The Law Commission

Working Paper No. 87

and

The Scottish Law Commission

Consultative Memorandum No. 62

Private International Law
Choice of Law in Tort and Delict

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CHOICE OF LAW IN TORT AND DELICT

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Summary

When a dispute arises in one part of the United Kingdom out of a tort or delict which was committed in another part of the United Kingdom or in a foreign country, the country whose law will be used to decide the dispute is selected by rules of private international law. In this consultation paper a Joint Working Party of the Law Commission and the Scottish Law Commission examines the rules of private international law which apply at present and provisionally recommends that they be abolished and replaced by new rules. Two alternative replacements are provisionally proposed and examined in the context of a number of specific issues. The purpose of this paper is to seek the views of the public on the proposals which it contains, all of which are provisional only.

Members of the Law Commissions' Joint Working Party on Private International Law

This consultation paper, apart from Part I, was prepared by a Joint Working Party of the two Law Commissions, composed as follows -

Professor A.L. Diamond, Chairman	Director, Institute of Advanced Legal Studies
Mr. A.E. Anton, C.B.E., F.B.A.	Consultant, Scottish Law Commission
Mr. R.D.D. Bertram, W.S.	Scottish Law Commission
Mr. L.A. Collins	Partner, Messrs. Herbert Smith & Co., London
Mr. B.J. Davenport, Q.C.	Law Commission
The Hon. Lord Maxwell	Scottish Law Commission
Mr. C.G.J. Morse	King's College London
Dr. P.M. North	Law Commission
Mr. R.J. Dormer, Secretary	Law Commission

A note on terminology and citations

For the sake of convenience, a tort or delict which forms the basis of an action in the United Kingdom in which our choice of law rules in tort and delict are invoked is referred to in this paper as a **"foreign tort"** or **"foreign delict"**. The word **"wrongdoer"** is used to mean the tortfeasor or delinquent: he will usually be the defendant or defender in an action in the United Kingdom. The word **"claimant"** is used to mean the plaintiff or pursuer; he will usually also be the victim of the tort or delict.

The following works are cited hereafter by the name of the author alone:

Anton	Private International Law (1967)
Cheshire and North	Private International Law (10th ed., 1979)
Dicey and Morris	The Conflict of Laws (10th ed., 1980)
Kahn-Freund	"Delictual Liability and the Conflict of Laws" [1968] II Receuil des Cours 1.
Morse	Torts in Private International Law (1978).

The following contractions are also used:

"E.E.C. Draft Convention" refers to the E.E.C. Preliminary Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations (1972). The relevant provisions are reproduced below in the Appendix to this paper.

"Hague Traffic Accidents Convention" refers to the Hague Convention on the Law Applicable to Traffic Accidents (1971).

"Hague Products Liability Convention" refers to the Hague Convention on the Law Applicable to Products Liability (1973).

"Restatement Second" refers to the American Law Institute's Restatement of the Law Second. References to the Restatement Second should, if the context permits, be taken to refer only to that part of the Restatement of the Law Second which deals with the conflict of laws (published in 1971).

THE LAW COMMISSION

Working Paper No. 87

AND

THE SCOTTISH LAW COMMISSION

Consultative Memorandum No. 62

PRIVATE INTERNATIONAL LAW[1]

CHOICE OF LAW IN TORT AND DELICT

PART I

INTRODUCTION

A. THE PROBLEM DESCRIBED

1.1 The area of our law known as the conflict of laws, or private international law, provides rules for dealing with cases which contain a foreign element - that is, where some aspect of the case has connections with a country other than that of the "forum" (the home country of the court hearing the case). In any particular case our rules of private international law may require that the rights and liabilities of the parties be decided, not by the law of the forum (which for the sake of convenience is referred to hereafter as the "lex fori") but by another country's law. For these purposes, England and Wales, Scotland, and Northern Ireland are treated as separate countries in the same way as wholly foreign countries are.

1.2 This consultation paper is concerned with the particular part of our private international law which deals with tort or delict cases containing a foreign element. Before considering the rights and liabilities of the parties to a dispute in the United Kingdom arising out of a tort or delict which was committed in another part of the United

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1 Third Programme of the Law Commission, Item XXI; Third Programme of the Scottish Law Commission, Item 15.

Kingdom or in a foreign country, the court must first go through a selection process known as "choice of law", in order to decide by what law those rights and liabilities are to be determined. In the field of tort and delict, that selection process raises "one of the most vexed questions in the conflict of laws".[2] This consultation paper is concerned with the choice of law rules by which the courts in England and Wales, in Scotland and in Northern Ireland decide which system of law shall apply in a tort or delict case. A summary of the provisional proposals made in this paper is set out in Part VII below.

1.3 Examples of torts and delicts in which our choice of law rules come into play are: (a) a road accident in England which is the subject of an action in Scotland;[3] (b) a defamatory statement published in Germany which forms the basis of an action in England;[4] (c) an injury at work in Libya for which the claimant seeks compensation in England;[5] and (d) an injury sustained on a Scottish ship in foreign territorial waters and which is later the subject of an action in Scotland.[6] Our present law in cases such as these is thought by many to be outdated and unsatisfactory. Since the decision of the House of Lords in Boys v. Chaplin[7] the present law is also uncertain, and one scholar has remarked that "[t]he uncertainty in the law disclosed by the history of [Boys v. Chaplin] is unlikely to escape the attention of the Law Commission ...".[8]

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2 Boys v. Chaplin [1968] 2 Q.B. 1, 20 (C.A.), per Lord Denning M.R.

3 McElroy v. McAllister 1949 S.C. 110.

4 Church of Scientology of California v. Commissioner of Metropolitan Police (1976) 120 S.J. 690 (C.A.).

5 Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136.

6 MacKinnon v. Iberia Shipping Co., Ltd. 1955 S.C. 20.

7 [1971] A.C. 356. We refer to this decision throughout as Boys v. Chaplin and not as Chaplin v. Boys even though it was decided before the House of Lords Practice Direction on the titles of cases [1974] 1 W.L.R. 305.

8 Graveson, "Towards a Modern Applicable Law in Tort", (1969) 85 L.Q.R. 505, 515.

1.4 The private international law of tort and delict is a highly specialised field which is very important in certain spheres of activity but whose immediate impact on the general public has hitherto been slight. Nevertheless, its importance is increasing, as has been explained by Dr. J.H.C. Morris,* writing in the English context:

> "Just as the law of contract responded to the pressures of international trade in the nineteenth century, so in the twentieth century the law of torts has responded to the pressures of the technological revolution as applied to the manufacture and distribution of products and to the means of transport and communications. Most of these pressures operate regardless of national or other frontiers. Dangerous drugs can cause babies to be born without arms or legs thousands of miles from the laboratory where the drugs were made. Unfair competition is no longer confined to a single country. Every year English motor-cars visit the continent of Europe in their thousands; accidents occur; people are injured or killed. English television aerials receive programmes from continental Europe, and even (with the aid of satellites in space) from America and Australia; private reputations sometimes suffer. For all these reasons, the conflict of laws can no longer rest content with solutions designed for nineteenth-century conditions."[9]

When the relevant provisions of the Civil Jurisdiction and Judgments Act 1982 come into force it is also possible that cases involving our choice of law rule in tort and delict will come before our courts more often than they have in the past (although it should be noted that none of the proposals made in this consultation paper would themselves affect in any way the jurisdiction of courts in the United Kingdom). Further, of the three main fields in our private international law of obligations (namely contract, trusts, and tort or delict), one (contract) has recently received attention, and the Hague Conference on Private International Law will be considering the law applicable to trusts and their recognition at its session this autumn. This leaves only tort and delict, which is the subject of this consultation paper.

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* Since this paper was prepared we have learnt with great sadness of the death of Dr. John Morris. His unique contribution to the law on this subject appears throughout this document.

9 Morris, The Conflict of Laws (3rd ed., 1984), p. 301.

1.5 The intricacy of the issues which arise in this area of the law is not in doubt, but it means that an examination of the options for reform could either be short but shallow, with little exploration of their implications, or long but deeper, with some explanation of how the options proposed would work in practice. The latter course is followed in this consultation paper, on the ground that this is not an area where it is possible to form a view about whether a proposal is acceptable without first understanding what its ramifications would be. However, this does mean that the consultation paper is long and detailed: more so than some readers may find necessary for their purposes. Some guidance for such readers is offered in paragraph 1.10 below.

B. THE ORIGIN OF THIS PROJECT

1.6 The Law Commission and the Scottish Law Commission became involved in this field as a result of proposals for an E.E.C. Convention on the law applicable to contractual and non-contractual obligations.[10] In March 1978 the Brussels Group of Experts considering the draft Convention decided to confine the proposed Convention to contractual obligations only,[11] but it was agreed that negotiations should be resumed on non-contractual obligations later, with a view to preparing a separate convention on that subject. In 1979 the two Law Commissions set up a Joint Working Party to provide advice to the United Kingdom delegation which would be concerned with the intended negotiations, and also to consider the reform of the choice of law rules in tort and delict in Great Britain. It later became clear that the formulation within the E.E.C. of a convention on non-contractual obligations would not, for the moment at least, proceed; and the Joint Working Party therefore

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10 The history of the Law Commissions' involvement may be traced through the Annual Reports of the Law Commission (from the Eighth (1972-1973) to the Eighteenth (1982-1983)) and of the Scottish Law Commission (from the Eighth (1972-73) to the Seventeenth (1981-82)).

11 The E.E.C. Convention on the Law applicable to Contractual Obligations (Cmnd. 8489) was concluded on 19 June 1980 and was signed by the United Kingdom on 7 December 1981. It has not yet been ratified by the United Kingdom.

confined its attentions to reform of this area of the law in Great Britain. Later the project was extended to cover Northern Ireland.

C. PREPARATION OF THIS PAPER

1.7 Although the two Law Commissions have considered in general terms the two preferred options for reform presented in this paper, and have agreed that both should be put forward for the purposes of consultation, the Law Commissions have not as such taken an active role in the preparation of this consultation paper. The remaining Parts, including the provisional conclusions and proposals, are the work of the Joint Working Party, whose present members are listed above at page (xiii). However, it is envisaged that when the consultation period is over the two Law Commissions will take responsibility in the usual way for the preparation of a Report on this subject.

1.8 The two Law Commissions are grateful to the outside members of the Joint Working Party for the time and effort which they have devoted to the preparation of this paper. Gratitude is due in particular to the Chairman, Professor A. L. Diamond, who is Director of the Institute of Advanced Legal Studies in London; and to Mr. C. G. J. Morse, of King's College London, whose contribution included the preparation of two substantial papers for the Joint Working Party. The comparative material in the Appendix to this consultation paper comes from one of those papers. Thanks are also due to the Office of Law Reform in Northern Ireland, which has been responsible for references to Northern Ireland law; and to Dr. James Fawcett, of the University of Bristol, who wrote a paper for us in the early stages of the project.

D. STRUCTURE OF THIS PAPER

1.9 The remainder of this paper is arranged as follows:

Part II: a statement in general terms of the present law of England and Wales and of Ireland, followed by a statement in general terms of the present law of Scotland, and then by an examination of the operation of

the present law in the context of a number of particular issues;

Part III: a statement of the defects in the present law and the reasons for reforming it;

Part IV: an examination of the options for reform, provisionally eliminating all but two of them;

Part V: an examination of how the two remaining options for reform would work for particular types of tort and delict;

Part VI: consideration of the operation of the two remaining options for reform in the context of the particular issues which were discussed in Part II;

Part VII: a summary of provisional conclusions;

Appendix: legislative provisions on choice of law in tort and delict from selected foreign countries; and the relevant articles of the E.E.C. Draft Convention.

1.10 Those readers who require only a broad outline of the present law and of our proposals for reform may find it sufficient to confine their attention to the early sections in Part II (paragraphs 2.1 -2.46), where the present law is discussed; Part III, where we consider the case for reform; and the later sections in Part IV (paragraphs 4.55 - 4.146), where we consider the two alternative options which we provisionally propose for replacing our existing law. Those two options are summarised at paragraph 4.144. The main issues raised in this paper are whether either of those two options is an acceptable replacement for our present law; if both, then which is preferable; and if neither, then what other rule should be adopted. However, we seek comments not just on these questions but on all of the provisional conclusions and proposals which are contained in Parts IV to VI of this consultation paper. It should be borne in mind throughout that our proposals are intended ultimately to be cast in statutory form.

PART II

THE PRESENT LAW

General Introduction

2.1 The present law on this subject is unclear in certain respects and it involves many intricate questions of detail. This means that our examination of it must be somewhat extended. However, its basic structure can be fairly easily discerned. For this reason we have divided our discussion of the present law into a number of sections. First we consider the general principles of the law of England and Wales and of Northern Ireland, and then the general principles of the law of Scotland. We do not explore every aspect of these general principles, which are considered in the standard textbooks on the subject, but we hope that these sections will be sufficient to give the reader a broad understanding of the present law. In the succeeding sections, which some readers may find more detailed than they require, we consider in greater depth the implications of the present law as it applies to certain particular issues, and we also consider how it applies to torts or delicts committed in a single jurisdiction within the United Kingdom, and to torts and delicts involving ships or aircraft.

The law of England and Wales and of Northern Ireland

A. INTRODUCTION

2.2 The present English law is based upon two leading cases, which may be used as focal points. A general rule, which remains the foundation of the present law, was formulated by Willes J. in Phillips v. Eyre.[12] In Boys v. Chaplin[13] the House of Lords considered a possible exception to the general rule.

2.3 We are not aware of any Northern Ireland authority on the

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12 (1870) L.R. 6 Q.B. 1.

13 [1971] A.C. 356. We do not hereafter cite the reference to Phillips v. Eyre or to Boys v. Chaplin except upon the first mention of each decision in each Part of this paper.

choice of law in tort and delict. In the absence of such authority, a court in Northern Ireland would probably adopt rules of law corresponding to those which apply in England and Wales. The general rule in England and Wales has been adopted (albeit with modifications) in other common law jurisdictions, and the decisions of Australian and Canadian courts in particular are relevant to an analysis of the present law of England and Wales.

B. THE GENERAL RULE: Phillips v. Eyre

1. The emergence of the general rule

2.4 Phillips v. Eyre arose out of a rebellion in Jamaica, which was suppressed by Eyre (who was Governor of Jamaica) and by others acting under his authority. Phillips brought an action in England against Eyre, alleging assault and false imprisonment during the rebellion. Eyre pleaded inter alia that he was protected from liability by an Act of Indemnity which had been passed by the Jamaican legislature after the rebellion. Eyre's plea was upheld by the court, and the plaintiff's action therefore failed. Willes J., delivering the judgment of the court, expressed the general rule in the following terms:

> "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England; ... . Secondly, the act must not have been justifiable by the law of the place where it was done."[14]

This rule is referred to as "the rule in Phillips v. Eyre", and we refer to its two propositions respectively as "the first limb" and "the second limb" of the rule. We consider the present meaning of these two limbs below: the second limb, in particular, received a new interpretation in Boys v. Chaplin.

2.5 Although the rule in Phillips v. Eyre has given rise to many problems of interpretation, one particularly pervasive doubt has been

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14 (1870) L.R. 6 Q.B. 1, 28-29. This formulation was approved by the House of Lords in Carr v. Fracis Times & Co. [1902] A.C. 176.

whether the rule is a "choice of law" rule at all, in the sense in which that phrase is commonly understood; and it is true that although each limb of the rule is a choice of law rule in the sense that it directs attention to a particular system of law to the exclusion of all others, neither of the systems of law so selected is expressly stated to be the one according to which the court will decide the case.

2.6 This has led to the suggestion that the rule in Phillips v. Eyre is only a rule of "jurisdiction". The word "jurisdiction" must in this context be understood to mean jurisdiction over the subject-matter of the dispute, not jurisdiction over the parties: it has not been suggested that the rule in Phillips v. Eyre has any connection with matters such as the issue and service of a writ. What has been suggested is that the rule merely lays down two preliminary or "threshold" requirements. If these were satisfied, the court would then proceed to determine the substantive rights and liabilities of the parties according to a system of law selected independently of the rule in Phillips v. Eyre. An alternative suggestion is that only one of the limbs of the rule is a jurisdictional requirement of this kind, while the other is a choice of law rule; and some of the language of Willes J. in Phillips v. Eyre may indeed appear to support the idea that the second limb of the rule is a choice of law rule, whereby the rights and liabilities of the parties will be determined according to the law of the place where the tort occurred (hereafter referred to, for the sake of convenience, as the "lex loci delicti"), while the first limb of the rule is a rule of "jurisdiction", which would serve to exclude actions contrary to English public policy.

2.7 These arguments have attracted some support, particularly in Canada[15] and Australia,[16] but although there are echoes of them in

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15 Hancock, (1940) 3 U. Tor. L.J. 400; Yntema, (1949) 27 Can. Bar Rev. 116; Spence, ibid., 661; Castel, (1958) 18 Rev. Barr. Quebec 465; Gagnon v. Lecavalier (1967) 63 D.L.R. (2d) 12; Northern Alberta Railways Co. v. K & W Trucking Co. Inc. [1975] 2 W.W.R. 763. Cf. Castel, Canadian Conflict of Laws, Vol. 2 (1977), pp. 613-614.

16 Nygh, (1970) 44 A.L.J. 160 and Conflict of Laws in Australia (3rd ed., 1976), p. 258; Anderson v. Eric Anderson Radio & T.V. Pty. Ltd. (1965) 114 C.L.R. 20, especially per Windeyer J; Hartley v. Venn (1967) 10 F.L.R. 151. Cf. Harding, (1965) 7 West. Aust. L. Rev. 196, n.3; McClean, (1969) 43 A.L.J. 183.

England[17] they are not generally supported here;[18] and they appear to be inconsistent with the historical background of the rule in Phillips v. Eyre, neither limb of which was new at the time of Willes J.'s formulation.[19] In England and Wales, therefore, the rule in Phillips v. Eyre is regarded as a true choice of law rule, whose meaning we now proceed to consider.

2. The general rule in more detail

(a) The first limb of the general rule

> "[T]he wrong must be of such a character that it would have been actionable if committed in England".[20]

2.8 The first limb of the general rule is derived from The Halley,[21] and although it does not appear to have formed part of the ratio decidendi of any English case since The Halley, it has survived unscathed and was approved obiter in Boys v. Chaplin.[22] The Halley concerned a collision in foreign waters between two ships, and raised for the first time the question-

> "... whether an English Court of Justice is bound to apply and enforce [foreign] law in a case, when, according to its own principles, no

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17 See Boys v. Chaplin [1968] 2 Q.B. 1, 21F, 25B-C per Lord Denning M.R., 38B-G per Diplock L.J.; Boys v. Chaplin [1971] A.C. 356, 375E per Lord Hodson, 381 per Lord Guest, 383 per Lord Donovan.

18 Cheshire and North, p. 273; Dicey and Morris, p. 938; Graveson, Conflict of Laws (7th ed., 1974), p. 569, n.11; Morse, pp. 46-50; Boys v. Chaplin [1971] A.C. 356, 384-387 per Lord Wilberforce; Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136. See also the transcript of Church of Scientology of California v. Commissioner of Metropolitan Police (briefly reported at (1976) 120 S.J. 690 (C.A.)).

19 See Morse, pp. 8-11, 25-30.

20 Phillips v. Eyre (1870) L.R. 6 Q.B. 1, 28-29.

21 (1868) L.R. 2 P.C. 193.

22 [1971] A.C. 356, 374 per Lord Hodson, 381 per Lord Guest, 383 per Lord Donovan, 389 per Lord Wilberforce, 406 per Lord Pearson.

wrong has been committed by the Defendants, and no right of action against them exists."[23]

Selwyn L.J. answered this question in the negative:

> "It is true that in many cases the Courts of England inquire into and act upon the law of Foreign countries, ... as in the case of a collision on an ordinary road in a Foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English Court admits the proof of the Foreign law ... as one of the facts upon which existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is ... alike contrary to principle and to authority to hold, that an English Court of Justice will enforce a Foreign Municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed."[24]

2.9 In the cases before The Halley, where this issue did not directly arise, it nevertheless appears to have been a tacit assumption that an action in England on a foreign tort would be determined according to English domestic law.[25] This is consistent with the fact that in such cases, by a legal fiction, the venue was laid in England: a device which was evolved by the common law courts to permit jurisdiction in certain actions over torts committed abroad. This device was necessary because, owing to the strict rules as to venue, the common law courts could originally not entertain an action on a foreign tort at all.[26]

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23 (1868) L.R. 2 P.C. 193, 202.

24 Ibid., 203-204.

25 See, for example, Blad's Case (1673) 3 Swans. 603, 36 E.R. 991; Blad v. Bamfield (1674) 3 Swans. 604, 36 E.R. 992; Dutton v. Howell (1693) Show. P.C. 24, 1 E.R. 17; Mostyn v. Fabrigas (1774) 1 Cowp. 161, 98 E.R. 1021; Dobree v. Napier (1836) 2 Bing. (N.C.) 781, 132 E.R. 301; R. v. Lesley (1860) Bell 220, 169 E.R. 1236; Scott v. Lord Seymour (1862) 1 H. & C. 219, 158 E.R. 865. See also Boys v. Chaplin [1971] A.C. 356, 395-396 per Lord Pearson.

26 See Hancock, Torts in the Conflict of Laws (1942), pp. 1-5; Holdsworth, A History of English Law, Vol. 1 (7th ed., 1956), pp. 534, 554; Vol. V (3rd ed., 1945), pp. 117-119, 140-142; Morse, pp. 8-9.

2.10 In England, this tacit assumption is now the generally accepted view of the first limb of the rule in Phillips v. Eyre: it is a choice of law rule the effect of which is to select English law in every case to govern an action in England on a foreign tort. This view was clearly expressed in Boys v. Chaplin by Lord Wilberforce[27] and Lord Pearson,[28] and has received both subsequent confirmation[29] and academic support.[30] In Australia[31] and in Canada[32] the lex fori is also applied as the substantive law to determine the rights and liabilities of the parties (subject to "justification" provided by the lex loci delicti). However, owing to the existence of support in those countries for the "jurisdiction" theory (mentioned above at paragraphs 2.5 - 2.7), it is not always entirely clear whether the choice of the lex fori is seen as arising out of or as separate from the rule in Phillips v. Eyre.[33]

2.11 Any action in England on a foreign tort will, therefore, be decided according to English internal law, and nothing turns on the meaning of the word "actionable" used by Willes J. in his formulation of

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27 [1971] A.C. 356, 384-387.

28 Ibid., 395-398.

29 Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136, 1147, per Hodgson J.; 1154 per Robert Goff L.J. See also the transcript of Church of Scientology of California v. Commissioner of Metropolitan Police (briefly reported at (1976) 120 S.J. 690 (C.A.)).

30 Cheshire and North, pp. 275-276; Dicey and Morris, p. 938; Morse, pp. 66-68.

31 Koop v. Bebb (1951) 84 C.L.R. 629; Anderson v. Eric Anderson Radio & T.V. Pty. Ltd. (1965) 114 C.L.R. 20. (These were both decisions of the High Court of Australia.)

32 O'Connor v. Wray [1930] 2 D.L.R. 899; McLean v. Pettigrew [1945] 2 D.L.R. 65. (These were both decisions of the Supreme Court of Canada.)

33 In New Zealand, there is some support for the English view as stated in the text: Richards v. McLean [1973] 1 N.Z.L.R. 521, 525.

the first limb of the general rule.[34] Subject to what is said in the next paragraph, the effect of the first limb of the rule in Phillips v. Eyre is simply that the whole of the domestic law of England and Wales (including the whole body of its statute law) is made available to the English court. This does not, however, imply that the lex fori has any intrinsic extra-territorial effect:

> "When the lex fori is applied in accordance with [the rules of private international law] to a case possessing a foreign element, this is not because the lex fori is held to possess some inherent power of extra-territorial operation, but because it is part of the lex fori in the wider sense, including the rules of private international law applied by it, that the lex fori in the narrower sense, i.e. in its purely internal aspect, governs the particular situation notwithstanding the existence of the foreign element."[35]

2.12 It may, nevertheless, remain necessary to decide whether a statute or rule of law made available by the rule in Phillips v. Eyre is in fact applicable in the circumstances of the case. For example, it may be that as a matter of construction a statute cannot be applied in the particular circumstances before the court: the principles of private international law cannot result in the application to events occurring abroad of a statute whose effect is as a matter of construction confined to events occurring here,[36] and the rule in Phillips v. Eyre does not mean that the tort is deemed to have occurred in the country of the forum. Thus, for example, a plaintiff in England may well not be able to base his claim upon breach of an English statutory duty, even if it corresponds exactly with a statutory duty imposed by the lex loci delicti. Conversely, there are certain types of English statute or rule which will apply in an

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34 On the "jurisdiction" theory of the rule in Phillips v. Eyre, the meaning of the word "actionable" may acquire a theoretical importance: see Anderson v. Eric Anderson Radio & T.V. Pty. Ltd. (1965) 114 C.L.R. 20.

