession and so for the *lex domicilii* rather than the *lex loci delicti*,[145] but these cases are unlikely to cause difficulty in Australia.[146] Nor are claims under Fatal Accidents Act legislation, unless different States define the dependants on whose behalf an action may be brought differently; here one would suggest, tentatively, but with Professor Kahn-Freund, that again the law of the domicil of the victim should displace the *lex loci delicti*,[147] though subject to the proviso that this does not increase the burdens on a defendant who is a resident of the State of the injury. Problems of vicarious liability may prove difficult in theory, but are unlikely to give rise to many practical difficulties in interstate cases.[148] Again Professor Kahn-Freund proposes tentatively that the existence of any relationship between the tortfeasor and the person whom it is sought to make vicariously liable for his misdeeds should be left to the law most closely connected with them, but that thereafter the *lex loci delicti* should govern;[149] the second part of this is easier to accept than the first, since it derives from the idea that a businessman should conduct his affairs in accordance with the laws of the State in which he chooses to operate. But in this area further discussion would be welcome.

The foregoing discussion has tried to indicate that there are considerable areas of potential difficulty in which extended debate on particular

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144 *Supra* nn. 125-142.

145 Kahn-Freund, *loc. cit.*, 110-113; McGregor, *loc. cit.*, 20. Cf. *Rest.* 2d. s.167 and *cf. Grant* v. *McAuliffe* 264 P. 2d. 944 (California, 1953), *Kerr* v. *Palfrey* [1970] V.R. 825. (Though n.b. Traynor, *loc. cit. supra*, n. 132).

146 It is hard to envisage that the States and Territories are likely to disagree on this matter again.

147 *Loc. cit.*, pp. 113-118.

148 Again because the matter is largely one of common law. It is, however, possible that *Joss* v. *Snowball* [1970] 1 N.S.W.R. 426 raised a problem of vicarious liability. The plaintiff in that case was clearly trying to sue the defendant *qua* employer rather than *qua* car owner, relying on the 'deemed agency' provisions of the New South Wales Motor Vehicles (Third Party Insurance) Act, 1942, s.16, which have no equivalent in Victoria. On this interpretation, the case was essentially a contest between the road traffic insurer and the employer's liability insurer; it is scarcely credible that the road traffic insurer, whose liability extended to accidents taking place anywhere in the Commonwealth, should have escaped liability (as one commentator feared: (1970) 45 *A.L.J.* 99).

149 *Loc. cit.*, 103-104, 106-109. *The Halley* (1868) L.R. 2 P.C. 193 itself guarantees the application of the *lex fori* in this case; the *M. Moxham* (1876) 1 P.D. 107 supports the view here expressed.

issues has apparently led to agreement on the law which should be applied to them, with the result that there is a good deal of assistance available to courts and other bodies in determining the rule which should be applied to a particular case should it be decided to opt for the flexibility in the basic *Phillips* v. *Eyre* rule sought by Lords Wilberforce and Hodson. Given the adherence to the rule of double actionability, English law is still a long way from the position advocated by Dr. Morris; but, especially within its restricted framework, the idea of displacing the *lex loci delicti* in some cases and replacing it by a law more appropriate to the particular issue should not be lightly dismissed as absurd or impractical. Even conceding that there are problems which remain largely unexplored it is submitted that the area in which conclusions are now possible is so wide and important that there is no longer substantial justification for subordinating a flexibility leading to more just results in individual cases to the demands of certainty and simplicity,[150] and that the way has been opened for Australian courts to evolve a better series of rules for choice of law in torts cases than the strict *Phillips* v. *Eyre* rule, especially as presently interpreted by them, can offer.

The conclusions reached above may be summarised as follows: if *Chaplin* v. *Boys* did nothing else, it affirmed and strengthened the basic rule of double actionability, now in respect of a specific *ius actionis*, by the *lex fori* and the *lex loci delicti*. This is certainly not inconsistent with any position taken by the High Court and, so far as the first branch