35 Kemp v. Piper [1971] S.A.S.R. 25, 29, per Bray C.J.

36 See Hodgson, (1981) 55 A.L.J. 349, commenting on Walker v. W.A. Pickles Pty. Ltd. [1980] 2 N.S.W.L.R. 281; Dicey and Morris, p. 936, n. 67.

action on a foreign tort independently of the rule in Phillips v. Eyre. An English rule which is expressed to be or which the courts decide is of mandatory application will be applied in all actions in an English court notwithstanding any foreign element; and an English statute which contains its own choice of law rules might apply to a foreign tort as a matter of construction rather than through the medium of the rule in Phillips v. Eyre.[37] In addition, any matter which is classified for the purposes of private international law as procedural rather than substantive will always be determined by English law as the lex fori.[38]

2.13 It follows in particular from the first limb of the general rule that:

(a) no action will lie in England in respect of a class of tort unknown to English law;

(b) the plaintiff cannot recover in England in respect of a head of damage unknown to English law; and

(c) the defendant may make use of a defence which is available under English law even if it is not available under the lex loci delicti,[39] provided it is not confined to events which occurred in England.

Further, however, it is not sufficient for a foreign tort to be merely of a type known to English law, such as "negligence" or "trespass": it is necessary that the actual wrong be actionable under the internal law of England. This is illustrated in the field of proprietary rights by Potter v.

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37 See Howgate v. Bagnall [1951] 1 K.B. 265 and, generally, Dicey and Morris, pp. 14-23.

38 See generally, Dicey and Morris, ch. 35.

39 In Anderson v. Eric Anderson Radio & T.V. Pty. Ltd. (1965) 114 C.L.R. 20 the plaintiff's contributory negligence was a complete defence under the lex fori but a ground for apportionment under the lex loci delicti: the plaintiff's claim failed.

The Broken Hill Proprietary Co. Ltd.,[40] where it was held that an action brought in Victoria in respect of the alleged infringement in New South Wales of a New South Wales patent would not succeed, notwithstanding that the tort was of a type which was known to the law of Victoria: the patent law of Victoria did not apply to the infringement of the New South Wales patent since patents were local in their application.[41]

(b) The second limb of the general rule

> "The act must give rise to civil liability by the law of the place where it was done."

2.14 The early cases also appear to contain the origin of the second limb of the rule in Phillips v. Eyre. As originally formulated by Willes J., the requirement was that "the act must not have been justifiable by the law of the place where it was done".[42] It may be relevant that the early cases were mainly actions in trespass, and that in an action in trespass the defendant could plead that his alleged acts were justified in the circumstances.[43] If the occurrence had taken place abroad, it was permissible to show that the defendant's acts were "justified" according to the law of the place where the alleged tort had been committed, "[f]or whatever is a justification in the place where the thing is done, ought to be a justification where the cause is tried".[44] Further, the expression

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40 [1905] V.L.R. 612 (affirmed on other grounds, (1906) 3 C.L.R. 479).

41 See also Norbert Steinhardt & Son Ltd. v. Meth (1960) 105 C.L.R. 440: "No action could be maintained in England for an infringement of an Australian patent, or in Australia for an infringement of an English patent" (per Fullagar J. at p. 443). On proprietary and other rights, see Dicey and Morris, pp. 951-954.

42 Phillips v. Eyre (1870) L.R. 6 Q.B. 1, 29.

43 See Milsom, Historical Foundations of the Common Law (2nd ed., 1981), pp. 295-296. The same language is today used to describe a plea in confession and avoidance: "All matter justifying or excusing the act complained of must be specially and separately pleaded" (The Supreme Court Practice 1985, Vol. 1, notes 18/8/1, emphasis added); see also Odgers' Principles of Pleading and Practice (22nd ed., 1981), pp. 140-142, and Sutton, Personal Actions at Common Law (1929), p. 184.

44 Mostyn v. Fabrigas (1774) 1 Cowp. 161, 175; 98 E.R. 1021, 1029, per Lord Mansfield.

"justification" might be regarded as peculiarly apt in those older cases where the defendant's act was sanctioned by governmental or sovereign authority, as in Phillips v. Eyre itself.[45]

2.15 The meaning of this limb of the general rule as formulated by Willes J. in Phillips v. Eyre depends upon the interpretation of the phrase "not justifiable". In The Halley[46] it was assumed that the injury complained of must be actionable by the lex loci delicti. However, in Machado v. Fontes[47] the Court of Appeal held that the defendant's act was "not...justifiable", within the meaning of the second limb of the general rule, even if the lex loci delicti provided only for criminal liability, and not for civil liability. The liability provided for by the lex loci delicti therefore did not have to be co-extensive with, or even correspond to, the liability which was imposed by English law. It was enough that the act was not wholly innocent under the lex loci delicti.

2.16 It has also been held in Australia that the plaintiff may succeed in his action if the defendant's conduct was actionable merely in the abstract under the lex loci delicti, even though there was in fact, in the circumstances of the case, no liability of any kind under that law. On this view, the defendant's conduct might for the purposes of the second limb of the rule in Phillips v. Eyre remain actionable or not justifiable even though, for example, under the lex loci delicti the plaintiff's contributory negligence provided the defendant with a complete answer to the claim.[48]

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45 Cheshire and North, p. 269; Morris, The Conflict of Laws (3rd ed., 1984), p. 309.

46 (1868) L.R. 2 P.C. 193, 203.

47 [1897] 2 Q.B. 231.

48 Hartley v. Venn (1967) 10 F.L.R. 151, taking up suggestions made in Anderson v. Eric Anderson Radio & T.V. Pty. Ltd. (1965) 114 C.L.R. 20, 23, 28-29, 34-35, 43-44. The Australian interpretation of the second limb of the rule in Phillips v. Eyre is examined by Phegan in "Tort Defences in Conflict of Laws - The Second Condition of the rule in Phillips v. Eyre in Australia", (1984) 58 A.L.J. 24.

2.17 In Boys v. Chaplin the House of Lords considered what interpretation should be given to the requirement that the defendant's conduct should not have been "justifiable" by the law of the place where it was done. The facts and other aspects of the decision in Boys v. Chaplin will be considered in more detail below;[49] but, although it is not easy (or, perhaps, not possible) to extract a ratio decidendi from that case, it appears to be accepted that Machado v. Fontes has been overruled by Boys v. Chaplin,[50] and that instead the second limb of the rule in Phillips v. Eyre is now to be interpreted in England and Wales as a requirement that the defendant's conduct must in the actual circumstances of the case give rise to civil liability, as between the same parties, under the lex loci delicti.[51] Criminal liability is, therefore, no longer relevant, and the rule in Phillips v. Eyre is thus one of "double actionability", a term which we shall use throughout this paper. Nevertheless, any provision of the lex loci delicti which is regarded in England as being of a procedural nature only will be disregarded. It appears that it may not be necessary that the lex loci delicti should classify the defendant's conduct as tortious or delictual: it may be sufficient simply that the conduct gives rise to civil

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49 Paras. 2.23 - 2.36.

50 Doubts about Machado v. Fontes had already been expressed, particularly in Australia; see, for example, Varawa v. Howard Smith Co. Ltd. (No. 2) [1910] V.L.R. 509; Koop v. Bebb (1951) 84 C.L.R. 629.

51 [1971] A.C. 356, 377 per Lord Hodson, 381 per Lord Guest, 388-389 per Lord Wilberforce; Cheshire and North, p. 270; Dicey and Morris, pp. 941-942; Graveson, Conflict of Laws (7th ed., 1974), pp. 572-573; Morse, p. 62; and see John Walker & Sons Ltd. v. Henry Ost & Co. Ltd. [1970] 1 W.L.R. 917, 933-934; Church of Scientology of California v. Commissioner of Metropolitan Police (1976) 120 S.J. 690 (C.A.) and also the later proceedings reported in The Times, 25 October 1977 (C.A.); Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136, 1146-1148, 1154. The proposition stated in the text has not yet been adopted in Canada; but in New Zealand the views of Lord Wilberforce were quoted with approval in Richards v. McLean [1973] 1 N.Z.L.R. 521, 525 (a case which, however, discusses jurisdictional and choice of law questions together). In Australia there appears so far to be no unanimity of view: see Phegan, "Tort Defences in Conflict of Laws - The Second Condition of the Rule in Phillips v. Eyre in Australia", (1984) 58 A.L.J. 24.

liability under that law, however the action would be classified.[52] However, it is probable that the right to receive compensation under a statutory compensation scheme (such as a Workmen's Compensation Act, or the scheme in force in New Zealand) is not enough.[53]

2.18 It is clear that the reference to the lex loci delicti in the second limb of the rule in Phillips v. Eyre is a reference only to the internal rules of that law, and not to its rules of private international law.[54] There is therefore no question of renvoi[55] in a tort case.

2.19 The effect of a requirement of civil liability under the lex loci delicti is thus to make available to the defendant in his action in England any substantive defences which exist under the lex loci delicti, in addition to his defences under English law; and if the events would not give rise to civil liability as between the same parties under the lex loci delicti, the fact that they would constitute a tort under English law will not assist the plaintiff.

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52 Boys v. Chaplin [1971] A.C. 356, 389F per Lord Wilberforce; Dicey and Morris, p. 942. This may not be the position in Scotland: see below, para. 2.42.

53 Walpole v. Canadian Northern Railway Co. [1923] A.C. 113 (P.C.); McMillan v. Canadian Northern Railway Co. [1923] A.C. 120 (P.C.); Going v. Reid Brothers Motor Sales Ltd. (1982) 35 O.R. (2d) 201, 210; Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R 1136, 1143. See Webb and Auburn, (1977) 26 I.C.L.Q. 971, 988; Dicey and Morris, p. 942.

54 This was made clear by Lord Russell in the Scottish case of McElroy v. McAllister 1949 S.C. 110, 126; but it appears also from the transcript of Church of Scientology of California v. Commissioner of Metropolitan Police per Bridge L.J. The decision is briefly reported at (1976) 120 S.J. 690.

55 "Renvoi" is a technical term of private international law, and is explained in the standard textbooks on the subject. It refers to the case where our choice of law rule selects a foreign law which would itself select, by its own choice of law rules, another law to decide the dispute. See Anton, pp. 55 ff.; Cheshire and North, pp. 60 ff.; Dicey and Morris, ch. 5; Morris, The Conflict of Laws (3rd ed., 1984), ch. 30.

2.20 It should be noted, however, that it is not necessary for the plaintiff to plead the existence of civil liability under the lex loci delicti: he may rest his case on the basis of English law alone, and leave it to the defence to raise any questions of foreign law.[56] If the defence does not do so, the case will be disposed of without any reference to foreign law.[57] Even if questions of foreign law are raised, there is a presumption that foreign law is the same as English law unless the contrary is proved as a fact.[58]

2.21 Finally, where different elements of a tort occur in different countries, it may become necessary to decide which is the locus delicti for the purposes of the second limb of the general rule. Although the language used by Willes J. may appear to indicate that for these purposes the locus delicti is the place where the actor acted, and not where the results occurred, the question has never been resolved in this context in England and Wales, although there are decisions concerned with applications for leave to serve process out of the jurisdiction, and there is also some further authority concerning torts allegedly committed in England.[59] We discuss the definition of the locus delicti in Part IV below,[60] and, in connection with a number of particular types of tort, in Part V.[61]

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56 Dicey and Morris, p. 968.

57 An example of this is Schneider v. Eisovitch [1960] 2 Q.B. 430, and see also Ichard v. Frangoulis [1977] 1 W.L.R. 556.

58 See generally Dicey and Morris, ch. 36.

59 John Walker & Sons Ltd. v. Henry Ost & Co. Ltd. [1970] 1 W.L.R. 917; White Horse Distillers Ltd. v. Gregson Associates Ltd. (1983) 80 L.S. Gaz. 2844.

60 Paras. 4.61 - 4.91.

61 Passim.

3. Summary

2.22 In England and Wales and in Northern Ireland the rule in Phillips v. Eyre may, therefore, be taken to mean that:

(a) the rights and liabilities of the parties to an action in England and Wales or in Northern Ireland on a foreign tort are determined by the lex fori, that is, the internal law of England and Wales or of Northern Ireland;

(b) the application of English or Northern Ireland law is subject to the qualification that the plaintiff's action in England and Wales or in Northern Ireland will succeed only to the extent that civil liability also exists, as between the same parties, under the lex loci delicti.

C. AN EXCEPTION TO THE GENERAL RULE: Boys v. Chaplin

1. When will the exception be used?

2.23 Boys v. Chaplin arose out of a motor accident in Malta. The motor scooter on which the plaintiff was riding collided with a car driven by the defendant, and the plaintiff sustained serious injuries. The accident was caused by the admitted negligence of the defendant. Both plaintiff and defendant were normally resident in England, but at the time of the accident were stationed temporarily in Malta as members of H.M. Forces.

2.24 Under English internal law, the plaintiff would have been entitled to special damages of £53, and also general damages of £2,250 in respect of pain, suffering, loss of amenities, and problematical future financial loss. By the law of Malta, on the other hand, the plaintiff was entitled only to the £53: the general damages were not available there. The only question for decision by the House of Lords was whether or not the plaintiff could recover the general damages in these circumstances.

2.25 The House of Lords decided unanimously that the plaintiff could recover the general damages, notwithstanding the provisions of

Maltese law. However, the House reached this conclusion for a "bewildering variety of reasons".[62] Although it is possible to extract from the speeches in the House of Lords a majority view on certain issues taken individually, those majorities are not all identically constituted, and no clear ratio decidendi emerges from the case as a whole.[63] Although (as we have seen), a measure of agreement has emerged with respect to some of the consequences of Boys v. Chaplin,[64] it is in these circumstances not possible to say with any certainty what the further effect of Boys v. Chaplin has been.[65]

2.26 It appears, however, to be agreed that Boys v. Chaplin has qualified the general rule in Phillips v. Eyre by permitting certain exceptions to the invariable application of that general rule, and thus introducing an element of flexibility (albeit of uncertain scope).[66] Nevertheless, no clear majority view on this point emerges from Boys v. Chaplin itself. Indeed, Lord Donovan expressly rejected any such notion,[67] although this rejection must be seen in the light of the fact that he, in common with Lord Guest, held that the plaintiff could recover damages on the English basis alone without any relaxation of the general rule since they were both of the view that the question of what heads of

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62 Cheshire and North, p. 265.

63 Cf. Briggs, "What did Boys v. Chaplin decide?" (1984) 12 Anglo-Am. L.R. 237.

64 See above, para. 2.17.

65 See Cross, Precedent in English Law (3rd ed., 1977), pp. 96-99; and the dictum of Viscount Dunedin in The Mostyn [1928] A.C. 57, 73-74.

66 Cheshire and North, pp. 277-278; Dicey and Morris, pp. 942-945; Morse, pp. 283-285; Church of Scientology of California v. Commissioner of Metropolitan Police (1976) 120 S.J. 690 and also the later proceedings reported in The Times, 25 October 1977; Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136. Briggs disagrees: (1984) 12 Anglo-Am. L.R. 237, 245. Again, this development has not yet been followed in Canada, and there is no unanimous view in Australia.

67 [1971] A.C. 356, 383.

damage were available was a procedural matter.[68] Lord Donovan further took the view, which was shared by Lord Pearson, that Machado v. Fontes was rightly decided, and that civil liability under the lex loci delicti was therefore not required. Lord Pearson nevertheless appeared to contemplate exceptions to the general rule, however formulated. If, as was his view, the general rule required actionability under English law and only "non-justifiability" under the lex loci delicti, then an exception would be required to discourage forum-shopping. However, if (contrary to his view) the general rule was that the alleged wrongful act must be actionable both by the law of the place where it was committed and by the law of the forum (and, as has been suggested above at paragraph 2.17, this is the currently accepted view of the general rule), then Lord Pearson considered that "an exception will be required to enable the plaintiff in a case such as the present case to succeed in his claim for adequate damages".[69]

2.27 Lord Pearson did not, however, elaborate on that statement, and the basis of any exception to the general rule must therefore be derived largely from the speeches of Lord Hodson and Lord Wilberforce,[70] both of whom were of the view that in order to permit the plaintiff to recover the general damages which he sought it would be necessary to escape from the requirements of the second limb of the rule in Phillips v. Eyre. Both held that in the circumstances of the case the plaintiff should be permitted to recover damages which were not confined to those available under the lex loci delicti,[71] but it is not at all clear how this

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68 This view is not generally accepted. See below, para. 2.56.

69 [1971] A.C. 356, 406.

70 The views of Lord Wilberforce in particular were relied upon in Church of Scientology of California v. Commissioner of Metropolitan Police (1976) 120 S.J. 690 and in Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136.

71 [1971] A.C. 356, 378-380 per Lord Hodson, 391-392 per Lord Wilberforce.

exception would be applied in future cases. Both Lord Hodson and Lord Wilberforce cited[72] with approval the language of the United States Restatement Second[73] and both emphasised that the parties had little connection with Malta, where the accident happened.[74] Lord Wilberforce, especially, adopted an approach which took into account the particular issue in question and the policy of the foreign law.[75] However, in the absence of further authority, any consideration of the circumstances justifying a departure from the general rule must remain largely speculative.[76]

2. The nature of the exception

2.28 One difficulty about the Boys v. Chaplin exception is that it is not clear whether it must apply to the case as a whole, or whether it may be confined to one or more individual issues. If it applied to individual issues, and a case arose which presented two issues, it would be possible for one of those issues to be subjected to the rule in Phillips v. Eyre, and for the other to benefit from the Boys v. Chaplin exception. The language used by Lord Hodson[77] and especially by Lord Wilberforce[78] in

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72 Ibid., 380 per Lord Hodson, 391 per Lord Wilberforce.

73 Proposed official draft, May 1, 1968. The text of the final version is slightly different. Section 145(1) of the Restatement Second now reads as follows: "The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties ...".

74 [1971] A.C. 356, 380 per Lord Hodson, 392 per Lord Wilberforce.

75 Ibid., 392.

76 For a discussion, see Morse, pp. 285-295. In Church of Scientology of California v. Commissioner of Metropolitan Police (1976) 120 S.J. 690 it was argued, and the Court of Appeal agreed, that the facts that the plaintiffs were resident in England and that the defendant was an English police officer might justify the use of the exception; cf. Lord Denning M.R. in the later proceedings in the same case (The Times, 25 October 1977). See Collins, (1977) 26 I.C.L.Q. 480.

77 [1971] A.C. 356, 380B.

78 Ibid., 389 ff. and especially 391 ff.

Boys v. Chaplin appears to indicate that an individual issue may be isolated and accorded separate treatment, and this view of the exception has received some support.[79]

2.29 It would appear that an exception to the rule in Phillips v. Eyre might be invoked by a court as a means of arriving at one of the following three results, in respect either of the whole case or of one or more issues:

1. the application of English law alone (as in Boys v. Chaplin itself);
2. the application of the lex loci delicti alone;
3. the application of a third law alone.[80]

2.30 It is clear that Boys v. Chaplin makes possible the first result mentioned above. What is not clear is whether Boys v. Chaplin can be said to provide support for any particular method of arriving at that result; that is, for any particular view of the conceptual nature of the exception to the general rule. Whether or not the second and third results mentioned above can also be achieved depends upon the view which is adopted of the nature of the exception.

2.31 One method of arriving at the first result would be simply to disapply the second limb of the general rule (which requires civil liability to exist under the lex loci delicti). The case (or, perhaps, the issue) would thus be subject only to the first limb of the general rule, and English law would alone apply. This method could not achieve either of

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79 Dicey and Morris, p. 943; Morse, pp. 291 ff; and see Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136.

80 There is a fourth possible view of the exception, namely that the court would wish to retain the requirement of "double actionability" but that, instead of requiring civil liability to exist under the lex loci delicti, the court would substitute a requirement of civil liability under some third law. This view appears to have little support. Cf. McGregor, (1970) 33 M.L.R. 1, 12.

the other two results mentioned above.[81] Apart from Boys v. Chaplin itself (from which it would seem that in an appropriate case a majority of their Lordships would have concurred in the results of such reasoning), some further support for this approach may be derived from Church of Scientology of California v. Commissioner of Metropolitan Police[82] where Lord Denning said:

> " 'Double actionability' is the general rule. There are some exceptions however. There may be some cases in which it is sufficient that it [the tort committed in a foreign country] should be actionable in England only."[83]

2.32 In Boys v. Chaplin, however, Lord Hodson and Lord Wilberforce both used language which is wider than this. It is arguable that the exception which they envisaged was intended by them to constitute an exception to the whole of the general rule, and not just to its second limb.[84] This would mean that where the exception applied, the rule in Phillips v. Eyre would not apply at all. The case, or a particular issue, would instead be decided according (for example) to the law of the country with which the occurrence and the parties were most closely connected. According to the circumstances this might be either English law, or the lex loci delicti, or some third law. On this view of the exception, therefore, all three of the results mentioned above could be achieved.

2.33 However, it is far from clear that Boys v. Chaplin can be taken as authority for this wide approach. The first objection is that such an approach did not command majority support in that case. Secondly, this approach would effectively amount to the adoption of a

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81 McGregor, (1970) 33 M.L.R. 1, 12.

82 The Times, 25 October 1977.

83 This passage is taken from the transcript, not from the report in The Times.

84 See Dicey and Morris, pp. 942-945; Morse, pp. 283-285; Karsten, "Chaplin v. Boys: another analysis", (1970) 19 I.C.L.Q. 35.

version of the "proper law of the tort"[85] whenever, exceptionally, the general rule was not to apply; but the House of Lords in Boys v. Chaplin rejected the idea of adopting the proper law of the tort as the general choice of law rule,[86] and their reasons for doing so would seem to apply equally to the proper law of the tort even as an exception to the general rule. The recent case of Coupland v. Arabian Gulf Oil Co.[87] does not greatly illuminate this matter. Although Hodgson J. in that case suggested that it may be permissible, in relation to a particular issue, to apply in effect the "proper law of that issue", it is not clear whether he envisaged that it might be permissible to apply a law which was neither the lex fori nor the lex loci delicti. This possibility did not arise in that case, and the provisions of the lex loci delicti were in practice the same as English law. Hodgson J. clearly envisaged, however, that in a suitable case English law might not be applied.[88]

2.34 A third possible view of the exception to the rule in Phillips v. Eyre is that in an appropriate case the court might disapply either of the two limbs of that rule, and would in consequence apply either English law alone or the lex loci delicti alone. This method would achieve the first two, but not the third, of the three possible results mentioned above at paragraph 2.29. In Boys v. Chaplin there was, of course, no question of applying the lex loci delicti alone, and there is no express support for this

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85 This concept is discussed in Part IV below, at paras. 4.126 - 4.142.

86 [1971] A.C. 356, 381 per Lord Guest, 383 per Lord Donovan, 391 per Lord Wilberforce, 405-406 per Lord Pearson. Lord Hodson expressed himself more neutrally: ibid., 377-378.

87 [1983] 1 W.L.R. 1136. For a comment on this decision, see Morse, (1984) 33 I.C.L.Q. 449.

88 [1983] 1 W.L.R. 1136, 1149G.

view in that case. However, it might be attractive to a court which considered it to be in the interests of justice to apply the lex loci delicti, and which was therefore faced with having to choose between this method of doing so and the wider method outlined in the last two paragraphs.

2.35 There is, however, a difficulty with this approach. As has been stated above,[89] the general rule is that an action in England on a foreign tort is decided in accordance with English internal law, subject to the proviso that civil liability must exist under the lex loci delicti. To disapply the second limb of the general rule is simply to dispose of the proviso; the rule that the action is to be decided according to English law is left intact. Displacement of the first limb of the general rule leaves only the proviso, which in itself does not constitute a rule that the action is to be decided according to the lex loci delicti. In order to achieve that result it would therefore be necessary to do more than simply waive the requirements of the first limb of the general rule, but it might be that a court which considered the exclusive application of the lex loci delicti to be appropriate would be prepared to reformulate the rule so as to adopt such an approach.

2.36 In the result, therefore, the precise nature and extent of the new element of flexibility must remain speculative. There is no particular assistance to be derived from the Australian cases in which the element of flexibility has been accepted.[90] In those cases the lex loci delicti was displaced and the lex fori applied without restriction, but the facts of those cases suggest that this result would have been achieved on any view of the exception.

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89 Para. 2.22.

90 Warren v. Warren [1972] Qd. R. 386; Corcoran v. Corcoran [1974] V.R. 164.

The law of Scotland

2.37 Subject to the further explanations below, the present rule of Scots law is not dissimilar to that of England. If a question of choice of law is raised, a claimant suing in Scotland in delict in respect of an act which has occurred outside Scotland requires at least to demonstrate that the conduct complained of gives rise to civil liability both under Scots law and under the lex loci delicti.[91]

2.38 In Scotland, as in England, the initial disposition of the courts was to say that, because an action founded on a delict committed abroad had been brought in the Scottish courts, Scots law should be applied.[92] In Goodman v. London and N. W. Railway Co.,[93] however, a widow claimed solatium in respect of the death of her husband in a railway accident in England. Lord Shand found that the widow's claim was time-barred in England under the Fatal Accidents Act 1846 (Lord Campbell's Act). He considered the English decisions in The Halley[94] and in Phillips v. Eyre and decided that, since the pursuer no longer had any right of action under the lex loci delicti, she had no right of action in Scotland. He remarked:

> "But just as the lex loci contractus must be applied in reference to the terms and effect of the contract for the purpose of ascertaining whether liability exists, so I think the lex loci must be applied with reference to the acts committed, in order to ascertain whether there be liability. It may be that it will not be enough that the pursuer shall be able to shew that the act committed in a foreign country gives a right of action there, and that the Courts of this country will not sustain an action founded on a foreign municipal law unless the claim is also consistent with the law of this country also. The case of the 'Halley' ... is an authority to that effect."[95]

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91 McElroy v. McAllister 1949 S.C. 110.

92 Horn v. North British Railway Co. (1878) 5 R. 1055. This decision was questioned in Naftalin v. L.M.S. Railway Co. 1933 S.C. 259 and overruled in McElroy v. McAllister 1949 S.C. 110.

93 (1877) 14 S.L.R. 449.

94 (1868) L.R. 2 P.C. 193.

95 (1877) 14 S.L.R. 449, 451.

Lord Shand went on to say:

> "But where the act is lawful according to the law of the country in which it is done, or where the act gives no cause or right of action there, I am of opinion that it cannot be treated as unlawful or as giving rise to a claim of damages in this country, should it happen that the person complained of either is or afterwards becomes subject to the jurisdiction of the Courts here. The present branch of the argument (which is taken on the footing that the pursuer cannot take any benefit by the English statute) involves the proposition, which appears to me to be extravagant, that an accident caused by the fault of the servants of an English railway company, which would in England give no right to compensation to the relatives of persons killed, would, notwithstanding, subject the company to claims of damages in the Courts of this country, provided the company happened to be from any cause liable to the jurisdiction of these Courts; in other words, an act inferring no legal liability in the country where it occurred might be made the ground of liability in this country, because of the accidental circumstance of the defenders being or becoming liable to the jurisdiction of the Courts here."[96]

2.39 The terms of Lord Shand's opinion are inconsistent with the approach implicit in Phillips v. Eyre, as interpreted in Machado v. Fontes,[97] that a foreign delict should be governed by the internal law of Scotland, subject to any defence of justification under the lex loci delicti.[98] An approach of this kind seemed appropriate to the court in McLarty v. Steele[99] where the pursuer claimed damages for a verbal slander uttered in Penang. Lord Moncrieff (with whom Lords Young and Rutherford-Clark concurred) remarked:

> "It may be the case that by English law redress will not be given for verbal slander unless special damage be proved, but it is certainly not the case that therefore verbal slander is lawful. We have thus

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96 Ibid.

97 [1897] 2 Q.B. 231.

98 See the discussion in paras. 2.15 - 2.16 above.

99 (1881) 8 R. 435.

here an admitted wrong, which is wrong both by the law of the place where it was committed and of the country where the action for redress is raised."[100]

The view, however, that actionability under the lex loci delicti is not a necessary condition of an action based on a delict committed abroad was inferentially disclaimed in such cases as the Rosses[101] and Evans v. Stein,[102] questioned in Naftalin v. L.M.S. Railway Co.,[103] and finally repudiated in McElroy v. McAllister.[104] In the last case Lord Justice-Clerk Thomson remarked:

"Insistence on the importance of the law of the forum has tended to lead both Scots and English law to the illogical conclusion that, whereas actionability in the forum is a sine qua non, a pursuer can invoke the Court of the forum without having to go so far as to establish actionability under the lex delicti. The persistent use of the word 'justification' in the English cases is symptomatic of this tendency. The high-water mark of this tendency in England is Machado v. Fontes, while in Scotland McLarty v. Steele seems to suggest that the commission of a moral wrong in the locus delicti is enough. In my view this tendency is wrong. Actionability under the lex loci delicti seems to me to be in principle a sine qua non. Otherwise a quite unjustifiable emphasis is given to the lex fori."[105]

2.40 As regards the role of the lex loci delicti, the decision in Naftalin put it beyond doubt that:

"The general rule of international law is that the rights of parties, in a case like the present, are regulated by the lex loci delicti."[106]

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100 Ibid., 436.

101 (1891) 19 R. 31.

102 (1904) 7 F. 65.

103 1933 S.C. 259.

104 1949 S.C. 110. We do not hereafter cite the reference to this case.

105 Ibid., 118.

106 1933 S.C. 259, 270 per Lord Anderson. This contrasts with the interpretation which is given to the English rule in Phillips v. Eyre, that the rights and liabilities of the parties arising out of a foreign tort are determined by the lex fori, subject only to the existence of civil liability between the same parties under the lex loci delicti: see paragraphs 2.8 - 2.22 above.

The decision in McElroy made the sense of the rule more explicit because, as Lord President Cooper declared:

> "When considering whether the act or omission complained of is 'actionable' by the lex loci delicti, the Scottish courts will not limit the inquiry to the question whether the act or omission is 'actionable' in the abstract, but will extend it to the further question - On whom does the lex loci delicti confer a jus actionis, and for what?"[107]

Thus in McElroy the court rejected a widow's claim to solatium for the loss of her husband under the common law of Scotland[108] because the right was an independent one of a substantive character unknown to the lex loci delicti. It is true that there is a passage in the judgment of Lord McDonald in Mitchell v. McCulloch[109] which suggests that the primary system involved is always that of the lex fori. He remarked:

> "What law therefore falls to be applied to a head of damages recognised by the lex loci delicti but disallowed by the lex fori as being too remote? In my opinion the lex fori is the appropriate law. This is not inconsistent with Naftalin and McElroy so long as it is remembered that the lex loci delicti has a part to play in that it may cut down or limit a right to damages otherwise exigible in the forum. In my opinion, however, it should not create or extend a right not recognised by the forum."[110]

The learned judge, however, in that passage was concerned to meet an argument by the pursuer that, the double actionability rule having been satisfied, all matters of heads of damage and remoteness of damage were exclusively matters for the lex loci delicti and that the role of the lex fori was merely to determine procedural matters, including the measure of damages. His remarks, it is thought, cannot be read as denying the general propositions established by the Whole Court in McElroy and in any future case, to the extent that they are inconsistent with those propositions, would fall to be ignored.

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107 1949 S.C. 110, 135.

108 Altered by the Damages (Scotland) Act 1976.

109 1976 S.L.T. 2.

110 Ibid., 5.

2.41 It is familiar law in Scotland that the assessment and mode of calculation of damages is a matter for the lex fori alone,[111] but the Scottish authorities also suggest that in actions in Scotland based on a delict alleged to have been committed abroad, not only must the conduct founded upon give rise to a claim under Scots law as well as under the lex loci delicti, but also the claim available under the lex loci delicti must be of the same kind as that which would have been available under Scots law, the lex fori, had the delict occurred in Scotland. In McElroy v. McAllister the widow claimed alternatively that she was entitled to damages under English law for pecuniary loss under the Fatal Accidents Acts. This claim was rejected on the ground that she had failed to make sufficiently specific averments of the effect of the relevant English law, but the judges (other than Lord Keith) appear to have taken the view that the specific jus actionis founded upon under the lex loci delicti must also be available to the pursuer under the lex fori. This view was confirmed in Mitchell v. McCulloch[112] where it was decided that the Scottish court could not give effect to a head of damage recognised by the lex loci delicti if it was not also recognised by the lex fori.[113] The distinction between liability in law to compensate certain types of loss and the manner of calculation of the loss is an old one, and was clearly made by Lord McLaren in Kendrick v. Burnett,[114] but it is not always easy to distinguish between questions of liability and questions of quantification. Though in Boys v. Chaplin Lord Guest[115] declared that solatium for personal injuries as distinct from solatium for the death of a relative was not a head of damage but merely an element in the quantification of

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111 This was a matter of concession in Mitchell v. McCulloch 1976 S.L.T. 2.

112 1976 S.L.T. 2.

113 This decision is examined and criticised by J.M. Thomson in "Delictual liability in Scottish private international law", (1976) 25 I.C.L.Q. 873.

114 (1897) 25 R. 82, 88.

115 [1971] A.C. 356, 382-383.

damages, he was the only member of the House to take that view[116] and his view is inconsistent with the approach of the Inner House in MacKinnon v. Iberia Shipping Co. Ltd.,[117] where, however, the point was not argued. The question may be an open one, but the better view would seem to be that any rule which indicates the type of loss for which damages are payable is a rule of substance, with the result that under the present law the rule of double actionability would apply to it.

2.42 The general rule of Scots law, following from McElroy v. McAllister, may be summarised by saying that, in order to found a successful claim in delict before a Scottish court, the conduct in question must give rise to the same right of action between the same parties, acting in the same capacities, under both the lex loci delicti and the lex fori. The action will succeed only to the extent that the specific heads of damage sought are recoverable under both systems of law. The predominant role, however, appears to be given to the lex loci delicti in determining the rights of parties but subject to the availability of the same type of claim under the lex fori. Although this seems to represent a reversal of the first and second limbs in Phillips v. Eyre, both the Scottish and the English versions of the double actionabililty rule will normally achieve the same result in practice. However, the somewhat different conceptual approach suggests (although we are not aware of any direct authority on the point) that, unlike the position in England and Wales,[118] the existence of contractual liability between the parties under the lex loci delicti is not sufficient to support an action in Scotland based on delictual liability.

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116. See Lord Hodson at p. 379D; Lord Wilberforce (with more hesitation) at p. 393B; Lord Pearson at p. 394G.

117 1955 S.C. 20.

118 See para. 2.17 above.

2.43 It should be noted that, if neither party raises questions of foreign law in his written pleadings, the Scottish court, in the words of Lord Hunter -

> "... is entitled to decide the case according to the law of Scotland, or, at any rate, to proceed upon the view that the lex loci delicti is the same as the law of Scotland."[119]

If, however, a party does found upon the lex loci delicti he must in his written pleadings make relevant averments of the content of that law.[120] It may be too late to do so after the closing of the record.[121]

2.44 The Scottish courts have rarely been called upon to consider which is the locus delicti in cases where different elements of the delict have occurred in different countries. The question does not appear to have arisen for decision in cases specifically involving the double actionability rule. What authority there is concerns delicts allegedly committed in Scotland and it is clear that the definition of the locus delicti can vary according to the nature of the delict in question.[122]

2.45 As we have seen, the general principle underlying the present law is that:

> "It is well settled ... that a pursuer suing in a Scots court in respect of a delict committed on the territory of a foreign country must

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119 Pryde v. Proctor & Gamble Ltd. 1971 S.L.T. (Notes) 18.

120 McElroy v. McAllister 1949 S.C. 110 per Lord Justice-Clerk Thomson at p. 118 and Lord President Cooper at p. 137; MacKinnon v. Iberia Shipping Co. Ltd. 1955 S.C. 20.

121 Bonnor v. Balfour Kilpatrick Ltd. 1974 S.C. 223.

122 See Soutar v. Peters 1912 1 S.L.T. 111 (alleged seduction thought to have taken place in Scotland where the fraudulent capture of the pursuer's affections had been completed, although the subsequent act of intercourse did not take place until a few hours after she had left Scotland); Longworth v. Hope (1865) 3 M. 1049 (alleged slander in journal printed in England and circulated in Scotland held to have been committed in Scotland where the harm resulted, not in England where the defender had acted); John Walker & Sons Ltd. v. Douglas McGibbon & Co. Ltd. 1972 S.L.T. 128 (acts done in Scotland preparatory to passing-off abroad sufficient to justify intervention by a court in Scotland).

aver and prove that the remedy sought is available both under the law of that foreign country and under the law of Scotland."[123]

The question, however, arises whether there are admitted exceptions to this general principle, particularly in view of the dicta of the House of Lords in Boys v. Chaplin. The matter is of particular interest in the context of events occurring in an "insulated environment" where the connection with a foreign system of law is largely adventitious. The case of MacKinnon v. Iberia Shipping Co. Ltd.[124] arose because a ship's engineer in the course of his employment on the S.S. "Baron Ramsay" received injuries which he claimed were occasioned by the negligence of its owners or of a fireman for whom they were responsible. At the relevant time, however, the "Baron Ramsay" was lying at anchor in the territorial waters of the Dominican Republic (or "San Domingo"). The court held that this fact involved that the locus delicti was San Domingo, and declared, following the decision in McElroy v. McAllister, that the pursuer's claim to solatium for pain and suffering could only succeed if such a claim were admitted both by the law of San Domingo and that of Scotland. Counsel for the pursuer, however, argued inter alia that, so long as the events complained of were entirely internal to the vessel, there was nothing to support the view that the locus of the occurrence was the littoral territory, whatever its extent or extension. Lord Carmont, who gave the leading judgment, said that there was much to be said for this argument from a practical and commonsense point of view and Lord Sorn remarked:

"... to apply the law of the geographical locus delicti produced results which had an element of absurdity. Did it contribute anything to the comity of nations that a Glasgow man, injured in the engine room of a Glasgow ship whilst on a voyage, should have his rights determined by the law of San Domingo in an action raised in this country when he got home? In the present case the ship was anchored in territorial waters, but, if the lex loci is to be applied here, it is to be assumed that it would also have to be applied even where the ship was only in course of passage through such waters. To the objection that the introduction of a distinction between external and internal acts would involve an additional, and perhaps troublesome, question in determining the choice of law, Mr Kissen

123 MacKinnon v. Iberia Shipping Co. Ltd. 1955 S.C. 20, 34 per Lord Russell.

124 1955 S.C. 20.

was able to point out that the distinction already had received some recognition in connexion with quasi-delict committed on the high seas - Dicey, (6th ed.) p.805; Cheshire, (4th ed.) p.272. The force of Mr Kissen's argument has impressed me, and re integra there would be much to be said for adopting the rule he suggests. I have, however, not found it possible to treat the matter as being an open question. The rule that the lex loci delicti applies to territorial waters appears to me to have stood for a long time without any distinction being drawn between one kind of act and another."[125]

2.46 A similar issue was raised in Boys v. Chaplin which, as a decision of the House of Lords, would normally be a highly persuasive authority in a matter of Scottish private international law. But, as Lord McDonald indicated in Mitchell v. McCulloch,[126] it is not -

> "... easy to extract a principle from this case since the grounds of decision, although all leading to the same conclusion, vary between the judges."

Lord Guest, in Boys v. Chaplin, considered that Naftalin v. L.M.S. Railway Co.[127] and McElroy v. McAllister were rightly decided.[128] The remaining judges, however, other than Lord Donovan, all recognised that the rigid application of such a double actionability rule may create injustice, and suggested different devices for departing from that rule.[129] This leaves the present law of Scotland in some uncertainty because Boys v. Chaplin, being an English case, is not binding in Scotland. Its authority, however, might well be prayed in aid to modify the Scottish rule in appropriate cases.

Torts or delicts committed in a single jurisdiction within the United Kingdom

2.47 Subject to the proviso mentioned in the following paragraph, it appears to be universally agreed that, notwithstanding the existence of a

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125 Ibid., 36-37.

126 1976 S.L.T. 2, 4.

127 1933 S.C. 259.

128 [1971] A.C. 356, 381.

129 We discuss Boys v. Chaplin in more detail at paras. 2.23 - 2.36 above.

foreign element, a tort committed in England and Wales will, in an action in England and Wales, be governed by English law only;[130] and it may be that a corresponding rule applies in Scotland.[131] A corresponding rule would probably be held to prevail also in Northern Ireland. It would appear that "England and Wales", "Scotland" and "Northern Ireland" include the adjacent territorial waters,[132] although in the case of a statute it is necessary to decide whether the statute applies to events taking place there.[133]

2.48 However, it does not appear ever to have been decided whether the rules in Phillips v. Eyre and McElroy v. McAllister simply do not apply at all to torts and delicts committed in the country of the forum, or whether those rules do apply but result in the exclusive application of the lex fori because the lex loci delicti in such a case is the same as the lex fori.[134] The distinction between these possibilities was of no consequence until the creation in Boys v. Chaplin of an exception to the rule in Phillips v. Eyre. Since then the distinction has acquired some theoretical significance in England and Wales and in Northern Ireland for, if the Boys v. Chaplin exception is capable of resulting in the application of a third law which is neither the lex fori nor the lex loci delicti,[135] and

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130 Dicey and Morris, p. 927. The case usually cited in support of this proposition is Szalatnay-Stacho v. Fink [1947] K.B. 1 (C.A.).

131 Walker, The Law of Delict in Scotland (2nd ed., 1981), p. 57.

132 Brodin v. A/R Seljan 1973 S.L.T. 198, discussed below at paras. 2.94 - 2.96.

133 For example, The Saxonia (1862) Lush. 410, 167 E.R. 179.

134 Graveson's view is that in such a case "the issue does not concern the conflict of laws": Conflict of Laws (7th ed., 1974), p. 568, but for the view that the double actionability rule does apply see Cheshire and North, pp. 284-285, and see also Dicey and Morris, p. 944. This point was not raised in Szalatnay-Stacho v. Fink [1947] K.B. 1.

135 As to which see above, paras. 2.29 - 2.36.

if the choice of law rule in tort does apply to events which occurred within the jurisdiction of the forum, then the lex fori could in theory be displaced in favour of a third law. This seems unlikely to happen, and the point is not relevant at all in Scotland so long as the rule in McElroy v. McAllister permits of no exception.

Particular consequences of the rules in Phillips v. Eyre and McElroy v. McAllister

A. INTRODUCTION

2.49 This Part of our consultation paper has so far discussed the present law in general terms. We now proceed to consider briefly the operation of the present law in the context of some particular issues which have given rise to problems. There are two question which arise in connection with each of the issues discussed in this section. The first is whether or not it is the law selected by our choice of law rule in tort and delict which applies to the issue. If the issue were regarded, not as an issue in tort or delict, but as belonging to a different category (for example, as contractual in nature) then it would be some other choice of law rule, and not the choice of law rule in tort or delict, which selected the law appropriate to govern the issue. It is therefore important to know how each issue should be classified for choice of law purposes, but such classification may be a matter of difficulty.

2.50 The second question which may arise is whether or not the issue should be regarded as procedural or as substantive.[136] Any matter which is regarded here as procedural only will be governed by the lex fori to the exclusion of any foreign law. Further, even where an issue was properly classified as tortious or delictual in nature, any provision of the lex loci delicti which was regarded here as procedural would be ignored in an action in a court in the United Kingdom.

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136 See Dicey and Morris, ch. 35.

2.51 It is primarily the first question with which this section is concerned. We have thought it most convenient to confine our discussion to the operation of the English rule in Phillips v. Eyre (as interpreted in Boys v. Chaplin) and of the Scottish rule in McElroy v. McAllister as they relate to the particular issues considered; except to the extent that the contrary appears, we have not discussed the possible effect of the exception to the English rule created in Boys v. Chaplin. It should be recalled, however, that the Boys v. Chaplin exception is of general application, and might in an appropriate case modify a result arrived at by means of the general English rule.

2.52 As has appeared from the foregoing discussion, the law of England and Wales and the law of Scotland differ in the emphasis which they give to the lex fori and the lex loci delicti. In England and Wales the former is of greater importance, in Scotland the latter. For the sake of convenience, however, where we refer in the succeeding paragraphs to the "first limb" of the rule in Phillips v. Eyre or McElroy v. McAllister, we mean in both cases the limb which applies the lex fori; where we refer to the "second limb" we mean the limb which applies the lex loci delicti.

B. THE ISSUES

1. Vicarious liability

2.53 Cases involving vicarious liability show that in England and Wales this issue is one to which the choice of law rule in tort applies,[137] and that the claimant's action will therefore fail unless the defendant is vicariously liable under both the lex fori and the lex loci delicti.[138] The law is probably the same in Scotland.

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137 The Halley (1868) L.R. 2 P.C. 193; The M. Moxham (1876) 1 P.D. 107; O'Connor v. Wray [1930] 2 D.L.R. 899; Joss v. Snowball [1970] 1 N.S.W.R. 426; Church of Scientology of California v. Commissioner of Metropolitan Police (1976) 120 S.J. 690. See Dicey and Morris, p. 958.

138 It may be particularly difficult for the claimant to succeed in a vicarious liability case, as is illustrated by Church of Scientology of California v. Commissioner of Metropolitan Police (1976) 120 S.J. 690: see Collins, "Vicarious liability and the conflict of laws", (1977) 26 I.C.L.Q. 480.

2. Defences

2.54 The double actionability rule implies, both in England and Wales and in Scotland, that the wrongdoer may rely in his defence on any available rule of the lex fori, and also on any substantive rule available to him under the lex loci delicti.[139]

2.55 One defence which has given rise to problems is that of contributory negligence. Although any observations on the effect of contributory negligence in the application of the general rule must remain speculative in the absence of English or Scottish authority, there would appear to be no reason to doubt that this defence will be subject to the general choice of law rule in tort and delict.[140] Thus where under the lex loci delicti contributory negligence by the claimant still constitutes a complete defence to his action, it would follow from the second limb of the general rule that the claimant's action in a court in the United Kingdom would fail, regardless of the fact that under our own law the only consequence would be a reduction in the damages recovered.[141]

3. Damages

2.56 It is clear that "[t]he law relating to damages is partly procedural and partly substantive".[142] In J. D'Almeida Araujo Lda. v.

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139 Cheshire and North, p. 278; Dicey and Morris, p. 961; Morse, pp. 179-180.

140 Anderson v. Eric Anderson Radio & T.V. Pty. Ltd. (1965) 114 C.L.R. 20.

141 Law Reform (Contributory Negligence) Act 1945 (as amended), which applies both to England and Wales and to Scotland. Cases to the contrary in Australia (Hartley v. Venn (1967) 10 F.L.R. 151, and see also Kolsky v. Mayne Nickless Ltd. [1970] 3 N.S.W.R. 511) and in Canada (Brown v. Poland and Emerson Motors Ltd. (1952) 6 W.W.R. (N.S.) 368 and LaVan v. Danyluk (1970) 75 W.W.R. 500) are not inconsistent with this since they were decided on the basis that the conduct complained of had merely to be "not justifiable" in the locus delicti, and did not have to give rise to civil liability there.

142 Boys v. Chaplin [1971] A.C. 356, 379 per Lord Hodson.

Sir Frederick Becker & Co. Ltd.[143] (a case of contract), a distinction was drawn between, on the one hand, remoteness of damage and, on the other hand, the monetary quantification or assessment of damages. It was held that the latter is classed as procedural, and is governed by the lex fori in any event. Questions of remoteness and heads of damage, however, are matters of substance, and are governed by the system of law selected by the relevant choice of law rule. Since Boys v. Chaplin it seems clear that in England and Wales the same distinction also applies in the field of tort. In Boys v. Chaplin the particular question which arose was this: was it necessary, before the plaintiff could recover general damages in England, that the same head of damage should be available under the lex loci delicti?[144] In other words, was the question whether general damages were obtainable a matter of substance, to which the rule in Phillips v. Eyre would be applied, or a matter of procedure, to be governed by English law as the law of the forum? It would seem from Boys v. Chaplin that the issue should be treated as substantive rather than procedural; and that, therefore, under the general rule in Phillips v. Eyre (we are not here considering any exception to the general rule) a plaintiff

143 [1953] 2 Q.B. 329.

144 The question arose because, as has been mentioned above (para. 2.24), damages for pain and suffering were available in England, but not under the lex loci delicti, which was Maltese law.

in England is not permitted to recover damages under a head which is not available under the lex loci delicti.[145] The rule appears to be the same in Scotland.[146]

4. Limitations on recovery

2.57 A rule of English or Scottish law imposing a ceiling on the amount of damages recoverable will take effect in England and Wales or in Scotland respectively in an action on a foreign tort or delict. It is not established whether under the second limb of the general rule in Phillips v. Eyre or McElroy v. McAllister any similar ceiling imposed under the lex loci delicti could further restrict the damages available. The outcome might depend on whether the foreign ceiling extinguished the right to

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145 Cheshire and North, pp. 280-281; Dicey and Morris, pp. 966-967; Boys v. Chaplin [1971] A.C. 356, 379D-F per Lord Hodson; 392F-393B per Lord Wilberforce (who preferred to state at p. 389C-D as "the broad principle" that "a person should not be permitted to claim in England in respect of a matter for which civil liability does not exist, or is excluded, under the law of the place where the wrong was committed"); 395A-B per Lord Pearson, who said that "it would be artificial and incorrect to treat the difference between the English law and the Maltese law, which materially affects the determination of the rights and liabilities of the parties, as a matter only of procedural law". It should, however, be noted that in Lord Pearson's view Machado v. Fontes was right, and therefore the plaintiff would in any event have recovered damages in accordance with English principles only. Briggs disagrees with the proposition stated in the text: (1984) 12 Anglo-Am. L.R. 237, and a dictum of Henry J. in Going v. Reid Brothers Motor Sales Ltd. (1982) 35 O.R. (2d) 201, 211 is also inconsistent with it. The interpretation of the second limb of the rule in Phillips v. Eyre is not the same in Australia as it is in England, and the Australian position is not entirely clear: Li Lian Tan v. Durham and General Accident Fire and Life Assurance Corporation Ltd. [1966] S.A.S.R. 143; Kemp v. Piper [1971] S.A.S.R. 25. See Phegan, "Tort Defences in Conflict of Laws -The Second Condition of the Rule in Phillips v. Eyre in Australia", (1984) 58 A.L.J. 24.

146 Naftalin v. L.M.S. Railway Co. 1933 S.C. 259, 273-274 per Lord Murray; McElroy v. McAllister 1949 S.C. 110, 134-135 per Lord President Cooper; MacKinnon v. Iberia Shipping Co. Ltd. 1955 S.C. 20.

damages over the maximum or merely prevented their recovery, since in the former case the foreign provision might be regarded as substantive, but in the latter as procedural.