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150 As an illustration, the text provides answers to nearly all the problems set out in Davis: *Casebook on the Conflict of Laws in Australia* (Butterworths 1971) pp. 243-245. Of the two cases arising from the combined negligence of A and B in the A.C.T., the first (in which both parties are habitually resident in N.S.W.) should (in a N.S.W. forum) be decided wholly according to the law of N.S.W., the law of the A.C.T. being displaced (see text accompanying nn. 141-144, *supra*). Where the defendant is habitually resident in the A.C.T., the law of the Territory should, (in a N.S.W. forum) be applied as a partial defence under the second branch of *Phillips* v. *Eyre* (see text accompanying nn. 122-125, *supra*). The text does not provide an answer if the plaintiff is habitually resident in the A.C.T. and the defendant in N.S.W.; here there is insufficient ground to displace the *lex loci delicti* so that (in a N.S.W. court) the law of the A.C.T. should provide a partial defence. This result is in accord with the Hague Convention Article 4 (c); and does not come under any of the exemptions from the *lex loci delicti* in the Resolutions of the Institute of International Law. Cavers also would agree (Comment on Reich v. Purcell (1968) 15 *U.C.L.A. Law Rev.* 647, 650-1); so would Kahn-Freund (*supra*, n. 125). Reese is non-committal ('Recent Developments', p. 193, Rule 3) and the Benelux Convention would depend on where the 'consequences' of the act are felt, but leaves the question of to whose act consequences must attach open to doubt. In an A.C.T. forum, *Anderson* v. *Eric Anderson Pty. Ltd.* (1965) 114 C.L.R. 20 would ensure the application of A.C.T. law. The question arising from the accident to Queensland spouses in N.S.W. would be decided by Queensland law subject to the law of the matrimonial domicil displacing the *lex loci delicti* for the purposes of the second branch of *Phillips* v. *Eyre*. (See text accompanying nn. 130-132). The variant on *Kemp* v. *Piper*, where the accident was a two-car accident caused by the negligence of E, a habitual resident of Victoria, would, even in a South Australian court, be defeated by the absence of an action for solatium in Victoria (see text accompanying nn. 122-125 and the references to the Conventions made earlier in the footnote). See too the refusal of Bray C. J. to acknowledge that *Kemp* v. *Piper* was necessarily inconsistent with *Li Lian Tan* v. *Durham* [1966] S.A.S.R. 143 (see [1971] S.A.S.R. 25, 30).

of the rule is concerned, is in accord with *Anderson* v. *Eric Anderson*. The predominance thus accorded to the *lex fori* puts the plaintiff, who has the choice of forum, at an advantage over the defendant; and the function of the second branch of the rule is to protect the defendant against being unfairly surprised. Proper protection requires that the second branch cover the specific *ius actionis* by the chosen foreign law. In choosing that foreign law the prime concerns are that it should be as far as possible certain and that it should be that which the parties can legitimately expect to govern the case; and the law which in most cases best meets these criteria is the *lex loci delicti*. One should normally, therefore, start with that law, but there will be some cases in which it is not, in fact, the law which best meets the set criteria. Sometimes this will be discoverable by a process of construing and interpreting the foreign rule, and where this is possible it should be done. In other cases a rule suitable to the particular issue must be evolved; whichever of the methodologies most frequently advocated is adopted many of the rules ultimately evolved are likely to be jurisdiction-selecting rules and 'rule-selecting' principles are likely to be supplementary to these.[151] This process, again irrespective of the methodology adopted, is not likely to lead to intolerable uncertainty in the law; indeed on many important matters there is already significant agreement on what the rules governing particular issues should be. Australian courts are therefore in a position to adopt a version of the *Phillips* v. *Eyre* rule which would be fairer than the one they now use and should adopt it rather than over-estimate the fears of uncertainty that have too long beset improvement in this area of law. Nevertheless, one should not over-estimate the part that private international law can play in tort law, and especially accident law; greater measure of uniformity in the laws of the States, particularly with respect to insurance,[152] and a thoroughgoing overhaul of domestic rules of accident law[153] will lead to better results for Australia as a whole than any survey of *Phillips* v. *Eyre*.

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151 Cf. the combination of jurisdiction-selection and rule-selecting rules in Reese: 'Recent Developments' at pp. 192-195 and in the rules set out by Fuld C.J. in *Tooker* v. *Lopez*, *supra*, n. 86. Once Cavers' First and Second Principles of Preference are read together, he too provides a similar combination (see the text accompanying nn. 109-110, *supra*).

152 At the very least some degree of uniformity in legislation should be reached so as to prevent the problems discussed in the following cases from arising: *Plozza* v. *South Australian Insurance Co.* [1963] S.A.S.R. 122; *Li Lian Tan* v. *Durham* [1966] S.A.S.R. 143; *Hall* v. *National and General Insurance Co. Ltd.* [1967] V.R. 355; *Edmonds* v. *James* [1968] Q.W.N. 104; *Zussino* v. *Zussino* [1969] 2 N.S.W.R. 227. See: 'Direct Recourse in Australia' (1969) 43 *A.L.J.* 155 (D.St.L.K.); Nygh: *Conflict of Laws in Australia*, pp. 127-8; Kahn-Freund, *loc. cit.*, pp. 149-157.

153 Compulsory first party insurance, as advocated by Atiyah: *Accidents, Compensation and the Law* (Weidenfeld and Nicolson, 1969) or by Ehrenzweig: *Specific Principles of Private Transnational Law*, *loc. cit.*, 178, 330, 340, would, as Ehrenzweig *loc. cit.* p. 330, recognises, ultimately remove the necessity for any conflicts law of automobile accidents (or, in the scheme proposed by Atiyah, of accidents generally).