2.58 An indication that an English court might be prepared to classify such a ceiling as substantive is provided by Turner L.J. in Cope v. Doherty,[147] in which case and in The Wild Ranger[148] it was held that the limitation of liability provided for by section 504 of the Merchant Shipping Act 1854 did not extend to foreign ships on the high seas. Although the ultimate successor to that section[149] does so extend,[150] it is not clear whether it can be applied to the exclusion of the lex loci delicti to an occurrence in foreign territorial waters, or whether a lower limitation of liability provided for under the lex loci delicti could under the second limb of the general rule in Phillips v. Eyre or McElroy v. McAllister serve to reduce further the maximum liability.

5. Prescription and limitation of actions

2.59 When the Foreign Limitation Periods Act 1984 is brought into force, it will no longer be material in an action in England and Wales whether a foreign limitation period is regarded as substantive or procedural: subject to certain exceptions it will be taken into account whichever is the case.[151] An action in England and Wales on a foreign

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147 (1858) De G. & J. 614, 626; 44 E.R. 1127, 1132.

148 (1862) Lush. 553; 167 E.R. 249.

149 Merchant Shipping Act 1894, s.503, which will be replaced by the Merchant Shipping Act 1979, s.17, when the latter is brought into force.

150 The Amalia (1863) 1 Moo. P.C. (N.S.) 471, 15 E.R. 778, decided under the Merchant Shipping Act Amendment Act 1862, s.54, the immediate predecessor of the Merchant Shipping Act 1894, s.503. Cf. Sundström, Foreign Ships and Foreign Waters (1971), pp. 65-66, where the proposition in the text is doubted.

151 Foreign Limitation Periods Act 1984, s.1(1),(2). See (1982) Law Com. No. 114, Cmnd. 8570, paras. 4.13, 4.14 - 4.17.

tort will therefore fail after the expiry of the shorter of the English and the foreign limitation period. It is intended that the law in Northern Ireland should be to the like effect.[152]

2.60 In an action in Scotland, it is not wholly clear whether the Scottish court in applying the internal law of the lex loci delicti should apply also its rules of limitation of actions which might otherwise fall to be ignored as being merely of a procedural character. In Goodman v. London and N.W. Railway Co.[153] Lord Shand, construing the English provision for himself, suggested that section 3 of the English Fatal Accidents Act 1846 imported in its terms an inherent temporal limitation or qualification of the right conferred. The same view was taken by Lord Russell in McElroy v. McAllister where he remarked:

> "... inasmuch as the statute which gives the right of action expressly limits the endurance of that right, the right itself and the cause of action which it is designed to enforce both cease to exist at the expiry of the period of endurance where, as here, an action has not been commenced within that period. In other words the effect of the so-called time limitation is to extinguish at its expiry the liability of the defender."[154]

These remarks, however, should be read in their limited context and with reference to the requirements of averment and proof of the relevant foreign law referred to by Lord President Cooper in the same case.[155] The Prescription and Limitation (Scotland) Act 1984 now provides,[156] in general, for the application of the limitation period of a foreign lex causae. This rule, however, does not apply where there is more than

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152 Hansard (H.C.), 7 March 1984, vol. 55, col. 589.

153 (1877) 14 S.L.R. 449, 450.

154 1949 S.C. 110, 127.

155 Ibid., 137.

156 Section 4. The Act (which came into force on 26 September 1984) implements the Scottish Law Commission's Report on Prescription and the Limitation of Actions (Scot. Law Com. No. 74 (1983)).

one law governing the obligation in question. Hence it does not apply in actions before a Scottish court arising out of a foreign delict. In these actions, it is still necessary for the court to decide whether the foreign limitation rule should be applied as a substantive rule, in which case the end result is the same as in England and Wales,[157] or whether it should be characterised as procedural only, in which case it would seem that it could be ignored.

6. Transmission of claims on death: the survival of actions

2.61 There are two circumstances in which the question of survival of actions may arise. The first is where the claimant dies: the question then is whether the action may be pursued by his personal representatives for the benefit of his estate. This is known as the "active transmission" of claims. The second is where the wrongdoer dies, in which case the question is whether his estate remains liable. This is known as the "passive transmission" of claims. We consider these two categories together. In both categories two different questions arise: first, whether the action survives at all; and secondly, if it does survive, who may represent the estate of the deceased in an action in a court in the United Kingdom.

(a) The law of England and Wales and of Northern Ireland[158]

2.62 There appears to be no English authority on the survival of tort actions in private international law,[159] and neither the statute embodying the present English domestic law[160] nor the corresponding

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157 See para. 2.59 above.

158 See Webb and Brownlie, "Survival of actions in tort and the conflict of laws", (1965) 14 I.C.L.Q. 1.

159 These matters could have been raised, but were not, in Howgate v. Bagnall [1951] 1 K.B. 265. The issue might have arisen in Batthyany v. Walford (1887) 36 Ch. D. 269 (C.A.), but the claim in that case was classified as contractual rather than tortious in nature.

160 Law Reform (Miscellaneous Provisions) Act 1934, s.1 (as amended).

Northern Ireland statute[161] (which permit both passive and active transmission) provides any assistance. To regard the issue of whether or not an action survives as merely procedural does not seem supportable, but in the absence of authority it has been suggested by some that the issue should not be classified as one in tort.[162] However, the Australian case of Kerr v. Palfrey[163] (a case of passive transmission) does appear to treat the question as an issue in tort and therefore as subject to the rule in Phillips v. Eyre.[164] If this is so, a claim in England which depends for its success upon the survival of a cause of action will succeed only if the action survives under the lex loci delicti as well as under English law. However, who ultimately benefits from, or stands to lose by, the survival of an action will not be a matter for the applicable law in tort. This will be regulated by the law which governs succession to the moveable estate of the deceased.

2.63 It would seem that the question of who may sue or be sued on behalf of the estate of the deceased is a procedural matter which would therefore be regulated by English law alone. This would imply (a) that it would not be necessary for a person representing the estate of the deceased, whether as plaintiff or as defendant,[165] to be appointed to that capacity under the lex loci delicti or indeed any law other than the lex fori, but (b) that (if plaintiff) he would have to obtain a grant of probate or letters of administration in England even if he had also done so under the lex loci delicti or any other law.[166]

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161 Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937, s.14 (as amended).

162 See, for example, Dicey and Morris, pp. 955-956 (active transmission), 959-960 (passive transmission). This point is discussed at paras. 6.24 - 6.32 below.

163 [1970] V.R. 825.

164 The reasoning in Kerr v. Palfrey is, however, not entirely satisfactory: see Morse, pp. 161-162, and n. 177 below.

165 Morse, pp. 161-162.

166 The same question arises in the context of an action for wrongful death. See paras. 2.67 ff. below.

(b) The law of Scotland

2.64 The law relating to transmission of rights by a deceased person to his executors is now contained in sections 2 to 6 of the Damages (Scotland) Act 1976, which contains no choice of law rules.

2.65 Before the 1976 Act, the general rule in Scotland was that a right of action vested in any person was not extinguished by his death. His executors, therefore, could prosecute any claim on his behalf in so far, at least, as it related to the period up to the date of death. This principle applied to any claim for patrimonial loss but, by way of exception, did not apply to any claim the deceased might himself have had for solatium for personal injuries. In relation to such a claim the executors had a title to sue only if the deceased had raised an action of damages in respect of the claim before his date of death.[167] The 1976 Act alters the law by providing that the deceased's right to recover solatium in respect of personal injuries should not transmit to his executors, even when during his life the deceased had commenced an action to this effect.[168]

2.66 There is no satisfactory authority as to the application in situations involving a foreign element either of the common law rules on this matter or of those embodied in the 1976 Act. In the case of McElroy v. McAllister the pursuer inter alia claimed that as executrix she was entitled under the English Law Reform (Miscellaneous Provisions) Act 1934 to damages in respect of the funeral expenses and the loss caused by the death of her husband. The claim for funeral expenses was conceded and argument confined to the claim for loss of expectation of life. This claim was dismissed by Lord Justice-Clerk Thomson on the ground that -

> "Actionability by the law of the forum is a sine qua non. The executrix could not have insisted in this claim had she been suing in respect of a wrong committed in Scotland";[169]

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167 See Stewart v. L.M.S. Railway Co. 1943 S.C. (H.L.) 19.

168 1976 Act, s.2(3)(a).

169 1949 S.C. 110, 118.

and on similar grounds by Lord President Cooper and by Lords Carmont and Jamieson.

7. Wrongful death as a cause of action

(a) Introduction

2.67 Under the common law of England and Wales the principle was that "[i]n a civil Court, the death of a human being could not be complained of as an injury".[170] Exceptions to this rule were created in the Fatal Accidents Acts 1846 to 1959. These were consolidated by the Fatal Accidents Act 1976, but until that Act was amended by section 3 of the Administration of Justice Act 1982, the Fatal Accidents Acts were designed to compensate relatives for the economic loss they had suffered and not to afford a solatium to them. The common law of Scotland, on the other hand, has for long conceded to a limited class of relatives both compensation and a solatium. These differences between the systems occasioned choice of law problems. Since the passing of the Damages (Scotland) Act 1976, the law of both countries is statutory. The law of Northern Ireland on this question has developed in the same way as the law of England and Wales.

2.68 The questions which arise in this context are similar to those which arise in that of the survival of actions and, since neither the Fatal Accidents Act 1976 nor the Damages (Scotland) Act 1976 contains conflict rules, any question as to choice of law in the case of an action in the United Kingdom in respect of a fatal accident which occurred abroad is probably governed by the common law on the subject.

(b) The law of England and Wales and of Northern Ireland

2.69 There appears to be no English authority directly in point, either as to whether the Fatal Accidents Act 1976 will be applied in any action in an English court irrespective of any foreign element; or (if not)

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170 Baker v. Bolton (1808) 1 Camp. 493, 170 E.R. 1033, per Lord Ellenborough.

as to the choice of law rule to be applied.[171] Neither is there any such Northern Ireland authority under the corresponding Fatal Accidents (Northern Ireland) Order 1977.

2.70 However, cases in Australia[172] and in Canada[173] under legislation similar to the English Fatal Accidents Act seem to show that the legislation there under consideration could not apply to events occurring abroad without the invocation of an independent choice of law rule. Further, the Australian decisions[174] indicate that the existence or not of a cause of action under the Fatal Accidents legislation is a matter of substance; that the action is in the nature of an action in tort; that, accordingly, the general rule in Phillips v. Eyre will apply; and that, therefore, under the first limb of the general rule, the action is brought under the Fatal Accidents legislation of the forum, not that of the locus delicti.

2.71 It would seem to follow also from the second limb of the general rule in Phillips v. Eyre that an action in England under the Fatal Accidents Act 1976 in respect of a fatal accident which occurred abroad will succeed only if the beneficiaries of that action would also have benefited from the equivalent action brought under the lex loci delicti. However, this proposition is consistent only with the first of two alternative analyses of the law given in Koop v. Bebb[175] (an action in

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171 Both Davidsson v. Hill [1901] 2 K.B. 606 and The Esso Malaysia [1975] Q.B. 198 concerned accidents at sea, to which different rules apply: see below, paras. 2.106 ff. The question was not raised in Finnegan v. Cementation Co. Ltd. [1953] 1 Q.B. 688 (see below, para. 2.73) or in Schneider v. Eisovitch [1960] 2 Q.B. 430, which is occasionally cited in this context.

172 Koop v. Bebb (1951) 84 C.L.R. 629; Kolsky v. Mayne Nickless Ltd. [1970] 3 N.S.W.R. 511; Kemp v. Piper [1971] S.A.S.R. 25.

173 Couture v. Dominion Fish Co. (1909) 19 M.R. 65; Johnson v. Canadian Northern Ry. Co. (1909) 19 M.R. 179; Young v. Industrial Chemicals Co. Ltd. [1939] 4 D.L.R. 392.

174 See n. 172 above.

175 (1951) 84 C.L.R. 629.

Victoria in respect of a fatal accident which had occurred in New South Wales). The second, and inconsistent, alternative was that the Victorian statutory provision corresponding to section 1 of the Fatal Accidents Act 1976 -

> "... may be regarded as giving a right of action in Victoria whenever the condition is fulfilled that the deceased person (if he had survived) would have been entitled by the law of Victoria, including its rules of private international law, to recover damages for the act, neglect, or default which caused his death."[176]

2.72 According to this second view, therefore, the rule in Phillips v. Eyre would be applied, not to the actual claim and the actual parties before the court, but to the hypothetical claim of the deceased against the wrongdoer. The rules of private international law would cease to be relevant once it was established that the deceased could successfully have sued the wrongdoer in an action at the forum. The existence or absence of a Fatal Accidents Act or its equivalent at the locus delicti would, on this view, be irrelevant, as would the provisions of any such legislation as did in fact exist there. This view seems to be based on a mistaken interpretation of the rule in Phillips v. Eyre as it applies to such cases.[177]

2.73 The question who in England may bring an action under the Fatal Accidents Act 1976 in respect of a fatal accident which occurred abroad would seem to raise a procedural matter to which the rule in Phillips v. Eyre would not apply.[178] Those persons are specified in section 2 of the Act. It would therefore appear that a person suing as executor or administrator should not have to obtain a grant of probate or

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176 Ibid., 641.

177 See Dicey and Morris, pp. 954-955 and especially nn. 18 and 23; Morse, p. 162. The reason why Kerr v. Palfrey [1970] V.R. 825, cited above at para. 2.62 and nn. 163, 164, may be regarded as an unsatisfactory case is that it appears at pp. 828-829 also to adopt this view in the context of the transmission of claims on death.

178 The same point arises here as arose in connection with the survival of actions: see above, para. 2.63.

letters of administration in the country of the locus delicti,[179] or, indeed, anywhere else except in the country of the forum. However, Finnegan v. Cementation Co. Ltd.[180] indicates that a person who wishes to bring an action as administrator must take out letters of administration in England, even if foreign letters of administration have been taken out as well.[181]

(c) The law of Scotland

2.74 In Scotland there is ample authority upon the choice of law aspects of the common law rules which accorded to certain classes of near relatives a right to recover solatium (or damages for injury to the feelings) and patrimonial loss. The cases of Goodman v. London and N.W. Railway Co.,[182] Naftalin v. L.M.S. Railway Co.[183] and McElroy v. McAllister were all concerned with claims to solatium in respect of the death of a relative occurring in an accident outside Scotland. The cases suggest that such a claim for solatium by relatives is to be regarded not as an element of quantification in a general claim for damages but as a claim in respect of a separate substantive right. If it is unknown to the lex loci delicti (as will usually be the case) it will not be admitted.[184]

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179 Young v. Industrial Chemicals Co. Ltd. [1939] 4 D.L.R. 392 is to the contrary. So are two other Canadian cases, which were however decided on different premises: in Couture v. Dominion Fish Co. (1909) 19 M.R. 65 and Johnson v. Canadian Northern Ry. Co. (1909) 19 M.R. 179 the court held that the cause of action arose out of the fatal accidents legislation of the locus delicti, not that of the forum. See Dicey and Morris, pp. 954-955.

180 [1953] 1 Q.B. 688.

181 In Byrn v. Paterson Steamships Ltd. [1936] 3 D.L.R. 111, which is apparently to the contrary, letters of administration could not in the circumstances have been granted at the forum, since the deceased (who was domiciled and resident abroad) had left no property there. The report does not say where the tort occurred.

182 (1877) 14 S.L.R. 449.

183 1933 S.C. 259.

184 See the fuller discussion at paras. 2.37 ff. above.

2.75 There have been no reported cases upon the application of the Damages (Scotland) Act 1976 in situations involving questions of private international law. This Act distinguishes clearly between the claims of the deceased's relatives[185] and those of his executors. All relatives have a claim for damages for loss of support under section 1(3) but, if the relative is a member of the deceased's immediate family within the meaning of section 10(2) of the Act, the court may also make a "loss of society award", i.e. a sum in damages to compensate the relative "for the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if he had not died".[186]

2.76 There seems little doubt that, in cases where the lex loci delicti is that of a country outside Scotland, the Scottish courts would apply to the loss of society award principles similar to those which they have evolved in the context of solatium.

8. Husband and Wife

2.77 At common law, throughout the United Kingdom, neither party to a marriage could bring an action in tort or delict against the other, but this has no longer been so since the Law Reform (Husband and Wife) Act 1962 or the Law Reform (Husband and Wife) Act (Northern Ireland) 1964. However, there is no English, Northern Ireland or Scottish authority on the question whether the 1962 Act or the 1964 Act applies as a matter of construction or policy to torts or delicts which have occurred abroad; or on the question what choice of law rule is to apply to the issue of interspousal immunity.

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185 Defined in Schedule 1 of the Act.

186 Section 1(4).

2.78 Decisions in Australia have treated interspousal immunity as a matter of substance rather than of procedure.[187] Further, in Warren v. Warren[188] the issue was held not to be subject to the general rule in Phillips v. Eyre. That case concerned parties who were domiciled in Queensland, where the action was brought, and where there was in force a statutory provision[189] permitting an action by one spouse against the other. Such an action was prohibited by the law of New South Wales,[190] where the motor accident which was the subject of the action had occurred. In these circumstances Matthews J. held that the question whether the wife could bring an action against the husband was to be referred to the law of their domicile, and should not be governed by the general rule in Phillips v. Eyre.

2.79 In the alternative, Matthews J. considered the issue as one in tort, and held that following Boys v. Chaplin the general rule should be departed from in the circumstances of the case, thereby permitting the plaintiff's action to proceed [191] (from which it follows that if the general rule had been applied the plaintiff would have failed in her action). This alternative approach was also adopted in Corcoran v. Corcoran,[192] it having been conceded by all parties that the issue was one in tort.[193]

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187 Warren v. Warren [1972] Qd. R. 386; Corcoran v. Corcoran [1974] V.R. 164. See Dicey and Morris, p. 959. Graveson, however, suggests that "English courts tend to make the question one of procedure": Conflict of Laws (7th ed., 1974), p. 594.

188 [1972] Qd. R. 386.

189 Law Reform (Husband and Wife) Act 1968 (Qld.), s.2.

190 Married Women's Property Act 1901-1964 (N.S.W.), s.16.

191 For a discussion of this aspect of Boys v. Chaplin see above, paras. 2.23 ff.

192 [1974] V.R. 164.

193 Ibid., 166. See also Schmidt v. Government Insurance Office of New South Wales [1973] 1 N.S.W.L.R. 59, where the issue was also treated as one in tort. Again, this case is unsatisfactory since it contains reasoning which is based on the second alternative analysis in Koop v. Bebb (1951) 84 C.L.R. 629, mentioned above at paras. 2.71 - 2.72.

9. Foreign Land

2.80 An English court will decline jurisdiction in any case involving the determination of title to foreign land.[194] Formerly this refusal to take jurisdiction extended also to cases of trespass to foreign land.[195] However, by section 30 of the Civil Jurisdiction and Judgments Act 1982, the jurisdiction of any court in England and Wales or in Northern Ireland to "entertain proceedings for trespass to, or any other tort affecting, immovable property" now extends to cases in which the property is situated outside that part of the United Kingdom, unless the proceedings are principally concerned with a question of the title to, or the right to possession of, that property. It is to be presumed that such actions will now be subject to the choice of law rules applicable to other types of foreign tort.

2.81 Section 30 of the Civil Jurisdiction and Judgments Act 1982 does not extend to Scotland, and the approach of the Scottish courts has been rather different. They have not excluded in principle the entertaining of actions, including actions of damages, in relation to immoveables abroad but, particularly in the context of actions to determine proprietary or possessory rights in immoveables, they have liberally admitted the plea of forum non conveniens.[196] There is no authority, however, on the choice of law rules applicable to claims for damage to immoveables abroad, and it is presumed that the double actionability rule would apply.

10. Contribution

2.82 The right to recover contribution is largely governed in England and Wales and in Northern Ireland by the Civil Liability

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194 British South Africa Co. v. Companhia de Moçambique [1893] A.C. 602; Hesperides Hotels Ltd. v. Muftizade [1979] A.C. 508. Cf. The Tolten [1946] P. 135.

195 Hesperides Hotels Ltd. v. Muftizade [1979] A.C. 508.

196 Anton, p. 125.

(Contribution) Act 1978, and in Scotland by section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940. There can be no doubt that the right to contribution is substantive and not merely procedural.

2.83 The Civil Liability (Contribution) Act 1978 contains no general choice of law rules and may be taken not to apply directly to all claims for contribution arising in a court in England and Wales or in Northern Ireland, but only to such of those claims as are governed by English or Northern Ireland law respectively.[197] There appears to be no English authority on the classification of a right to contribution for the purposes of private international law. There is, however, authority in purely domestic English cases to the effect that a right to contribution between tortfeasors is not in itself a right in tort, but is a right sui generis,[198] and there are dicta in Australian cases to the same effect.[199] A right to contribution could also arise by contract. It would therefore appear likely that the general rule in Phillips v. Eyre would not apply to a claim for contribution and that a different choice of law rule would be used to select the law applicable to the issue.[200]

2.84 In Scotland, however, it could be argued that section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 requires a Scottish court to apply the rules enunciated by that section as part of the

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197 The Law Commission made this point in its Working Paper (No. 75) on Classification of Limitation in Private International Law (1980), para. 76.

198 Harvey v. R.G. O'Dell Ltd. [1958] 2 Q.B. 78, 107-108; Ronex Properties Ltd. v. John Laing Construction Ltd. [1983] 1 Q.B. 398, 407. The point arose under the Law Reform (Married Women and Tortfeasors) Act 1935, s. 6(1)(c), which has now been repealed and replaced by the Civil Liability (Contribution) Act 1978.

199 Plozza v. South Australian Insurance Co. Ltd. [1963] S.A.S.R. 122, 127; Nominal Defendant v. Bagot's Executor and Trustee Co. Ltd. [1971] S.A.S.R. 346, 356, 365-366 (reversed in part on other grounds (1970) 125 C.L.R. 179); Stewart v. Honey (1972) 2 S.A.S.R. 585, 592. To the contrary is Baldry v. Jackson [1977] 1 N.S.W.L.R. 494, where the claim was classified as delictual.

200 See Dicey and Morris, pp. 967-968; Morse, p. 209.

lex fori to all claims for contribution coming before it, whether or not the claim is itself governed by Scots law.

11. Indemnity

2.85 There does not appear to be any English, Scottish, or Northern Ireland authority on the classification of a right to indemnity for the purposes of private international law. A right to indemnity may, for example, be contractual, quasi-contractual or sui generis, and cannot be regarded as intrinsically tortious or delictual. It would therefore appear likely that our present choice of law rule in tort or delict would not be applied to this issue, and that a claim for indemnity would therefore not be governed by the rule in Phillips v. Eyre or McElroy v. McAllister.[201]

12. Tort or delict and contract

2.86 In the uneasy relationship of tort or delict and contract in the conflict of laws there are two particular problems which may arise.

(a) Wrong is both a tort or delict and a breach of contract

2.87 The question here is whether the person wronged should frame his claim in the United Kingdom in contract or in tort or delict. It is, however, clear in England and Wales that the claimant may choose how to frame his claim, and the wrongdoer has no option but to defend on the ground chosen by the claimant.[202] It is thought that this remains so even where the lex loci delicti is that of a country, such as France, where the existence of a claim in contract means that no claim in tort or delict may

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201 See Nominal Defendant v. Bagot's Executor and Trustee Co. Ltd. [1971] S.A.S.R. 346, 365-368; Stewart v. Honey (1972) 2 S.A.S.R. 585, 592; Borg Warner (Australia) Ltd. v. Zupan [1982] V.R. 437, 442, 456.

202 See Matthews v. Kuwait Bechtel Corporation [1959] 2 Q.B. 57 (C.A.); Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136, 1153 (C.A.). This question may assume a particular practical importance if there is any question of serving a writ outside the jurisdiction under R.S.C., O.11.

be brought,[203] since the second limb of the rule in Phillips v. Eyre requires only that the wrong complained of should give rise to civil liability under the lex loci delicti, and contractual liability may well be sufficient.[204]

2.88 The same choice exists also for a person pursuing his claim in Scotland.[205] Although there does not appear to be any Scottish authority dealing with this question in the context of a claim in contract or delict arising out of a "foreign" wrong, it is reasonable to assume that the claimant would still have the option of which remedy to pursue.

(b) Contractual defence to a claim in tort or delict

2.89 The second question, upon which there is little clear authority, concerns the effect of a contractual defence to a claim in tort or delict, where the tort or delict is subject to the rule in Phillips v. Eyre or McElroy v. McAllister. This issue arose in England in Sayers v. International Drilling Co. N.V.[206] That case arose out of an accident which occurred during the course of the plaintiff's employment on an oil rig off the coast of Nigeria (but apparently within Nigerian territorial

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203 See Kahn-Freund, 130-134; H. & L. Mazeaud and Tunc, Responsabilité Civile, Vol. 1 (6th ed., 1965), paras. 173-207.

204 See above, para. 2.17. It is not established whether this civil liability is that provided for under the internal law of the locus delicti, or whether it is merely such civil liability as could be established in an action there: the former would seem more consistent with the general rejection of renvoi in tort and delict cases (see para. 2.18 above). The distinction would be relevant when the only civil liability was that provided for under a contract whose proper law was not that of the locus delicti.

205 Donoghue v. Stevenson 1932 S.C. (H.L.) 31, 64 per Lord Macmillan; Junior Books Ltd. v. Veitchi Co. Ltd. 1982 S.L.T. (H.L.) 492, 501 per Lord Roskill. See also Duke v. Jackson 1921 S.C. 362, where the pursuer's action of damages was founded on delict and on breach of contract.

206 [1971] 1 W.L.R. 1176 (C.A.).

waters). Following the accident, the plaintiff commenced proceedings in England against his employers, seeking from them damages for negligence.

2.90 The case did not proceed to a full consideration of all the issues involved, but went to the Court of Appeal for a determination of the proper law of the plaintiff's contract of employment, a clause in which would (if valid) have excluded liability on the part of the plaintiff's employers. The plaintiff sought to show that the proper law of the contract was English and that the exclusion clause was void.[207] His employers claimed that the proper law of the contract was Dutch, by which law the exclusion clause was valid.

2.91 In the Court of Appeal, Salmon and Stamp L.JJ. held that the proper law of the contract was Dutch, so that as a matter of contract law the exclusion clause was valid. In so holding, however, Salmon and Stamp L.JJ. made no comment on the inter-relationship of the claim in tort and the defence in contract.

2.92 Lord Denning M.R. based his decision upon different grounds. After stating his view that the law to be applied in considering a claim in tort was the proper law of the tort,[208] he identified two issues. His view was that the proper law of the tort (apart from the contract) was Dutch,

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207 By virtue of the Law Reform (Personal Injuries) Act 1948, s. 1(3); see para. 2.95 below. It is not clear whether the plaintiff's position was simply that s. 1(3) applied because the proper law of the contract was English, or whether he also claimed in the alternative that s. 1(3) applied as a mandatory provision of English law even if the proper law of the contract was not English. It seems that the Court of Appeal was not asked to consider the latter point. See the discussion of Brodin v. A/R Seljan 1973 S.L.T. 198 at paras. 2.94 - 2.96 below.

208 [1971] 1 W.L.R. 1176, 1180. This proposition is untenable as a matter of authority: Morse, p. 282.

whereas the proper law of the contract (apart from the tort) was English.[209] However, in his opinion -

> "it is obvious that we cannot apply two systems of law, one for the claim in tort, and the other for the defence in contract. We must apply one system of law by which to decide both claim and defence."[210]

He held that the appropriate system of law was that with which the issues had the closest connection, namely Dutch law, so that the exclusion clause was effective.

2.93 The rule in Phillips v. Eyre was not mentioned in Sayers, and we do not think that it is "obvious that we cannot apply two systems of law, one for the claim in tort, and the other for the defence in contract". Nevertheless, Sayers does seem to indicate that a contractual term which would be void in a contract whose proper law was English but which is valid according to its proper law may be effective as a defence to an action on a foreign tort.[211]

2.94 The only relevant reported case in Scotland, Brodin v. A/R Seljan,[212] deals with the relatively simple issue whether, when a delict has been committed in Scotland, the defender may rely upon a contractual defence alleged to be available to him under the foreign proper law of a contract between himself and the pursuer,[213] but which would not

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209 [1971] 1 W.L.R. 1176, 1181.

210 Ibid.

211 Subject to the Unfair Contract Terms Act 1977, s.27(2), the effect of which is that the parties to a contract may not necessarily succeed in avoiding the provisions of the Act by the device of applying foreign law to their contract.

212 1973 S.L.T. 198.

213 A foreign contract can provide a defence to an action based upon a tort committed in England: Galaxias Steamship Co. Ltd. v. Panagos Christofis (1948) 81 Ll. L.R. 499; Kahler v. Midland Bank Ltd. [1950] A.C. 24; Zivnostenska Banka v. Frankman [1950] A.C. 57. See also Scott v. American Airlines Inc. [1944] 3 D.L.R. 27.

have been available to the defender had the proper law of the contract been Scots law. This question has not been decided in England and Wales.

2.95 The original pursuer, a seaman, had been injured in an accident on board a ship while it was docking in a Scottish port, and alleged that the accident had been occasioned by the negligence of the defenders. He claimed damages in reparation for the injuries he sustained. The pursuer died after the case was first heard on the procedure roll, and his widow and executrix was sisted as pursuer in his place. The defenders averred that the deceased had entered into a contract of service with the defender of which the proper law was the law of Norway, that he had agreed that service on board the vessel should be governed by the rights and duties provided for by the law of Norway, and that under Norwegian law the deceased was entitled only to certain limited payments under national insurance legislation. The pursuer's reply was that the accident took place in Scotland and that section 1(3) of the Law Reform (Personal Injuries) Act 1948 applied.[214] This rendered void any provision in a contract of service in so far as it would have the effect of excluding or limiting any liability of the employer in respect of personal injuries caused, to the person employed, by the negligence of persons in common employment with him.

2.96 Lord Kissen sustained the pursuer's claim on the ground that the alleged delict had been committed in Scotland and that there was nothing in section 1(3) to suggest that it was intended to apply only to delicts in Scotland arising out of contractual relations under a contract governed by Scots (or English) law. The contract, therefore, so far as it had the effect of excluding liability under section 1(3), was unenforceable.

2.97 The present state of the authorities is such that no view of the relationship between a contractual defence and the general rule in Phillips v. Eyre or McElroy v. McAllister can be confidently advanced as that

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214 This is the same provision as was in issue in Sayers v. International Drilling Co. N.V. [1971] 1 W.L.R. 1176: see paras. 2.89 - 2.93 above.

which a court in the United Kingdom will adopt.[215] The intricacy of the issues inherent in this relationship is not in doubt.[216] In principle, however, it would seem -

(a) that the validity and interpretation of a contractual term should be a matter for the proper law of the contract; but that

(b) under the rule in Phillips v. Eyre or McElroy v. McAllister the contractual defence (as so construed) should, if valid, then be tested according to both the lex fori and the lex loci delicti; and that the claimant's action would fail if the contractual term would be an effective defence under either the lex fori or the lex loci delicti.

2.98 Thus, for the purposes of the first limb of the rule in Phillips v. Eyre or McElroy v. McAllister, the validity and construction of the contractual term would be decided by the proper law of the contract, selected according to the principles of private international law of the lex fori (that is, English, Scottish, or Northern Ireland principles); and the effect as a defence of the term so construed would then be decided by the lex fori. If, for example, it was a rule of the lex fori that liability for the tort or delict in question could not be excluded by contract, then a contractual term which purported to do so would be of no effect notwithstanding that it was valid according to the proper law of the contract.

2.99 No consideration was given in Sayers v. International Drilling Co. N.V.[217] to the effect of the contractual term under the lex loci

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215 The question was discussed but not analysed in detail in Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136. Since the contract in that case would not in any event have excluded liability there was no need to do so. See Morse, (1984) 33 I.C.L.Q. 449, 459.

216 For more detailed discussion, see Dicey and Morris, pp. 962-964; Kahn-Freund, pp. 141-145; Morse, pp. 187-194; Collins, "Interaction between contract and tort in the conflict of laws", (1967) 16 I.C.L.Q. 103; North, "Contract as a tort defence in the conflict of laws", (1977) 26 I.C.L.Q. 914, 920-927.

217 [1971] 1 W.L.R. 1176.

delicti. It would, however, appear inevitable that under the second limb of the rule in Phillips v. Eyre or McElroy v. McAllister this question would have to be examined in order to discover whether civil liability existed between claimant and wrongdoer under the lex loci delicti. What is not at all clear, however, is whether for this purpose a court in the United Kingdom would determine the validity and construction of the contractual term by its proper law, selected according to its own principles of private international law (and then test the contractual term so construed against the provisions of the lex loci delicti), or whether the court in the United Kingdom would instead determine the validity and construction of the contractual term according to the system of law selected by the principles of private international law in force under the lex loci delicti.[218]

2.100 An illustration may make this clear. Consider a tort or delict committed in Ruritania. The claimant brings an action against the wrongdoer in England. The wrongdoer's only defence is that by virtue of a contractual term he is exempted from liability. According to English principles of private international law, the proper law of the contract is Mercian. By Mercian law the contractual term is void. The wrongdoer therefore has no defence under the first limb of the rule in Phillips v. Eyre. However, the second limb of the rule in Phillips v. Eyre requires civil liability to exist under the law of Ruritania. Under Ruritanian rules of private international law the proper law of the contract is not Mercian law, but the law of Wessex, according to which the contractual term is valid. The contractual term would therefore constitute a good defence to

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218 This issue was not explored in Canadian Pacific Railway Co. v. Parent [1917] A.C. 195 (P.C.). In that case a widow brought an action in Quebec, seeking damages in respect of her late husband's death, which had occurred in Ontario following an accident there caused by the negligence of the railway company's employees. It was held that, owing to contractual conditions binding upon him, the deceased would have been precluded from bringing an action against the railway company himself. Under the law of Ontario this meant that the widow could not have maintained an action there either. The widow's action in Quebec therefore failed under the second limb of the rule in Phillips v. Eyre, even though the law of Quebec did not contain a similar restriction.

an action in Ruritania. Thus the result of the action in England will depend upon whether, for the purposes of the second limb of the rule in Phillips v. Eyre, the English court will determine the validity of the contractual term according to the law of Mercia or the law of Wessex.

2.101 It would seem, although there is no authority, that an analysis corresponding to that of the inter-relationship of tort or delict and contract (as outlined above) is also appropriate to the assignment or assignation of delictual claims. Thus it would be for the law governing the tort or delict to say whether or not the claim could be assigned: this question would therefore be submitted to the rule in Phillips v. Eyre or McElroy v. McAllister.[219] The law governing the assignment or assignation would however determine the validity and construction of the particular transaction.[220]

13. Third party rights against insurers

2.102 Our internal law on this subject is contained principally in the Third Parties (Rights Against Insurers) Act 1930 and the Third Parties (Rights Against Insurers) Act (Northern Ireland) 1930, which apply, in particular, when the insured goes bankrupt or, being a company, is wound up.[221] This legislation is silent on questions of private international law.

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219 Cf. Dicey and Morris, pp. 956-957, where it is suggested that the claim need be assignable only under the lex loci delicti.

220 Morse, pp. 147-148.

221 In the case of motor insurance, further relevant legislation is the Road Traffic Act 1972, ss. 149, 150 and the Road Traffic (Northern Ireland) Order 1981, articles 98, 100. In addition, the injured party may in certain circumstances be able to recover from the Motor Insurers' Bureau ("M.I.B."). Such recovery is not based upon statute but rather upon agreements between the appropriate Secretary of State and the M.I.B. The relevant agreements are: "Compensation of Victims of Untraced Drivers", agreements dated 22 November 1972 and 7 December 1977 (which apply to claims "arising out of the use of a motor vehicle on a road in Great Britain"); "Compensation of Victims of Uninsured Drivers", agreement dated 22 November 1972.

2.103 The question which arises in this context is whether or not a direct action against an insurer is governed by the rule in Phillips v. Eyre or McElroy v. McAllister: in other words, whether or not the appropriate choice of law rule is that in tort and delict. There appears to be no authority on the point in this country, and it is therefore not possible to say with certainty how a court in the United Kingdom would characterise the issue of whether the claimant could sue the insurer directly, but it seems that under the 1930 Acts the third party is subrogated to the rights of the insured, and that his right of direct action should therefore be regarded as contractual in nature.[222]

2.104 Relevant cases arising out of motor accidents have, however, arisen in Australia.[223] Two of these cases[224] treat the issue as one in tort, and therefore as subject to the general rule in Phillips v. Eyre. In the other cases, the rule in Phillips v. Eyre was not applied, and in so far as the courts offered observations on the proper classification of the action, it was described as quasi-contractual or as a right sui generis conferred by statute and acting as an extension of contractual obligations. In Plozza v. South Australian Insurance Co. Ltd.[225] and in Stewart v. Honey[226] the right of direct action which the court was

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222 See Macgillivray and Parkington on Insurance Law (7th ed., 1981), para. 1093.

223 Plozza v. South Australian Insurance Co. Ltd. [1963] S.A.S.R. 122; Li Lian Tan v. Durham and General Accident Fire and Life Assurance Corporation Ltd. [1966] S.A.S.R 143; Hall v. National & General Insurance Co. Ltd. [1967] V.R. 355; Stewart v. Honey (1972) 2 S.A.S.R. 585; Hodge v. Club Motor Insurance Agency Pty. Ltd. (1974) 7 S.A.S.R. 86; Ryder v. Hartford Insurance Co. [1977] V.R. 257.

224 Li Lian Tan v. Durham and General Accident Fire and Life Assurance Corporation Ltd. [1966] S.A.S.R. 143; Ryder v. Hartford Insurance Co. [1977] V.R. 257. In the latter case the tort had occurred in the country of the forum.

225 [1963] S.A.S.R. 122.

226 (1972) 2 S.A.S.R. 585.

prepared to apply happened also to be that provided for under the lex fori, which was held to extend to accidents which occurred outside the territory of the forum. However, it appears from those cases and also from Hall v. National and General Insurance Co. Ltd.[227] and Hodge v. Club Motor Insurance Agency Pty. Ltd.[228] that the appropriate right of direct action is not that of the lex fori as such, but that provided for by the legislation under which the relevant contract of insurance was issued. This legislation might be domestic or foreign. It should, of course, be borne in mind that the Australian decisions were reached in the context of a federal system and also on the basis of the particular legislation there under consideration.

2.105 Two Australian cases which treat the issue as governed by the law of the contract of insurance also indicate that preconditions of the insurer's liability provided for by that law must be complied with.[229] One such precondition may give rise to a further problem. It is likely that the law governing the direct action will provide that the liability of the insurer to the claimant shall in some way be contingent upon the prior establishment of liability of the insured to the claimant. What this means in any particular case will depend upon the law under consideration. However, where that law is foreign, and for the purposes of that foreign law it is necessary to use a choice of law rule in tort or delict to select a third law by which to determine the liability of the

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227 [1967] V.R. 355.

228 (1974) 7 S.A.S.R. 86.

229 Plozza v. South Australian Insurance Co. Ltd. [1963] S.A.S.R. 122, 128-129; Hall v. National & General Insurance Co. Ltd. [1967] V.R. 355, 364. Any relevant precondition must presumably be substantive and not merely procedural, for if it is regarded as procedural only it will be ignored here: General Steam Navigation Co. v. Guillou (1843) 11 M. & W. 877, 152 E.R. 1061. See Cheshire and North, pp. 702-703; Dicey and Morris, p. 1192.

insured to the claimant,[230] the question arises whether the choice of law rule which a court in the United Kingdom would use will be the rule in Phillips v. Eyre or McElroy v. McAllister, or the rule which would be used by a court in the country of the direct action legislation in question. There is no authority on this point.[231] It would seem, however, that the question whether or not the insured would be liable in tort or delict in an action in the United Kingdom is in principle an issue separate from the question whether or not the insurer is liable to the third party in an action in the United Kingdom.

Torts and delicts at sea

A. TORTS AND DELICTS COMMITTED ON THE CONTINENTAL SHELF

2.106 By virtue of section 3(2) of the Continental Shelf Act 1964 (as extended by section 8 of the Mineral Workings (Offshore Installations) Act 1971)[232] and the Orders in Council made thereunder,[233] questions arising out of acts or omissions taking place in certain offshore areas in connection with the exploration of the sea bed or subsoil or the exploitation of their natural resources are to be determined according to "the law in force" in such part of the United Kingdom as is specified in the Orders. It is thought that one effect of these provisions is that an act or omission which takes place in a designated offshore area is to be treated for choice of law purposes as if it had occurred in the

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230 This may not be necessary under the legislation in question. It was, for example, stated in Plozza v. South Australian Insurance Co. Ltd. [1963] S.A.S.R. 122, 127-128 (where the legislation applied was that of the country of the forum) that the insured had to be liable to the claimant according to the law of the place where the tort occurred but that it was not necessary that he should also be liable according to the lex fori, and the rule in Phillips v. Eyre was not invoked.

231 It is assumed in Dicey and Morris, pp. 960-961, that the choice of law rule of the forum would apply.

232 These provisions will be repealed, and replaced by s.23 of the Oil and Gas (Enterprise) Act 1982, when the relevant provisions of that Act are brought into force.

233 S.I. 1980 Nos. 184 and 559; S.I. 1982 No. 1523.

specified part of the United Kingdom, so that (for example) the English choice of law rule in tort would apply in an action in an English court arising out of an act or omission which had occurred in the Scottish or Northern Ireland offshore area.[234]

B. OTHER TORTS AND DELICTS COMMITTED ON THE HIGH SEAS[235]

1. Torts and delicts not confined to one ship[236]

2.107 A collision is, perhaps, the most obvious example of a tort or delict on the high seas which is not confined to one ship. Cases arising out of collisions on the high seas are in England decided according to "the general maritime law as administered in [England]",[237] which means, in

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234 Daintith and Willoughby (eds.), A Manual of United Kingdom Oil and Gas Law (1977), pp. 33, 56-57, 397-398.

235 The expression "high seas" is here used to mean that part of the sea which is not subject to the sovereignty of any state. This meaning is more confined than that sometimes attached to the expression, particularly in connection with the jurisdiction of the Admiralty Court, which extended to the territorial sea as well. See Halsbury's Laws of England, Vol. 1 (4th ed., 1973), paras. 301 ff.; and The Tolten [1946] P. 135, 156 ff.

236 It is for convenience that we refer only to ships. The same principles would apply to any other seagoing structure, such as an oil rig.

237 The Leon (1881) 6 P.D. 148, 151 per Sir Robert Phillimore. See The Zollverein (1856) Swab. 96, 166 E.R. 1038; The Chartered Mercantile Bank of India, London, and China v. The Netherlands India Steam Navigation Co., Ltd. (1883) 10 Q.B.D. 521; Cheshire and North, pp. 291-292; Dicey and Morris, p. 974; Marsden, The Law of Collisions at Sea (British Shipping Laws, Vol. 4, 11th ed., 1961), paras. 249-250, and 261 et seq; Winter, "Maritime Torts: The Choice-of-Law Principles", (1954) 3 I.C.L.Q. 115, 121-125. Regulations for preventing collisions have now been adopted by international agreement: Convention on the Revision of International Regulations for Preventing Collisions at Sea (1972) Cmnd. 5471. Effect has been given to these regulations in the United Kingdom by the Collision Regulations and Distress Signals Order 1977, S.I. 1977 No. 982 (as amended). These extend in certain circumstances to seaplanes and have been similarly applied in modified form to hovercraft (Hovercraft (Application of Enactments)(Amendment) Order 1977, S.I. 1977 No. 1257).

reality, the rules evolved by English courts for the determination of maritime questions,[238] and which was described by Willes J. in Lloyd v. Guibert[239] as "being in truth nothing more than English law".[240] The application of English law by the English courts in disputes concerning collisions is well settled, and it would further appear that the English courts apply English law to all torts on the high seas, whether or not the case is heard by a court exercising Admiralty jurisdiction and whether or not the principles of maritime law are invoked:[241] the exact scope of these principles does not appear to be entirely clear. The English law to be applied includes statutes which can as a matter of construction extend to the high seas, but not those which cannot be so construed.[242] It is not clear whether a distinction would be made between, on the one hand, a tort or delict which could only be said to have taken place on the high seas (such as a collision), and, on the other hand, a tort or delict which (while not confined to one ship) could be described as having taken place on board one of the ships rather than upon the high seas - for example, a defamatory statement communicated from one ship to another.

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238 See The Gaetano and Maria (1882) 7 P.D. 137, 143 per Brett L.J.; The Tojo Maru [1972] A.C. 242, 290-291 per Lord Diplock.

239 (1865) L.R. 1 Q.B. 115.

240 Ibid., 123.

241 E.g. The Sub-Marine Telegraph Co. v. Dickson (1864) 15 C.B. (N.S.) 759, 143 E.R. 983 (negligently allowing anchor to foul cable lying on sea-bed); The Tubantia [1924] P. 78 (trespass and wrongful interference with salvage services). See Cheshire and North, p. 292; Dicey and Morris, pp. 972-973; Winter, "Maritime Torts: The Choice-of-Law Principles", (1954) 3 I.C.L.Q. 115, 121.

242 For example, in both Davidsson v. Hill [1901] 2 K.B. 606 and The Esso Malaysia [1975] Q.B. 198 the provisions of the Fatal Accidents Acts were held to apply to an action by a foreigner arising out of events which had occurred on the high seas. The editors of Dicey and Morris suggest (at p. 975, n. 77) that the Maritime Conventions Act 1911 would also apply as part of the general maritime law. By contrast, it was held in Cope v. Doherty (1858) 2 De G. & J. 614, 44 E.R. 1127 and in The Wild Ranger (1862) Lush. 553, 167 E.R. 249 that the limitation of liability provided for by the Merchant Shipping Act 1854, s. 504, did not extend to foreign ships on the high seas: see above, para. 2.58.

2.108 Despite the contrary decision in Kendrick v. Burnett,[243] the law of Scotland on these questions is believed to be to the same general effect. In other words, such cases fall to be regulated, according to the laws and customs of the sea, by the maritime law of Scotland. This has been held to be identical to that of England.[244] The history of the matter is discussed in Sheaf Steamship Co. Ltd. v. Compania Transmediterranea.[245]

2.109 Although it would be possible to maintain that the rule in Phillips v. Eyre or McElroy v. McAllister applies to torts and delicts on the high seas, and that the lex loci delicti for the purposes of the second limb of the rule is the maritime law,[246] the preferable view must surely be that the rule does not apply at all.[247] If this is so there is no question of the possible operation of the Boys v. Chaplin exception.

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243 (1875) 25 R. 82. See also the explanations of Lord President Dunedin in Convery v. Lanarkshire Tramways Co. (1905) 8 F. 117.

244 Currie v. McKnight's Executors (1896) 24 R. 1.

245 1930 S.C. 660.

246 See Graveson, Conflict of Laws (7th ed., 1974), p. 585. The judgment of Phillimore J. in Davidsson v. Hill [1901] 2 K.B. 606, 616 appears to assume that the double-barrelled general rule does apply, at least in relation to an action for damages for personal injury sustained as a result of a collision on the high seas, or an action under the Fatal Accidents Acts consequent upon such a collision. The same appears from Gronlund v. Hansen (1969) 4 D.L.R. (3d) 435, 443. In the latter case reliance was placed upon Canadian National Steamships Co. v. Watson [1939] 1 D.L.R. 273. Even if Gronlund v. Hansen is properly classified as a tort occurring on the high seas and not confined to one ship, since it arose (at least partly) out of a collision, Watson was a tort involving only one ship, and the two cases would therefore seem to require the application of different sets of principles.

247 Cheshire and North, p. 291; The Chartered Mercantile Bank of India, London, and China v. The Netherlands India Steam Navigation Co., Ltd. (1883) 10 Q.B.D. 521, 537, per Brett L.J.

2. Torts and delicts confined to one ship

2.110 In England, it seems likely that the general rule would apply in this situation.[248] If so, it would seem reasonable to suppose that the lex loci delicti would in all ordinary cases be the law of the ship's flag (or, if the flag does not identify a single system of law, that of the port of registry).[249] In Scotland, it is believed that as a general rule the requirement of double actionability would require to be fulfilled but there is no express authority to this effect.

C. TORTS AND DELICTS COMMITTED IN FOREIGN WATERS

1. Torts and delicts not confined to one ship

2.111 In England, the general rule in Phillips v. Eyre applies, and the law of the flag of the ship or ships is irrelevant; for the purposes of the second limb of the rule the lex loci delicti is that of the littoral state.[250] The most obvious example of such a tort is a collision, either between two ships or between a ship and a fixed structure. Similarly, it is believed that in Scotland the rule of double actionability would apply, the lex loci delicti being the law of the littoral state.

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248 Canadian National Steamships Co. v. Watson [1939] 1 D.L.R. 273; Cheshire and North, p. 290; Dicey and Morris, p. 972; cf. Winter, "Maritime Torts: The Choice-of-Law Principles", (1954) 3 I.C.L.Q. 115. An example of such a tort is provided by The Jalakrishna [1983] 2 Lloyd's Rep. 628, where, however, choice of the applicable law was not in issue.

249 Cf. Gronlund v. Hansen (1969) 4 D.L.R. (3d) 435, 443, where the lex loci delicti was held to be "the general maritime law of all civilized nations as it is administered in Canada". This does not appear to be consistent with the classification of this case as involving a tort confined to one ship, but (pace Dicey and Morris, p. 972, n. 56) it may be that it should not be so classified. See above, n. 246. Section 265 of the Merchant Shipping Act 1894, which provided a choice of law rule for certain purposes, and which was relied upon in Canadian National Steamships Co. v. Watson [1939] 1 D.L.R. 273, was repealed by the Merchant Shipping Act 1970, s.100 and Schedule 5, and was not replaced.

250 The Halley (1868) L.R. 2 P.C. 193 (P.C.); The M. Moxham (1876) 1 P.D. 107 (C.A.); Carr v. Fracis Times & Co. [1902] A.C. 176; The Arum [1921] P. 12; The Waziristan [1953] 1 W.L.R. 1446.

2. Torts and delicts confined to one ship

2.112 It would seem that the general rule in Phillips v. Eyre would apply in this situation also, although there appears to be no English authority.[251] Whether an English court would consider the lex loci delicti to be the law of the ship's flag or the law of the state in whose waters the ship was situated when the tort occurred remains undecided. The latter, however unattractive, would appear to be more consistent with the general rule,[252] and the question was decided in this sense in Scotland in the case of MacKinnon v. Iberia Shipping Co. Ltd.,[253] which is examined in paragraph 2.45 above.

Torts and delicts in flight[254]

2.113 There appears to be no relevant authority. The questions which arise in this context are similar to those which arise in connection with ships, although the legal treatment accorded to aircraft is not entirely analogous to that accorded to ships.[255] In particular, it appears that the concept of the "law of the flag" has not been developed to the same extent in relation to aircraft as it has in relation to ships. In consequence it may therefore be that in the case of a tort or delict confined to one aircraft over the high seas, the applicable law will be the lex fori and that the law of the state of registration of the aircraft

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251 The point was not raised in Sayers v. International Drilling Co. N.V. [1971] 1 W.L.R. 1176 (C.A.): see above, paras. 2.89 - 2.93. This case concerned an accident on an oil-rig.

252 See Yorke v. British & Continental Steamship Co. Ltd. (1945) 78 Ll. L.R. 181, 184, per du Parcq L.J.

253 1955 S.C. 20.

254 See generally, Graveson, Conflict of Laws (7th ed., 1974), pp. 585-589; McNair, The Law of the Air (3rd ed., 1964), pp. 281-295; Shawcross and Beaumont, Air Law, Vol. 1 (4th ed. re-issue, 1984), paras. I(93)-(98).

255 McNair, The Law of the Air (3rd ed., 1964), pp. 260 ff.

would be irrelevant.[256] In all other cases a rule corresponding to that applying to ships may exist, the lex loci delicti, where relevant, being that of the subjacent territory.[257]

2.114 Some of the issues which may arise in this field involve also a contract of carriage and are the subject of uniform rules arrived at by international agreement,[258] which means that, in a case to which the rules apply, the choice of law rule in tort and delict will not in practice be invoked, and probably cannot in any event apply.[259]

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256 Ibid., 288; but with one exception the shipping cases cited in support of this proposition do not concern torts which were confined to one ship.

257 Ibid., 282; and for collisions see pp. 288-295. Cf. Shawcross and Beaumont, Air Law, Vol. 1 (4th ed. re-issue, 1984), para. I(97).

258 The Carriage by Air Act 1961, s.1 and Schedule 1, gives effect to the Warsaw Convention as amended at The Hague (1955). That Convention has subsequently been further amended, and Schedule 1 to the Carriage by Air Act 1961 will in consequence be replaced by Schedule 1 to the Carriage by Air and Road Act 1979 when s.1 of that Act is brought into force. The Carriage by Air (Supplementary Provisions) Act 1962 gives effect to the Guadalajara Convention (1961). These conventions apply only to certain "international carriage", but have been extended in modified form to almost all other carriage by air: Carriage by Air Acts (Application of Provisions) Order 1967 (S.I. 1967 No. 480) as amended. It has been suggested that this Order will always be applied in an action in the United Kingdom notwithstanding the existence of a foreign element: Shawcross and Beaumont, Air Law, Vol. 1 (4th ed. re-issue, 1984), para. VII (73)-(74).

259 Shawcross and Beaumont, Air Law, Vol. 1 (4th ed. re-issue, 1984), para. VII (71); McGilchrist, "Does the Warsaw Convention govern non-contractual liability?" [1983] L.M.C.L.Q. 685. See, for example, Goldman v. Thai Airways International Ltd. [1983] 1 W.L.R 1186 (plaintiff injured on board a Thai aircraft 80 miles north-west of Istanbul).

PART III

THE CASE FOR REFORM

A. THE PRESENT LAW IS ANOMALOUS

3.1 The present law gives a very prominent role to the lex fori through the double actionability rules in Phillips v. Eyre[260] and in McElroy v. McAllister.[261] The prominence of the role of the lex fori, in so far as it has received express justification, appears to be based on the idea that as a matter of principle an action in the United Kingdom on a foreign tort or delict should fail if it is not in accordance with the domestic law of the forum. This idea was expressed by Lord Justice-Clerk Thomson in McElroy v. McAllister as follows -

> "so far as actionability is concerned, it would be too much to expect the Court of the forum to entertain an action for what is not a wrong by the law of the forum. The Court of the forum must in fundamentals be true to its own law";[262]

and in the same case Lord President Cooper said that -

> "if a pursuer chooses to sue not in the primary Court [i.e. in the country where the delict was committed] but in some other Court of his own selection, he has only himself to thank if he finds himself encumbered by difficulties which ... prove insuperable."[263]

3.2 Similarly, in The Halley Selwyn L.J. said -

> "it is ... alike contrary to principle and to authority to hold, that an English Court of Justice will enforce a Foreign Municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed."[264]

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260 (1870) L.R. 6 Q.B. 1.

261 1949 S.C. 110.

262 Ibid., 117.

263 Ibid., 139.

264 (1868) L.R. 2 P.C. 193, 204.

3.3 It may be doubted whether the Privy Council in The Halley really "... intended to lay down a general rule to the effect that no action for a tort could succeed in England unless it was well founded according to English domestic law".[265] Nevertheless, a role of such prominence for the lex fori may have been understandable in view of the earlier history of actions on foreign torts and delicts,[266] and given also that the law of tort and delict was formerly seen much more than it is today as having a punitive, deterrent or "admonitory" function, and thus as closely allied to the criminal law (where there is, of course, no question of applying a foreign law in a prosecution in the United Kingdom).[267] However, the law of tort and delict is no longer seen in the same light. It is today seen much more as compensatory, or as concerned with restoring an equilibrium of private rights:

> "...under modern conditions, the law of tort, like the law of contract, serves the purpose of adjusting economic and other interests, ... it is increasingly an instrument of distributive rather than of retributive justice, and ... for this reason the argument in favour of the lex fori derived from the connection between the law of tort and the law of crime carries little conviction today."[268]

In our view the prominence of the lex fori therefore now requires to be re-examined.

3.4 The application of the lex fori as a matter of principle to foreign torts and delicts, and its prominence under our present law, are the subjects of widespread academic criticism;[269] and, although the role

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265 Dicey and Morris, p. 937.

266 See above, paras. 2.8 - 2.9, 2.38.

267 The reasons for the role played by the lex fori are surveyed by Kahn-Freund at pp. 20 ff.

268 Dicey and Morris, p. 931.

269 For example: Anton, p. 239; Castel, Canadian Conflict of Laws, Vol. 2 (1977), pp. 615-616; Cheshire and North, pp. 266-268; Dicey and Morris, pp. 931, 937-938; Graveson, Conflict of Laws (7th ed., 1974), p. 570; Hancock, Torts in the Conflict of Laws (1942), pp. 86-89 and (1968) 46 Can. Bar Rev. 226; Kahn-Freund, pp. 34-35; Morse, pp. 50-55 and passim; Sykes and Pryles, Australian Private International Law (1979), p. 332.

of the lex fori in the present English rule was confirmed in Boys v. Chaplin, Lord Wilberforce there said of the first limb of the rule in Phillips v. Eyre that -

> "[i]t may be admitted that it bears a parochial appearance: that it rests on no secure doctrinal principle: that outside the world of the English-speaking common law it is hardly to be found."[270]

In almost every other area of the civil law[271] a court in the United Kingdom is prepared to apply a foreign law in an appropriate case (unless, of course, it would be contrary to public policy to do so); and everywhere else in our private international law, except in matters of procedure, if our choice of law rule selects a foreign law to determine a question, that foreign law applies exclusively and not concurrently with the lex fori.

3.5 One argument in favour of a heavy emphasis on the lex fori is that an English, Scottish or Northern Ireland court is thereby able to "give judgment according to its own ideas of justice".[272] We do not believe this argument to be as strong as might at first appear. In the first place, we do not see why this argument should prevail in the field of tort and delict but not in other fields. In the second place, and more importantly, we believe that such an assertion begs the question. A distinction must in our view be drawn between justice at the substantive level and justice at the choice of law level.[273] In other words, while we must assume that our domestic law represents our own ideas of justice

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270 [1971] A.C. 356, 387. We understand that countries in which a rule analogous to Phillips v. Eyre or McElroy v. McAllister applies, or has applied, include Egypt, Hungary, Japan, Syria, Thailand and the Soviet Union. The Hungarian provisions are set out in the Appendix to this paper.

271 The field of divorce provides an exception.

272 Boys v. Chaplin [1971] A.C. 356, 400, per Lord Pearson.

273 See Kegel, "The crisis of conflict of laws", [1964] II Hague Rec. 91, 185; Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98; and also Jaffey, "The foundations of rules for the choice of law", (1982) 2 Ox. J.L.S. 368.

between the parties in a case involving no foreign element, the introduction of a foreign element changes the picture; and as is recognised in other areas of our private international law, it may be that the foreign elements in a case make it entirely just to apply a foreign law to determine a dispute, even though the substantive provisions of that foreign law might be very different from those of the lex fori. As Jaffey has put it -

> "Justice at the substantive level is to be found in domestic tort rules, but if one or more of the parties is foreign, and relevant events occurred abroad, justice between the parties at the choice of law level may require that the substantive standards of justice of another country's law should be applied by the English court."[274]

Although opinions may differ about the particular foreign elements which should be taken into account and the weight to be attached to them, it is difficult to justify being "... so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home".[275]

3.6 Both the rule in Phillips v. Eyre and that in McElroy v. McAllister require a reference to the lex loci delicti, and it is therefore clear that neither in England and Wales nor in Scotland has it been accepted that "our own ideas of justice" require the unadulterated application of the lex fori. Apart from matters of procedure, and subject to overriding public policy considerations, we do not believe that there is today any reason of principle why the lex fori should be applied automatically and in every case, without regard to the circumstances. Although it might, of course, be right in a particular case to apply the lex fori, its automatic role in our present law seems to us to be rigid and unnecessary, especially since the forum may well have no relevant connection at all with the dispute, being dictated only by the presence there of the wrongdoer or of his assets.[276]

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274 Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98, 102.

275 Loucks v. Standard Oil Co. of New York 120 N.E. 198 (1918), per Cardozo J. at p. 201.

276 Cf. the view of Lord President Cooper quoted in para. 3.1 above.

3.7 Apart from the argument based on justice which we have just considered and which Lord Pearson used in Boys v. Chaplin,[277] judicial support for the present law appears to be based more on the difficulty of finding an acceptable alternative rule[278] than upon a principled defence of the first limb of the general rule.

B. THE PRESENT LAW LEADS TO INJUSTICE

3.8 The injustice of the present law stems mainly from its requirement of double actionability. This requirement follows from the fact that the interests of justice clearly require that in our present rule the role given to the lex fori should be confined. For example, where the wrongdoer's conduct and its reaction upon the claimant would give rise to no cause of action at all in the place where the train of events occurred, it would be wrong to permit the wrongdoer to be subjected to liability under our own domestic law for no reason other than that the claimant chose to bring his action in the United Kingdom. Thus in Scotland, an action arising out of a foreign delict is based upon the lex loci delicti, whose application is tempered by the superimposition of the lex fori.[279] In England and Wales and in Northern Ireland the position is the converse: the lex loci delicti tempers the application of the lex fori.[280] The results of these two rules are in practice usually the same. As is widely conceded, however, the result of these (or indeed any similar) double actionability rules is another injustice: they are considerably to the advantage of the wrongdoer. The claimant cannot succeed in any claim unless both the lex fori and the lex loci delicti make provision for it; but the wrongdoer can take advantage of any defence available under the lex fori, and also of any substantive defence that is available under the lex loci delicti. An example of such injustice is provided by the Scots case of McElroy v. McAllister itself, which was described by Lord Keith in his

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277 [1971] A.C. 356, 400.

278 See below, para. 3.17.

279 See paras. 2.38 - 2.40 above.

280 See paras. 2.8 ff. above.

judgment as "a typical case where insistence on the double rule enunciated by Willes, J., may work injustice".[281] In Boys v. Chaplin Lord Pearson said of the general rule as it is now understood that it -

> "... involves a duplication of causes of action and is likely to place an unfair burden on the plaintiff in some cases. He has the worst of both laws."[282]

3.9 As Lord Pearson further pointed out in Boys v. Chaplin,[283] the existence of a double actionability rule makes it hard to see that a court in this country is at present able to "give judgment according to its own ideas of justice".[284] Under such a rule the claimant can never succeed to a greater extent than is provided for by the less generous of the two systems of law concerned; and, depending on the particular divergences between those two systems, he may not succeed even to that extent. It is therefore not necessarily the case that the result produced by a double actionability rule corresponds with the standards of justice of either of the two systems of law concerned, except where those two systems themselves give virtually identical results; and in the case where the two systems of law do give virtually identical results, there seems little point in deciding the case or the issue by reference to more than one of those systems.

3.10 It might be argued that, in England and Wales, the Boys v. Chaplin exception will eliminate any injustice caused by the general double actionability rule, since in that case the lex fori alone was applied and the provisions of the lex loci delicti avoided. However, the existence in England and Wales since Boys v. Chaplin of a potential exception to the general rule does not, in our view, remedy the flaws in the general rule itself. Further, the exception is in any event unsatisfactory, for the reasons mentioned in the next following paragraphs.

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281 1949 S.C. 110, 132. The case is discussed above at paras. 2.39 - 2.41.

282 [1971] A.C. 356, 405.

283 Ibid.

284 Ibid., 400.

C. THE PRESENT LAW IS UNCERTAIN

3.11 The uncertainty of the present law consists mainly in the doubt surrounding Boys v. Chaplin: the extent to which exceptions may be made to the general double actionability rule is not clear. By contrast, the effects of the general rule are by now fairly clear in principle. Even so, it will be apparent from paragraphs 2.53 - 2.105 above that the operation of the general rule as applied to a number of issues in tort or delict remains a matter for speculation, owing to the lack of authority. While this state of affairs is unsatisfactory, the problems which it may cause should not be over-estimated, since it would probably be fairly clear in most cases what the result of applying the general rule should logically be; although it is true that some of the areas of doubt are of considerable potential importance, such as the relationship between our choice of law rule in tort and delict and contractual exemption clauses,[285] and the rights of third parties against insurers.[286]

3.12 However, the Boys v. Chaplin exception is another matter. As far as the law of Scotland is concerned, the principal uncertainty is whether, and if so) to what extent, the courts in Scotland will adopt the Boys v. Chaplin exception. In England and Wales and in Northern Ireland, the uncertainty arises from the case itself. The exception is almost wholly undefined and the manner of its application in future cases is a matter for speculation. We have explored the doubts raised by the case in Part II;[287] they may be summarised as follows -

(a) It is not clear how far the exception goes. Clearly it can result in the application of the lex fori alone instead of the concurrent application of both the lex fori and the lex loci delicti. Whether it could in appropriate circumstances result in the application of the lex loci delicti alone, or in the application of some third law alone, is a matter of conjecture.

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285 See paras. 2.89 - 2.100 above.

286 See paras. 2.102 - 2.105 above.

287 Paras 2.21 - 2.36, 2.46.

(b) It is not clear what circumstances will justify the use of the exception. However, it does seem that the mere fact that the claimant's rights are doubly restricted under the general rule will not be sufficient to bring the exception into play. Emphasis was laid in Boys v. Chaplin itself on the fact that the parties were English and simply happened to be in Malta at the time of the accident: the parties had little connection with Malta, and the disapplication of Maltese law would not undermine the policy of the Maltese law. However, it is not possible to predict with confidence what factors might be thought relevant in a future case, or what weight would be attached to them.

3.13 In our view, the uncertainty surrounding the Boys v. Chaplin exception is unsatisfactory. Fears were expressed in Boys v. Chaplin that uncertainty would result from the adoption of the concept of the "proper law of the tort" as a choice of law rule.[288] The exception to the general rule which was created in Boys v. Chaplin appears to have resulted in a degree of uncertainty which is no less unsatisfactory. This uncertainty can only work to the detriment of the public, by complicating the task of professional advisers, by casting doubts on insurance claims and by increasing the hazards of litigation. It is hard to say whether the tendency to litigate has been increased or reduced, but it appears likely that litigation, once embarked upon, will be more prolonged and more expensive.

D. FORUM SHOPPING

3.14 A claimant is said to be "forum shopping" when he is able to bring his action in any of two or more countries, and he chooses the one where he believes the outcome will be most favourable to him. This

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288 [1971] A.C. 356, 381 per Lord Guest, 383 per Lord Donovan, 405 per Lord Pearson. We discuss the proper law of the tort in Part IV below.

practice receives much condemnation,[289] and a choice of law rule which might encourage it may come in for criticism on that account. It might therefore be said that one advantage of the present double actionability rule is that it discourages forum shopping to a greater extent than the application of a single law would, for the claimant has to surmount two hurdles rather than one hurdle only. To this extent a claimant may be discouraged from bringing an action in the United Kingdom.[290] However, even if this is true, it only reduces the number of claimants who are shopping for a forum in this country; it does not necessarily mean that forum shopping is reduced as a global activity, since the potential claimant may be encouraged by our choice of law rule to shop elsewhere for his forum.

3.15 We have no evidence of the extent to which forum shopping actually occurs,[291] and we are therefore not able to express a view about how far it is realistically necessary or desirable to go in order to discourage this practice. However, we do not believe that arguments based on forum shopping are more or less important in the context of tort and delict than in any other context; and, in any event, the choice of a forum may be influenced by a large number of factors, of which the relevant choice of law rule is only one. It is possible to curb forum shopping by means of the rules relating to jurisdiction or of the doctrine of forum non conveniens, but apart from this, and in the absence of uniform rules of substantive law, the incidence of forum shopping will be reduced if the choice of law rules of different countries are similar or the same. To the extent that a desire to discourage forum shopping should be allowed to influence our choice of law rules, this is an argument in favour of a reformed choice of law rule which bears a closer resemblance than our existing one does to the rules of foreign countries.

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289 For example, see Boys v. Chaplin [1971] A.C. 356, 378, 380 per Lord Hodson, 383 per Lord Donovan, 389 per Lord Wilberforce, 401, 406 per Lord Pearson.

290 Cf. Dicey and Morris, p. 937.

291 See Morse, pp. 57-58.

3.16 It should be mentioned in this context that the Civil Jurisdiction and Judgments Act 1982 contains provisions which are relevant to actions in tort and delict.[292] When the relevant provisions of that Act are in force it is possible that courts in the United Kingdom will be faced more often than hitherto with actions arising out of foreign torts or delicts.

E. CONCLUSION: CAN NO BETTER RULE BE FOUND?

3.17 In our view the present law cannot be justified on grounds of principle and is anomalous, uncertain, and can result in injustice. However, although it appears to have little extra-judicial support, there also appears to be some judicial acceptance of the present law on the practical ground that no better rule can be found. For example, in Boys v. Chaplin, Lord Hodson, Lord Wilberforce and Lord Pearson were opposed to applying the lex loci delicti, on the ground that the locus delicti might well be fortuitous;[293] and Lord Guest, Lord Donovan and Lord Pearson were opposed to the adoption of the "proper law of the tort" on the ground that it would give rise to greater uncertainty.[294] Such judicial acceptance of the present law is, however, not universal - for example, Lord Denning has been an advocate of the "proper law of the tort".[295]

3.18 Our provisional view is that, for the reasons above stated, the present law is defective and should be reformed, and comments are invited on this view. The remainder of this consultation paper is concerned with the question of what should replace the present law.

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292 In particular, Schedule 1, articles 5(3), 6; Schedule 4, articles 5(3), 6.

293 [1971] A.C. 356, 380, 388 and 405 respectively.

294 Ibid., 381, 383 and 405 respectively.

295 Boys v. Chaplin [1968] 2 Q.B. 1, 19-26 (C.A.); Sayers v. International Drilling Co. N.V. [1971] 1 W.L.R. 1176.

PART IV

THE OPTIONS FOR REFORM

A. INTRODUCTION

4.1 In this Part we describe in broad terms a number of basic rules or approaches which might form the foundation of a choice of law rule in tort and delict more appropriate than the one we now have. Although each option for reform has its own advantages and disadvantages, there are also certain general considerations which we have borne in mind throughout, and we therefore mention these before discussing the individual options. The options themselves fall into four groups. We discuss first two possible rules based on the application of the lex fori. We then consider three approaches which have in recent years been very influential in the United States. Thirdly we discuss options based on the application of the lex loci delicti. Finally we consider the concept of the "proper law" of the tort" together with its United States manifestation in the form of the Restatement Second. Of these options our provisional conclusion is that two are acceptable as models for the reform of our own choice of law rule. One is an option whereby the lex loci delicti would apply unless another country had a closer and more real connection with the occurrence and the parties, in which case (subject to certain conditions) the law of that other country would apply. The other option would always apply the "proper law" of the tort or delict (that is, the law of the country with which the occurrence and the parties had the closest and most real connection), but certain presumptions as to the proper law would be provided in a number of cases. These two options are summarised at paragraph 4.144 below.

4.2 In view of the defects which we believe to exist in the present law, we have formed the view that our reformed system of choice of law rules in tort and delict should, in principle, not leave the present choice of law rules continuing to apply in any area, and we have therefore kept in mind throughout that our reformed choice of law rule is intended to have as wide a field of application as possible. However, in considering the available options, we have not found it practicable in this Part to examine

all the various types of tort and delict. Although the discussion of the options in this Part is not intended to be confined strictly to the "basic" wrongs of personal injury, death, and damage to property, we have however considered each option with such torts and delicts primarily in mind. Other types of tort and delict are then considered in Part V, against the background of our conclusions from this Part.

B. GENERAL CONSIDERATIONS

1. Matters which would be unaffected by our proposals

4.3 It should be recalled throughout what follows that none of our proposals is intended to make any change in the following areas.

(a) Procedure

4.4 Some matters are classified for the purposes of private international law as "procedural", as opposed to "substantive". The distinction between procedure and substance is dealt with in the standard works on private international law.[296] The lex fori applies in any event to matters classed as procedural, while matters classed as substantive are governed by the system of law selected by our choice of law rule. We propose no change in this principle or in the classification of any particular matter. Thus (for example) the measure of damages (as opposed to the heads of damage), rules of evidence, methods of enforcement, and generally the mode of trial and the machinery of justice in the United Kingdom, all of which are procedural, would be unaffected by our proposals.

(b) Mandatory rules

4.5 Certain rules of our own domestic law, although not procedural, are regarded as so important that as a matter of construction

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296 For example, Anton, ch. 25; Cheshire and North, ch. XX; Dicey and Morris, ch. 35.

or policy they must apply in any action before a court of the forum, even where the issues are in principle governed by a foreign law selected by a choice of law rule. In tort and delict cases, owing to the universal application of the lex fori through the rules in Phillips v. Eyre and McElroy v. McAllister, it has largely been unnecessary to decide which of our rules of law are of mandatory application. Although this question may arise more frequently under a reformed choice of law rule, our proposals for reform are not intended to alter the principles involved or to affect the classification of any of our rules of law as mandatory or not.

(c) Public policy

4.6 It is always open to a court in the United Kingdom to refuse, in exceptional cases, to apply a foreign law on the ground of public policy: "an English court will refuse to apply a law which outrages its sense of justice or decency".[297] This discretion is, however, to be exercised sparingly:

> "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[298]

Our proposals would not affect any of these principles, which we intend should remain unchanged notwithstanding reform of our choice of law rules.

(d) Special choice of law rules

4.7 Except where otherwise stated, our proposals are intended to do no more than replace our existing choice of law rules in tort and delict, and are not intended to cover a wider or narrower field. Except where we

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297 In the estate of Fuld (No. 3) [1968] P. 675, 698 per Scarman J.

298 Loucks v. Standard Oil Co. of New York 120 N.E. 198, 202 (1918), per Cardozo J; cited with approval in Cheshire and North, p. 146, and Dicey and Morris, p. 83.

expressly say otherwise, our proposals would therefore apply in all the areas where our existing choice of law rule applies, but not in any area to which our existing choice of law rule does not extend. Further, our proposals are not intended to supersede or alter any special rules which may exist in particular fields, or preclude the adoption of further special rules in the future. Our proposals are therefore not intended to affect any rules adopted pursuant to any international convention.

(e) Jurisdiction

4.8 Our proposals are not intended to affect the jurisdiction of courts in the United Kingdom.

2. The expectations of the parties

4.9 The relevance of the expectations of the parties in tort or delict cases is a matter of some uncertainty. In the case of a contract, for example, it is clearly of the utmost importance that the parties should be aware in advance of the obligations they are undertaking. In the sphere of tort and delict the question does not appear to us to be so clear-cut.

4.10 As far as the expectations of a potential wrongdoer are concerned, it is argued that it is important to be able to predict, before undertaking an activity, what law would determine liability in tort or delict, if a tort or delict were to occur. As Kahn-Freund has said -

> "Those engaging in activities which may involve liability should be able to calculate the risk they are incurring. They should be able to feel safe in Rome if they do these as the Romans do",[299]

or, in other words -

> "when in Rome see that your insurance policy covers the risks against which Romans insure".[300]

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299 Kahn-Freund, p. 43.

300 Ibid., 44.

4.11 This argument seems to us to require some qualification. It is, of course, relevant in the case of potential wrongdoers who are alive to the possibility of liability in respect of their future activities, and who may wish to take advice about the extent of that liability. However, such a potential wrongdoer is likely to have most in mind the possibility of being sued in the country where his activities are being carried on. In such a case our rules of private international law are of no relevance. Where a potential wrongdoer is conscious of the potential impact upon his activities of our rules of private international law, the question is, therefore, how important it is that a court in the United Kingdom should apply the same law as would be applied in an action in the country where the activity is being carried on. Although there may be other reasons for doing this, protection of the expectations of the potential wrongdoer is not one of them, for (as Kahn-Freund has said) "...expectations depend on what the lawyers will tell their clients about the decisions of the courts...".[301] In many cases it would indeed seem to be doubtful whether the potential wrongdoer could be said to have any relevant expectations at all. In the words of the United States Restatement Second -

> "... the protection of the justified expectations of the parties ... is of lesser importance in the field of torts. This is because persons who cause injury..., particularly when the injury is unintentionally caused, usually act without giving thought to the law that may be applied to determine the legal consequences of this conduct. Such persons have few, if any, justified expectations in the area of choice of law to protect, and as to them the protection of justified expectations can play little or no part in the decision of a choice of law question."[302]

4.12 It has been argued, however, that it is necessary for insurers to be able to predict the law by which their insured might be held liable in

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301 Ibid., 153-154.

302 Restatement Second, s.145, comment b, pp. 415-416. The description of expectations as "justified" seems, however, to beg the question. See also Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881, 894-895, and The Conflict of Laws (3rd ed., 1984), p. 305; Shapira, (1977) 77 Col. L.R. 248.

respect of his activities. This is said to be necessary to enable the insurer to assess the level of risk and to calculate the premiums accordingly. Our present understanding is that this argument is misconceived: although foreseeability of risk does play a part in the calculation of premiums, we understand that its role is generally rather small, and that premiums are based more on an analysis of past liability than on an assessment of future risk.[303] Further, we understand that the level of premiums is not in practice affected by our own rules of private international law, but, rather, reflects the level of damages generally awarded in the courts of the place where the activity is being carried on. Where an action is brought in a court in the United Kingdom, the assessment of damages is of course a matter of procedure and will be governed by the lex fori, not the system of law selected by our choice of law rule; and we propose no change in this principle.[304]

4.13 The expectations of the parties are, however, relevant in a different way after the tort or delict has occurred. Here the concern of the parties is not to predict the law according to which they must regulate their conduct, but rather that the choice of law should be, and be seen to be, reasonably appropriate in the circumstances. It is necessary that our choice of law rules should not be capricious in their operation.[305]

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303 C.R. Morris, "Enterprise liability and the actuarial process - the insignificance of foresight", (1961) 70 Yale L.J. 554; Hanotiau, "The American Conflicts Revolution and European Tort Choice-of-Law Thinking", (1982) 30 Am. J. Comp. L. 73, 76-78.

304 We are grateful to the British Insurance Association for their assistance on these matters.

305 See Anton, p. 40: "... even if every judge were perfectly impartial as between persons from his own country and persons from others, it would still be a valid objection that without established rules any decision which rejected the pleas of a stranger would be liable to be construed as a biased one. Justice might well be done, but would the unsuccessful foreign litigant think so?"

3. The need for certainty in the law, and the tension between certainty and refinement

(a) The need for certainty

4.14 After a tort or delict has occurred, it is a consideration of the first importance that the law should be certain, in the sense that the rules should be clearly formulated and their results easily predictable. It is clearly desirable that the parties to a dispute should be able to ascertain their rights and liabilities as easily as possible, and preferably without resorting to litigation. Where the subject matter of the dispute is a foreign tort or delict, this consideration would therefore support a choice of law rule which, at least after the event, pointed as unambiguously as possible towards the law by which the dispute between the parties was to be decided. A clear and simple choice of law rule would make it easier for insurance companies to deal with claims; and would quite probably promote settlements, since settlement might be difficult if the parties' advisers could not predict the course of litigation, and prediction would be difficult if the applicable law could not be foretold.

4.15 There are also procedural reasons why certainty is desirable. In the first place, a party who wishes to rely upon foreign law in our courts must prove it as a fact; but, if choice of law rules whose effect was uncertain applied, the parties might have to ascertain the content of more than one system of law in order to be ready for more than one outcome of the choice of law process. The applicable law could, no doubt, be determined as a preliminary issue, but we believe that it would be preferable to avoid this where possible. Secondly, where time limits are regarded as matters of substance, an uncertain choice of law rule could be a trap for the parties and their legal advisers: it would not be possible to tell in advance which limitation period applied. Thirdly, it might not be clear until the choice of law issue was resolved who were the appropriate parties to the action.

(b) The tension between certainty and refinement

4.16 To achieve maximum certainty, a choice of law rule must be based on a clear and simple connecting factor, with as few exceptions as possible. Such rules have a high degree of rigidity, in that they cannot be adapted to suit all the varied circumstances in which tort and delict cases arise. However, the objective of any choice of law rule is ideally to select the law which in all the circumstances it would be most appropriate to apply, and cases may arise where the law selected on the basis of a simple connecting factor is that of a country which has in reality very little connection with the actual occurrence:

> "No purely mechanical rule can properly do justice to the great variety of cases where persons come together in a foreign jurisdiction for different purposes with different pre-existing relationships, from the background of different legal systems."[306]

4.17 A certain but crude choice of law rule which is not sufficiently subtle to cater adequately for the circumstances of particular cases may result in the application of what is clearly not the most appropriate law. This becomes important where the result of applying that law to the dispute differs from the result which would be obtained by applying another apparently relevant system of law, although it matters little where the results would be similar. It would be idle to suppose that a court is never influenced in its choice of law by its perception of the results which will follow from its decision. Experience both here and abroad (but particularly in the United States) has shown that a choice of law rule of great simplicity may produce results which "begin to offend our common sense",[307] and the courts may therefore seek to escape from them, for example by applying to a particular issue a different classification, and hence also a different choice of law rule.[308] Thus an

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306 Boys v. Chaplin [1971] A.C. 356, 391, per Lord Wilberforce.

307 Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881, 885, and The Conflict of Laws (3rd ed., 1984), p. 304.

308 We have discussed the classification of a number of issues at paras. 2.49 ff. above, and we return to them in Part VI below.

issue between the parties might be classified, not as an issue in tort or delict, but as an issue in family law,[309] or contract,[310] or as procedural;[311] or, ultimately, the doctrine of public policy may be invoked:[312] in all such cases, the choice of law rule in tort and delict would be avoided. The technique of classification is, of course, perfectly legitimate in principle, but it becomes particularly unsatisfactory where the new classification is artificial. Indeed, many issues in a tort or delict case have a dual nature (being connected, say, with both tort or delict and with family relations), and cannot rigidly be classified into one category or another. Further, the "classificatory approach to tort problems"[313] suffers from the fact that -

> "[i]t is conceptually so crude and indiscriminating that, while indicating a satisfactory solution for one case, it compels the court to approve an unwelcome result in another."[314]

4.18 While it is important that our reformed choice of law rule should possess a high degree of certainty, it is also important that it should be sufficiently refined to be capable of selecting an appropriate system of law in as high a proportion of cases as possible, so that the

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309 For example, as to whether one spouse could sue the other in tort, see Haumschild v. Continental Casualty Co. 95 N.W. 2d 814 (1959) (now superseded: Zelinger v. State Sand and Gravel Co. 38 Wis. 2d 98, 156 N.W. 2d 466 (1968)); Warren v. Warren [1972] Qd. R. 386 (as one of two alternative grounds).

310 For example, Levy v. Daniels' U-Drive Auto Renting Co., Inc. 143 A. 163 (1928).

311 For example, Boys v. Chaplin [1971] A.C. 356, 381-382 per Lord Guest, 383 per Lord Donovan; Grant v. McAuliffe 264 P. 2d 944 (1953); Kilberg v. Northeast Airlines Inc. 172 N.E. 2d 526 (1961), [1961] 2 Lloyd's Rep. 406.

312 For example, Kilberg v. Northeast Airlines Inc. 172 N.E. 2d 526 (1961), [1961] 2 Lloyd's Rep. 406.

313 As Morse describes it: p. 221.

314 Hancock, (1962) 29 U. Chi. L.R. 237, 253.

courts are only rarely faced with the choice of either applying an inappropriate law or using a device to escape altogether from the choice of law rule in tort and delict. Unfortunately, these two factors (certainty and refinement) tend to pull in opposite directions, in that it is the simple rule which is more certain, and the refined rule which is less so. The appropriate balance between certainty and refinement is, in our view, the major test which an acceptable choice of law rule in tort and delict must satisfy.[315]

4. The relevance of the problem of ascertaining foreign law

4.19 The problem of ascertaining foreign law should not be underestimated: it may be time-consuming, expensive, inconvenient and difficult, although the rule that foreign law must be proved as a fact in our courts is accompanied by the presumption that foreign law coincides with our own unless the contrary is shown by the party who raises the question,[316] and, in Northern Ireland, by the fact that a court there may take judicial notice of the law of England and Wales and of the Republic of Ireland.[317]

4.20 However, to use the difficulty of establishing foreign law as an argument against any choice of law rule which is likely to select a foreign law is, in our view, to go too far. All choice of law rules exist to cater for those cases which, exceptionally, contain a foreign element, and it is to be expected in such cases that it may be appropriate to refer to a foreign law. We do not see why the difficulty of establishing foreign law

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315 Cf. Jaffey, "The foundations of rules for the choice of law", (1982) 2 Ox. J.L.S. 368, 387-388.

316 See generally, Anton, pp. 565 ff.; Dicey and Morris, ch. 36. The difficulty of ascertaining the details of foreign law was adverted to by Lord Hodson and Lord Wilberforce in Boys v. Chaplin [1971] A.C. 356, 380, 387-388.

317 Judicature (Northern Ireland) Act 1978, s. 114(2).

should be of greater relevance in the field of tort and delict than it is in any other field of our private international law.

5. Agreement as to the applicable law

4.21 The difficulty of establishing foreign law is a strong practical argument against a choice of law rule which is uncertain to the extent that the applicable law could be any one of a number of foreign laws. To require the parties to inform themselves on the provisions of one foreign law may be a tolerable burden, but (save in exceptional cases) to require them to do so in respect of several foreign laws is not. However, it could be that the parties might find themselves able to agree on what system of law should govern their mutual liability in tort or delict, and we believe that such agreement (whether arrived at before or after the event) should be given effect to in the United Kingdom. We therefore propose that the parties should by means of contract be permitted to choose which law should govern an action between them in tort or delict. Although it seems probable that an agreement as to the applicable law would often result in the application of the lex fori, we propose that such an agreement should be effective whether or not it had this result.[318] Comments are invited on these proposals. Although it may be that the present law already permits these results, in which case no legislative change would be necessary, the matter does not appear to be settled; our view is, therefore, that any implementing legislation should expressly provide for it. Comments are invited on this view also.

6. Uniformity of result

4.22 Ideally, the outcome of an action in tort or delict would be the same whatever the country in which the litigation took place. This consideration favours our adopting a choice of law rule which is similar to those used in other countries; but uniformity of result can never be wholly achieved without agreement, at least as regards foreign countries,

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318 Cf. article 129(4) of the Swiss proposals, whereby the parties may after the event choose the lex fori only: see Appendix.

and in the absence of such agreement it is not possible to do more than bear this factor in mind. It is, however, possible to try to ensure uniformity of result within the United Kingdom, and we therefore believe that our reformed choice of law rule should be the same in Scotland, in Northern Ireland, and in England and Wales, and that in each jurisdiction it should continue to apply to cases where the foreign element springs from another part of the United Kingdom in the same way as it applies to cases with a wholly foreign element.

7. Renvoi[319]

4.23 Our discussion of the options for reform supposes that renvoi will, in principle, be excluded. In other words, a reference to a foreign law will be to its internal law and will not extend to its rules of private international law.[320] This is already the position under the present law.[321]

C. THE OPTIONS FOR REFORM

1. Options based on the lex fori

(a) The lex fori as the uniquely applicable law

4.24 The simplest possible choice of law rule would be one that applied the lex fori in every case. The arguments in favour of such a rule are principally as follows:

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319 See n. 55 above.

320 There is one area, namely defamation, where we canvass the possibility of referring not only to the internal law but also to the private international law of a foreign country: see paras. 5.49 - 5.51 below.

321 See para. 2.18 above.

(1) The application of the lex fori would mean that there would never have to be an investigation into what law was applicable. Once an action was commenced, a lex fori rule would therefore be as certain a rule as it would be possible to find.

(2) A lex fori rule would mean that it would not be necessary to ascertain and prove foreign law, and the court in the United Kingdom would always be applying a familiar law.

(3) A lex fori rule would mean that a court in the United Kingdom always applied a law which must be taken to represent our own domestic conceptions of substantive justice.

These arguments undeniably render a lex fori rule attractive. We nevertheless believe that such a rule would be indefensible in principle.

4.25 In the first place, as we have explained in Part III above,[322] it is not in our view necessary to apply the lex fori in a case involving a foreign element in order that a court in the United Kingdom may "give judgment according to its own ideas of justice". The exclusive application of the lex fori constitutes a refusal to attach any weight to the foreign elements in a case. While in some areas of law there may be a good policy reason for such refusal, this is not, in our view, the position today in the field of tort and delict. The English rule in Phillips v. Eyre has always attached some importance to a foreign law, namely the law of the place where the tort was committed; and that rule now gives the lex loci delicti greater weight than before, since the conduct complained of must now be actionable, rather than merely not innocent, under that law. The lex loci delicti has always had even greater weight in Scotland. It would in our view be wholly retrograde to retreat from this position to the extent of denying all relevance to any foreign law.

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322 At paras. 3.1 - 3.7.

4.26 Secondly, in some cases there might be several different countries in which a claimant could legitimately make his claim (for example, under the Civil Jurisdiction and Judgments Act 1982). In such cases the certainty which is said to be the advantage of a lex fori rule exists in reality only after an action has been commenced. Before then the rights and liabilities of the parties will depend entirely upon where the claimant chooses to make his claim, and the applicable law will be wholly uncertain until he does make it. In addition to being unsatisfactory for the defendant or defender, this is likely to discourage settlements.

4.27 Thirdly, the scope for injustice in such a rule is clear. For example, a defendant or defender could be made liable in the United Kingdom for an act which was lawful at the place where the act was done and in circumstances where the train of events had no connection at all with this country; conversely, the automatic application of the lex fori may be hard on a claimant whose only chance of recovery may for reasons beyond his control lie in suing here. It is no answer to say that a claimant who chooses to sue in the United Kingdom should be ready to accept the application of the lex fori, for although he may in theory have a choice of forum, he may in practice have no such choice if the wrongdoer or his assets are located here.

4.28 A fourth point is that although (as we have said[323]) there are difficulties in ascertaining and proving foreign law, the existence of the presumption that foreign law is the same as the lex fori, coupled with the possibility of agreeing the applicable law, in our view answers many of the arguments in favour of the lex fori.[324] Finally, a lex fori rule would discourage uniformity of result, even within the United Kingdom; and (to the extent that this is important) would undoubtedly encourage forum-

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323 Para. 4.19.

324 Kahn-Freund, p. 35.

shopping. It would also give rise to inconsistencies between actions commenced in the United Kingdom and actions commenced in other countries, judgments resulting from which would fall to be enforced here under, for example, the provisions of the Civil Jurisdiction and Judgments Act 1982.

4.29 None of the foreign systems of law which we have surveyed for the purposes of this paper adopts the lex fori as its exclusive choice of law rule.[325]

(b) The lex fori as basic rule subject to displacement

4.30 It could be argued, of an action that takes place in a particular country, that the fact that it does so means that it is probable that at least one of the parties has a connection with the country of the forum; and that this in turn makes it likely that, in practice, in an action in the United Kingdom, the most appropriate law will more often than not turn out to be the lex fori. It could be argued that in consequence the basic rule should be that the lex fori applies (since this would more often than not lead to the right choice of law), but that the lex fori should be capable of displacement in favour of some other law when the circumstances so warranted. Various different displacement rules are discussed below in another context;[326] they range from the very specific (for example, the application of the law of the common habitual residence of the parties instead of the lex fori), to the very general (for example, the application, instead of the lex fori, of the law of such country (if any) as had a closer and more real connection with the occurrence and the parties).

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325 See Appendix, but see also n. 270 above.

326 Paras. 4.97 - 4.123.

4.31 The introduction of exceptions to the automatic application of the lex fori of course reduces the main advantage of the lex fori rule, namely its simplicity; but, on the other hand, such exceptions would represent an attempt to introduce a degree of refinement into a rigid rule by referring to connecting factors which, where they applied, would be intended to result in the application of a system of law more appropriate than the lex fori, thereby recognising the relevance of foreign elements in the situation.

4.32 For two reasons we do not support a "lex fori with exceptions" rule. First, we have doubts about the practical effectiveness of rules of displacement when combined with a basic lex fori rule, unless the rules of displacement were mandatory and very specific. There would seem to be a clear tendency for courts which are faced with a choice of law question in the context of tort and delict to apply the lex fori if possible.[327] There can be little doubt that a "lex fori with exceptions" choice of law rule would encourage this tendency. Although this would in practice make the results of such a rule more predictable, there would be a corresponding loss in that less use than was intended would in practice be made of the possibility of displacing the lex fori in favour of the system of law indicated by a relevant exception. The introduction of exceptions into a lex fori rule might, therefore, not have the desired effect.

4.33 Our second and main objection to a "lex fori with exceptions" rule is more fundamental: for the reasons above stated, we believe that the lex fori is, as a matter of principle, the wrong place to start. In our view the lex fori has little, if any, prima facie claim to application; it is the lex loci delicti which has the greatest prima facie claim to application, and if a "basic rule with exceptions" approach is to be adopted, it ought in our view to start with the lex loci delicti. We discuss this approach below at paragraphs 4.55 - 4.125.

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327 See, e.g., Shapira, (1977) 77 Col. L.R. 248, 255-256.

4.34 The "lex fori with exceptions" approach has not been adopted in any of the foreign systems of law which we have surveyed for the purposes of this paper,[328] although a draft bill which would have had this result was submitted to the Israeli Ministry of Justice by Professor Amos Shapira.[329] The Israeli Parliament did not, however, proceed with the bill.[330]

2. Three rule-selecting approaches

4.35 A "rule-selecting" approach to choice of law is at the opposite end of the spectrum from a "jurisdiction-selecting" approach. Jurisdiction-selecting choice of law rules merely -

> "... select a particular country (or jurisdiction) whose law will govern the matter in question, irrespective of the content of that law. They do not select a particular rule of law. Theoretically at least, the court does not need to know what the content of the foreign law is until after it has been selected."[331]

Rule-selecting approaches, on the other hand, do not blindly select a jurisdiction whose domestic law will determine the outcome of the dispute; instead, from among the competing domestic rules which have some claim to be applied, a rule-selecting approach picks one domestic rule according to given criteria (which usually take account of the content of the domestic rules in question), and that domestic rule will decide the particular issue in dispute. Different rule-selecting approaches use

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328 See Appendix.

329 For text and comments see Shapira, (1972) 7 Israel L.R. 557. See also Shapira, (1977) 77 Col. L.R. 248.

330 Edwards, (1979) 96 South African L.J. 48, 79 n. 271.

331 Morris, The Conflict of Laws (3rd ed., 1984), p. 512.

different sets of criteria by which to pick the applicable domestic rule. We consider next three such approaches which have been particularly influential in the United States,[332] although not all the courts there have been influenced by the same one, and sometimes a court will adopt more than one approach.[333] Another United States development, the approach of the Restatement Second, is discussed below.[334]

(a) Governmental interest analysis[335]

4.36 The governmental interest analysis approach to choice of law is based on the notion that -

> "[w]hen a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies";[336]

and upon the view that a court at the forum is in any event bound to apply its own law if the country of the forum has such an interest. If the

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332 A different United States approach, which lays much stress on the lex fori, is that advocated by the late Professor Ehrenzweig. His approach is described in his Treatise on the Conflict of Laws (1962), in his Private International Law, General Part (1967), and also in a large number of articles.

333 The literature on developments in the United States is vast; but there is a general survey in Morse, ch. 9, and a briefer account is to be found in Morris, The Conflict of Laws (3rd ed., 1984), ch. 34. For an exhaustive analysis with particular reference to the law of the state of New York see also Korn, "The Choice-of-Law Revolution: A Critique", (1983) 83 Col. L.R. 772.

334 Paras. 4.136 - 4.139.

335 This method, which was largely developed by the late Professor Brainerd Currie, is explained in a series of his articles collected under the title of Selected Essays on the Conflict of Laws (1963), and in later articles, especially "The Disinterested Third State", (1963) 28 L. & Contemp. Prob. 754. A short statement is to be found in his comment on Babcock v. Jackson 12 N.Y. 2d 473, 191 N.E. 2d 279 (1963), which appears in (1963) 63 Col. L.R. 1212, 1233.

336 Currie, (1963) 63 Col. L.R. 1212, 1242.

country of the the forum had an interest, its law would therefore apply whatever the interests of other states. If it should transpire that there was only one interested state, the conflict would be a "false conflict",[337] and the law of the only interested state would apply. However, if the forum was disinterested, and more than one other state turned out to be interested, there would be a quandary, since the approach as originally propounded did not permit the weighing of competing interests; but a later variant on the theme of governmental interest analysis would apply the law of the state whose interest would be most impaired if its law were not applied. This gloss on the governmental interest analysis method is called "comparative impairment".[338]

4.37 There is no doubt that the governmental interest analysis approach has had a great deal of influence in the United States. The early case of Babcock v. Jackson[339] contains traces of it,[340] and it has been wholly or partly adopted in many subsequent decisions in a number of states. There are also references to it in the speech of Lord Wilberforce in Boys v. Chaplin. However, there are in our view serious objections to it as a basis for reform of our choice of law rules.

(i) In principle

4.38 In the first place it will be as well to clear up a terminological confusion. We believe that it is usually misleading in a tort or delict case

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337 This phrase is also used to mean a conflict between two laws which are the same or which would achieve the same result. See Morris, The Conflict of Laws (3rd ed., 1984), pp. 526-528; Morse, pp. 235-241.

338 The idea of comparative impairment is illustrated by Bernhard v. Harrah's Club 16 Cal. 3d 313, 546 P. 2d 719 (1976). There is a note on comparative impairment at (1982) 95 Harv. L.R. 1079.

339 12 N.Y. 2d 473, 191 N.E. 2d 279 (1963); reported in this country at [1963] 2 Lloyd's Rep. 286.

340 Babcock v. Jackson contains traces of other methods as well: "...the majority opinion contains items of comfort for almost every critic of the traditional system" (Currie, (1963) 63 Col. L.R. 1212, 1234).

to refer to the "interest" of a state in the application of the policy expressed in its laws, because (as has been pointed out[341]) a state as such can rarely be said to be interested in the outcome of private litigation. When a state is said to be "interested" it means, therefore, that the policy or purpose of the law of that state would be furthered if it were applied in the particular case. However, in our view this is in turn a misleading conception. Unless there is a public interest involved, a rule of domestic law merely reflects one view of the right balance between claimant and wrongdoer. Where there are several competing views as to the appropriate balance, the selection of one such view cannot be achieved simply by comparing them,[342] and does not seem appropriately described as furthering the policy or purpose of one of the laws in question, provided no public interest is involved.

4.39 The governmental interest analysis or comparative impairment approach does not purport to take into account the interests of the parties in dispute. In our view this is a serious argument against it. As long as "justice" is understood as meaning justice at the choice of law level, as we have discussed above,[343] our view is that -

> "... the duty of a court in a conflict of laws case, as in any other case, is to concern itself with doing justice as between the parties whose interests are involved. A solution in terms of governmental interests may have the incidental effect of doing justice between the parties but it is of secondary rather than of primary importance."[344]

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341 See Fawcett, "Is American governmental interest analysis the solution to English tort choice of law problems?" (1982) 31 I.C.L.Q. 150, 151; Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98, 98-101, and see also Jaffey, "The foundations of rules for the choice of law", (1982) 2 Ox. J.L.S. 368, 375-377.

342 See Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98, 99-101.

343 Para. 3.5.

344 Morse, p. 225. See also Anton, p. 41, and Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98.

4.40 Other objections in principle to this approach are that it lays too much emphasis on the lex fori,[345] and that it is suitable only for a federal system.

(ii) In practice

4.41 The governmental interest analysis or comparative impairment approach has a serious practical drawback, in that it requires the policy of the conflicting rules of law to be ascertained, and the interests of the states involved to be assessed. This is easier said than done.[346] The United States experience has, we believe, shown that the governmental interest analysis approach is one of extreme uncertainty and that it can be most unsatisfactory in practice.

4.42 In the case of many judge-made rules it would be difficult to say whether a particular rule had a policy at all, and if so, what it was.[347] Even where the rules of law in question are statutory, it may not be easy to ascertain their policy, and in many cases the courts have appeared merely to make assumptions instead of reaching conclusions based on

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345 The interest analysis approach has been described as "strikingly parochial": Juenger, "Conflict of Laws: A Critique of Interest Analysis", (1984) 32 Am. J. Comp. L. 1, 13.

346 There is a large literature on the difficulties involved, but see, for example, Reese, "Chief Judge Fuld and choice of law", (1971) 71 Col. L.R. 548, 557-560; Fawcett, "Is American governmental interest analysis the solution to English tort choice of law problems?" (1982) 31 I.C.L.Q. 150; Morris, The Conflict of Laws (3rd ed., 1984), pp. 519-520.

347 Currie himself recognised this when he said, of the retention in Arizona of the maxim actio personalis moritur cum persona, that "[i]f the truth were known, it would probably be that Arizona has retained that rule simply because of the proverbial inertia of legal institutions, and that no real policy is involved". (Currie, Selected Essays on the Conflict of Laws (1963), p. 143.)

evidence. For example, in Frummer v. Hilton Hotels International Inc.,[348] (an international rather than an inter-state case), the court had to search for "those considerations which led England to adopt" the Law Reform (Contributory Negligence) Act 1945. The court's view of those considerations, though plausible, is not supported by any authority, and neither is its assessment of "England's interest" in having the 1945 Act applied in the case before it. In Reyno v. Piper Aircraft Co.[349] a United States District Court found itself considering why the law of Scotland did not impose strict products liability, but only liability for negligence, and made the assumption that "the only purpose of the requirement of proof of negligence is to aid manufacturers in Scotland".[350] In Babcock v. Jackson[351] the court appeared to base its view of the policy of the Ontario statute in issue in that case upon a note in a law journal;[352] but in a later case[353] the same court appeared to concede that in the light of "further research" its original view might well have been wrong.[354] Indeed, "guest" statutes of the kind considered in Babcock v. Jackson (that is, statutes relieving drivers of liability for negligence to passengers in their cars) have been said to express any one or more of four policy

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348 304 N.Y.S. 2d 335 (1969).

349 479 F. Supp. 727 (1979). These were forum non conveniens proceedings reported further at 630 F. 2d 149 (1980) and 454 U.S. 235, 70 L. Ed. 2d 419 (1981).

350 479 F. Supp. 727, 736 (1979).

351 12 N.Y. 2d 473, 191 N.E. 2d 279 (1963); [1963] 2 Lloyd's Rep. 286.

352 191 N.E. 2d 279, 284 per Fuld J.

353 Neumeier v. Kuehner 31 N.Y. 2d 121, 286 N.E. 2d 454 (1972).

354 Ibid., 455, quoting Reese, "Chief Judge Fuld and choice of law", (1971) 71 Col. L.R. 548, 558.

objectives,[355] and the governmental interest analysis or comparative impairment method does not appear well equipped to cope with rules of law which have multiple purposes. Examples of the difficulty in ascertaining the policy behind a rule of law and determining the extent to which that policy would be furthered by applying it in the particular case could be multiplied almost indefinitely. "Inventive minds can discover local interests and ascribe major weight to them even when factual contacts are small and the interest itself is making its first appearance in court."[356] Yet the difficulties which have been experienced in the United States, even in cases of interstate conflicts, and which are causing some disenchantment with this approach there,[357] would be as nothing compared to the difficulties which would arise in the United Kingdom, where most conflicts cases will be international and not simply between jurisdictions with similar legal systems, and where the obstacles in the way of ascertaining policies and interests would be greater than in the United States.[358]

4.43 There is the risk, therefore, that -

> "[i]n the absence of reliable information as to the intended policy function of the legal norm in question, the [governmental interest analysis] process may readily degenerate into a speculative postulation, or even fabrication, of putative underlying policies, solely on the ground of their assumed plausibility."[359]

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355 Shapira, (1977) 77 Col. L.R. 248, 262 n.69. See also Kahn-Freund, pp. 69-70.

356 Leflar, "The Nature of Conflicts Law", (1981) 81 Col. L.R. 1080, 1087.

357 Rosenberg, "The Comeback of Choice-of-Law Rules", (1981) 81 Col. L.R. 946; Korn, "The Choice-of-Law Revolution: A Critique", (1983) 83 Col. L.R. 772; Juenger, "Conflict of Laws: A Critique of Interest Analysis", (1984) 32 Am. J. Comp. L. 1.

358 Fawcett, "Is American governmental interest analysis the solution to English tort choice of law problems?" (1982) 31 I.C.L.Q. 150, 155-165; and see Kahn-Freund, pp. 60-61.

359 Shapira, (1977) 77 Col. L.R. 248, 262.

Further, the discovery of a policy or purpose behind a particular rule of law at its inception is not a guarantee that the rule is still sustained by the same policy or purpose. An old rule may today be retained for reasons other than those which prompted its introduction in the first place. On the other hand, it might be universally regarded as out of date and ripe for replacement.

4.44 The "comparative impairment" approach, by which it is necessary not only to ascertain the competing policies but also to balance the competing interests, seems to us to suffer from the further disadvantage that it is extremely difficult to conceive of a principled method by which to arrive at the appropriate balance, even supposing that the policies of the laws in conflict could be ascertained in the first place:

> "... it is frequently difficult to discover the purposes or policies underlying the relevant local law rules of the respective jurisdictions involved. It is even more difficult, assuming that these purposes or policies are found to conflict, to determine on some principled basis which should be given effect at the expense of the others."[360]

4.45 The theoretical advantage of the governmental interest analysis or comparative impairment approach is its capacity to deal with conflicts cases on a flexible and individually-tailored basis. In practice, this seems hard to attain, and the theoretical flexibility gives way to a process which is at once unprincipled and unpredictable - "a discretionary system of equity".[361] This, together with our objections in principle to an approach based on the furthering of state policy rather than the doing of justice at the choice of law level leads us to believe that the

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360 Neumeier v. Kuehner 286 N.E. 2d 454, 457 (1972), per Fuld C.J.

361 Anton, p. 40.

governmental interest analysis or comparative impairment approach is not a suitable option for reform of our own choice of law rule in tort and delict.[362] We seek comments on this view.

(b) Principles of preference

4.46 In 1933, Professor David Cavers drew attention to the deficiencies of a purely jurisdiction-selecting choice of law rule.[363] He proposed an alternative method which has much in common with the governmental interest analysis method discussed in the immediately preceding paragraphs, but which is also significantly different from it.[364]

4.47 The two methods have in common an attempt to distinguish between a 'true conflict" and a "false conflict"[365] by inspecting the laws in conflict in the light of their purposes and the circumstances of the case. Where such inspection revealed a false conflict, neither the governmental interest analysis nor the principles of preference approach would go any further. However, in the case of a true conflict, the governmental interest analysis method would (in its pure form) apply the lex fori, or (in its "comparative impairment" form) attempt to weigh the competing state interests and apply the law of that state whose interests would be most impaired by failure to do so. Cavers, on the other hand, would neither resort to the lex fori nor attempt to weigh the competing

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362 Many before us have reached the same conclusion: for example, Anton, pp. 33-42; Cheshire and North, p. 29; Morris, The Conflict of Laws (3rd ed., 1984), pp. 518-520, 531; Morse, pp. 225-226; Fawcett, "Is American governmental interest analysis the solution to English tort choice of law problems?" (1982) 31 I.C.L.Q. 150, 166; Raffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98.

363 "A critique of the choice of law problem", (1933) 47 Harv. L.R. 173.

364 The views of Professor Cavers are also explained in The Choice of Law Process (1965) and "Contemporary conflicts law in American perspective", [1970] III Hague Rec. 75.

365 See above, para. 4.36 and n. 337.

state interests, but would instead resort to a system of what he called "principles of preference". He originally suggested five such principles for use in tort and delict cases,[366] and has subsequently added a sixth for use in products liability cases.[367] Whereas Cavers originally thought his principles of preference should be used only in cases of true conflicts, he later came to believe that they might be useful at an earlier stage, when deciding whether a conflict was false or avoidable.[368]

4.48 While it is not essential to the Cavers approach that the particular principles devised by him should be adopted without modification, we quote here his first principle for the purposes of illustration -

> "1. Where the liability laws of the state of injury set a higher standard of conduct or of financial protection against injury than do the laws of the state where the person causing the injury has acted or had his home, the laws of the state of injury should determine the standard and the protection applicable to the case, at least where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing their relationship."[369]

The other principles are phrased in similar language. Each of them identifies certain countries whose law might be applied in the particular circumstances which it contemplates; and contains a stated criterion,

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366 Cavers, The Choice of Law Process (1965), ch. VI; and see also ch. V.

367 Cavers, "The proper law of producer's liability", (1977) 26 I.C.L.Q. 703, 728-729.

368 Cavers, "Contemporary conflicts law in American perspective", [1970] III Hague Rec. 75, 153.

369 Cavers, The Choice of Law Process (1965), p. 139. The five principles in the field of tort and delict are summarised in Morris, The Conflict of Laws (3rd ed., 1984), p. 522.

framed in terms of the content of the laws so identified, by means of which one of those laws is selected as the applicable law. Each criterion reflects a value judgment[370] as to what the result should be in the case envisaged.

4.49 The principles of preference approach is of great interest, especially (like the governmental interest analysis approach) in its attempt to identify false conflicts, but further (unlike that approach) in its attempt to formulate, on some principled basis, rules for deciding which of two competing laws should be applied. There is evidence that the principles of preference approach has influenced the court in some United States cases,[371] and in our view it is a more attractive one than the governmental interest analysis or comparative impairment method. However, there are nevertheless serious objections to the adoption of such an approach in the United Kingdom.

4.50 In the first place, it relies in its initial stage on the ascertainment of the policy or purpose of the competing rules of law, and we have explained above[372] that we think this is wholly impracticable. Secondly, the number of principles of preference which would be required in the field of tort and delict would in our view be large, and while this might not have caused any particular difficulty if the method had emerged as a result of a gradual process of judicial evolution, it seems less well suited to a ready-made statutory scheme, which would have to

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370 Cavers, The Choice of Law Process (1965), p. 213.

371 See, for example, Cipolla v. Shaposka 267 A. 2d 854 (1970); Neumeier v. Kuehner 31 N.Y. 2d 121, 286 N.E. 2d 454 (1972). In the latter case, Fuld C.J. formulated three principles to deal with disputes between drivers and passengers in motor vehicles.

372 Paras. 4.41 - 4.45.

be complex and long. Accordingly we do not think a system based on this approach could be adopted in the United Kingdom,[373] and we invite comments on this view.

(c) Choice-influencing considerations

4.51 Professor Robert Leflar has attempted to distil from the cases those considerations which in fact influence the choice of law.[374] He is not the first or the only person to have done so,[375] and section 6 of the United States Restatement Second contains a similar list of choice of law principles,[376] but Leflar's "effort to systematize and correlate the choice-influencing considerations"[377] produced the following list of five:[378]

(A) Predictability of results;

(B) Maintenance of interstate and international order;

(C) Simplification of the judicial task;

(D) Advancement of the forum's governmental interests;

(E) Application of the better rule of law.

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373 See Kahn-Freund, p. 58; Morris, The Conflict of Laws (3rd ed., 1984), pp. 523-531; Morse, p. 259.

374 See Leflar, American Conflicts Law (3rd ed., 1977), s. 96 and ch. 10; and also Morse, pp. 263-267.

375 For example, see also Cheatham and Reese, "Choice of the Applicable Law", (1952) 52 Col. L.R. 959.

376 The Restatement Second is discussed below at paras. 4.136 - 4.139.

377 Leflar, American Conflicts Law (3rd ed., 1977), p. 195.

378 Ibid.

4.52 These considerations are not listed in order of priority,[379] and their relative importance would vary according to the area of law involved;[380] and further, as Leflar says -

> "[i]dentification of the relevant choice-influencing considerations and attachment of appropriate significance to each of them is a task that will have to be worked at indefinitely, with little prospect of complete agreement among either judges or commentators."[381]

4.53 However, the intention behind this approach is that the application of all the choice-influencing considerations in the circumstances of a particular case will provide a "test of the rightness of choice-of-law rules and decisions";[382] and the approach has been used in a number of United States decisions as a means of showing which law should be applied.[383] The Leflar method of resolving choice of law problems is a different kind of approach from those discussed elsewhere in this Part. It does not provide an objective choice of law rule; it identifies and classifies common factors which may have influenced decisions over a period of judicial evolution, but which do not by themselves point in the direction of one or another of the rules in conflict.

4.54 We have already given reasons why we do not believe that the fourth of the above-listed choice influencing considerations would be satisfactory,[384] and we do not think that the fifth is acceptable. Quite

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379 Ibid.

380 Ibid.

381 Ibid., 193.

382 Ibid., 194.

383 See, for example, Clark v. Clark 222 A. 2d 205 (1966); Heath v. Zellmer 35 Wis. 2d 578, 151 N.W. 2d 664 (1967); Conklin v. Horner 38 Wis. 2d 468, 157 N.W. 2d 579 (1968); Milkovich v. Saari 203 N.W. 2d 408 (1973); Hunker v. Royal Indemnity Co. 57 Wis. 2d 588, 204 N.W. 2d 897 (1973).

384 See above, paras. 4.41 - 4.45.

apart from this, however, we have reached the view that, although this approach is illuminating in the context of a judge-made rule, as a candidate for our reformed choice of law rule it suffers from a major defect, which is that it is inherently unacceptably subjective and uncertain, and we doubt whether any list of choice-influencing considerations could of itself constitute a self-sufficient statutory choice of law rule. Comments are invited.

3. Options based on the lex loci delicti

(a) Reasons for applying the lex loci delicti

4.55 The principle that the lex loci delicti should apply in cases of foreign torts and delicts is old-established and forms the basis of the choice of law rule in many foreign countries.[385] It has the predominant role in the present Scottish choice of law rule in delict,[386] and appears in England and Wales and in Northern Ireland as the second limb of the rule in Phillips v. Eyre. A choice of law rule based on the application of the lex loci delicti is a traditional jurisdiction-selecting rule which has nothing in common with the new United States approaches discussed immediately above. It is noteworthy, however, that at least one of the new approaches to the problem of choice of law in tort and delict concedes that in many cases the lex loci delicti will be the appropriate law to apply, or at least to take as a starting point.[387] Although, as we shall see below,[388] we do not believe that a bare lex loci delicti choice of

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385 See Appendix for some examples.

386 See paras. 2.37 - 2.40 above.

387 E.g., Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881, and see the Restatement Second. We discuss the proper law approach below at paras. 4.126 - 4.142.

388 Paras. 4.92 ff.

law rule is acceptable, the arguments in favour of applying the lex loci delicti at least as a prima facie rule are strong and are principally as follows.

4.56 In the first place there is a practical argument. Where it is alleged that a tort or delict was committed by one party against another, one objective fact which unites the parties and the occurrence is the place where the tort or delict was alleged to have occurred (the "locus delicti"). In most cases this place will be easily identifiable.[389] In many cases there will be no other objectively ascertainable factor which is common to the parties and the occurrence: the parties will usually be connected only by the tort or delict committed by one against the other. In the case of a jurisdiction-selecting rule, which seeks to connect a particular case with the appropriate legal system by means of a "connecting factor", there would in such a case appear to be no other connecting factor which could be resorted to if the lex fori is not to apply.[390] A rule which applies the lex loci delicti is clear, simple, and certain; its results are easily predictable; and in the ordinary case without special features there is no other obvious candidate as the applicable law apart from the lex fori, which, as we have said above, we do not believe would be an acceptable solution.

4.57 Quite apart from any common factor uniting the parties and the occurrence, there are reasons of principle for applying the lex loci delicti. First, if (as will in practice be likely) one of the parties to the tort or delict is himself independently connected with the locus delicti, for example through habitual residence there, it is right that he should in the ordinary case be able to rely on his own local law for his rights and be subject to such liabilities as are prescribed by that law. This principle has been expressed as follows:

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389 We discuss the problem of the multi-state case below, at paras. 4.61 - 4.91.

390 We discuss options based on the lex fori above, at paras. 4.24 - 4.34.

> "the legal position of a person who, in his own country, acts or is affected by an act, or takes part in a transaction, should not be adversely affected by a foreign element ... which it was not open to him to avoid".[391]

This would in addition appear likely to correspond with his expectations after the tort or delict had occurred; and it does not appear likely that the expectations of the other party would be any different. The case is stronger where both parties are connected with the locus delicti independently of the tort or delict. The application of the lex loci delicti is thus in our view consistent with the demands of justice at the choice of law level,[392] at least in the ordinary case which presents no special features: it is the law which it is most appropriate to apply.

4.58 The application of the lex loci delicti would usually also correspond with the liability which a wrongdoer who had taken such matters into account would expect to be imposed upon him by a court at the place where his activities were being carried on. We have explained above[393] that this consideration does not necessarily mean that a court in the United Kingdom should also apply that law, but it would appear simpler and more satisfactory if the courts here did so nonetheless.

4.59 Another reason for applying the lex loci delicti is that this would promote uniformity and discourage forum shopping. It would encourage uniformity in two ways. The first is that the application of the lex loci delicti is a widely accepted choice of law rule, and the results of an action in the United Kingdom on a foreign tort or delict would therefore tend to be the same as if the action had been brought elsewhere. The second is that the result of an action in the United

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391 Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98, 102.

392 On this point see Jaffey, "Choice of law in tort: a justice based approach", (1982) 2 L. S. 98, passim.

393 Para. 4.11.

Kingdom will also tend to be the same as that of an action brought in the country where the tort or delict occurred, for in the latter case the courts are likely to apply their own lex fori, which will be the same as the lex loci delicti. This will be particularly important if the foreign judgment then falls to be recognised and enforced in the United Kingdom, for example under the Civil Jurisdiction and Judgments Act 1982. Since the results of an action in the United Kingdom and of an action at the locus delicti would, under a lex loci delicti rule, tend to be the same, there will be no disadvantage to the claimant in suing in his own courts, if it is practicable to do so,[394] and this will usually be more convenient and less expensive.

4.60 Our provisional conclusion is, therefore, that the lex loci delicti is in many cases both in principle and in practice the most appropriate law to apply, and is therefore a suitable basis upon which to build a choice of law rule in tort and delict. However, we have reached the view that the application of the lex loci delicti in all cases, without exception, would not be satisfactory. The application of the lex loci delicti is not appropriate in all circumstances. Experience abroad, especially in the United States, has shown that a bare lex loci delicti rule may lead to injustice, and many countries have introduced exceptions to the application of the lex loci delicti. Our view is, however, that a lex loci delicti rule with exceptions has clear merits. We discuss a number of possible exceptions below.[395] First, however, it is necessary to consider what is meant by the locus delicti (and hence also the lex loci delicti) in a case where different elements in the train of events occur in different countries.

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394 For example, he may take advantage of article 5(3) of the E.E.C. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, or of the new R.S.C., O. 11, r. 1(1)(f) when this is in force : see n. 404 below.

395 Paras. 4.97 - 4.125.

(b) The definition of the locus delicti in multi-state cases

(i) Introduction

4.61 In most cases the whole train of events making up a tort or delict occurs in a single country. In such a case the question of defining the locus delicti does not arise. However, any rule based on the lex loci delicti would also have to cope with a tort or delict whose constituent elements occurred in different countries, however infrequent such cases may in practice be. We refer to such a case as a "multi-state" case.

4.62 It would, of course, be possible to confine the lex loci delicti rule to single-state cases only, and to develop a different rule for multi-state cases, but we do not believe that such a solution is necessary. We believe that if the lex loci delicti is to be adopted as the basic rule, some way of accommodating the multi-state case should if possible be found; and, as will appear below, we believe that there exist ways in which this can be done. An alternative approach would be to adopt a rule which did not assume the existence of a locus delicti: one such is the proper law approach, which we discuss below.[396]

4.63 In the absence of a single locus delicti the reasons of policy which indicate the application of the lex loci delicti are no longer adequate without further refinement. To take the simplest case, where a wrongdoer acts in one country and causes harm to a claimant in another country, there can no longer be said to be one single country with which the train of events has the strongest prima facie connection; there are, instead, two such countries. Arguments based on the expectations of the parties now pull both ways, for the actor may feel wronged if he is not allowed to rely on the law of the country where he acted, and the claimant may feel that he should be allowed to rely on the law of the

396 Paras. 4.126 - 4.142.

country where he was harmed. However, as Kahn-Freund[397] and others[398] have pointed out, while it might be permissible to allow more than one country to take jurisdiction in a multi-state case, thus making a definition of the locus delicti unnecessary in the jurisdictional context,[399] this is clearly unacceptable for choice of law purposes: there must be some way of choosing one law which is to apply. In the context of a lex loci delicti rule it is therefore necessary, in a multi-state case, to select one country only as the locus delicti, and to use the law of that country as the lex loci delicti. (The application of the lex loci delicti as so identified would then be subject to the same exceptions to the general lex loci delicti rule as were provided for in the ordinary single-state case. We discuss such exceptions in the next section).

4.64 Examples of multi-state cases are -

(i) A defective machine is manufactured in England and is exported to France, where it causes injury and loss of profit. The locus delicti might be England or France.

(ii) A Scotsman is injured, by a car driven by another person, in a road accident in France. He then returns home to Scotland, where he dies as a result of his injuries. The initial injury is thus suffered in France, and the consequential death in Scotland. The locus delicti might be France or Scotland.

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397 [1974] III Hague Rec. 137, 405-406.

398 For example, Collins, "Where is the locus delicti?" (1975) 24 I.C.L.Q. 325, 327-328; Cheshire and North, pp. 287, 289.

399 For example, in Handelskwekerij G.J. Bier B.V. & Stichtung Reinwater v. Mines de Potasse d'Alsace S.A. [1976] E.C.R. 1735, [1978] Q.B. 708 (European Court of Justice) it was held that under Article 5(3) of the E.E.C. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters the claimant could at his option sue either at the place where the damage occurred or at the place of the event which gave rise to and was at the origin of the damage. See n. 404 below.

(iii) The accident in the previous example was caused, not by the driver of the other car, but by negligent servicing of that car in Italy. The locus delicti might be France, Scotland, or Italy.

(iv) At meetings in Spain, Ireland and Portugal, conspirators agree to reduce the German and Swiss profits of a multinational company, by means of acts done in Austria and Italy. The locus delicti might be any of the countries mentioned, or even the country where the multinational company had its head office.

4.65 Although the one law chosen as the lex loci delicti in a multi-state case will be that of a country which it is convenient to call the locus delicti, it is fictitious (as can be seen from the examples in the previous paragraph) to say of a train of events whose elements occurred in various places that "the tort" or "the delict" can be localised, on some ostensibly objective basis, in only one of those places.[400] In this context, therefore, the selection of one country as the locus delicti does not imply that "the tort" or "the delict" could be said to have occurred there; it implies only that, for policy reasons, the law of that country should in principle apply in a multi-state case. The phrases "locus delicti" and "lex loci delicti" are thus simply used as a convenient shorthand: they bear a special meaning when the different elements of a wrong occur in different countries.

4.66 In this section we consider various ways of identifying the locus delicti in a multi-state case. What follows is relevant only to the multi-state case. It should be stressed that none of these problems occurs in a case concerning a train of events confined to one country. In such a case the identity of the locus delicti presents no difficulty at all.

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400 See Castree v. E.R. Squibb & Sons Ltd. [1980] 1 W.L.R. 1248, 1250.

(ii) The present law

4.67 Although our present choice of law rule in tort and delict potentially requires the locus delicti to be defined in a multi-state case, it appears that there are no reported cases in which the English courts have been called upon to do so in the context of the rule in Phillips v. Eyre, although there are cases where the tort was alleged to have occurred in England.[401] The situation in Scotland appears to be the same.[402] Relevant decisions appear also to be rare in other countries where the rule in Phillips v. Eyre prevails.[403]

4.68 The question has, however, frequently arisen in a jurisdictional context, for under R.S.C., O.11, r.1(1)(h), a writ may be served out of the jurisdiction -

> "if the action begun by the writ is founded on a tort committed within the jurisdiction."[404]

A similar rule has existed in other jurisdictions (although not in Scotland[405]) for many years. Although the jurisdiction cases will be mentioned as appropriate below, they offer only limited assistance in

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401 See para. 2.21 above.

402 See para. 2.44 above.

403 See, however, Interprovincial Co-operatives Ltd. v. The Queen (1975) 53 D.L.R. (3d) 321.

404 This will in due course be altered by the R.S.C. (Amendment No.2) Rules 1983 (S.I. 1983 No. 1181) to take account of the Civil Jurisdiction and Judgments Act 1982. The new provision, which will be R.S.C., O. 11, r.1(1) (f), will permit service of a writ out of the jurisdiction if in the action begun by the writ "the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction". Northern Ireland has corresponding provisions: R.S.C. (Northern Ireland) (Revision) 1980, O.11, r.1(1)(h), which will be altered by R.S.C. (Northern Ireland) (Amendment) 1984 (S.R. 1984 No. 110).

405 Service is irrelevant to questions of jurisdiction in Scotland.

deciding how to approach the question of the locus delicti. The reasons for this are as follows:[406]

(a) they decide only whether a tort or delict was committed within the jurisdiction: they do not necessarily decide where a tort or delict was committed, if not within the jurisdiction;

(b) the distinction is sometimes blurred between the commission of a tort or delict within or outside the jurisdiction and the discretion of the court to permit or deny leave to serve process out of the jurisdiction;

(c) the criteria for deciding whether or not the court should take jurisdiction need not be the same as the criteria for determining the locus delicti for choice of law purposes.

(iii) The "place of acting" rule or the "place of result" rule[407]

4.69 The solutions most usually canvassed for the problem of determining the locus delicti in a multi-state case are either that the locus delicti should be considered as the place where the wrongdoer acted (a "place of acting" rule), or, alternatively, that the locus delicti should be the place where the conduct of the wrongdoer harmed the claimant or his interests (a "place of result" rule).[408]

4.70 The main argument of principle for adopting a place of result rule as opposed to a place of acting rule is that a place of result rule is more in accordance with the modern view of the law of tort and

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406 See Morse, p. 115.

407 See generally, Webb and North, "Thoughts on the place of commission of a non-statutory tort", (1965) 14 I.C.L.Q. 1314; Morse, pp. 113-123.

408 It is, perhaps, arguable that the second limb of the rule in Phillips v. Eyre presupposes a choice of the "place of acting" rule, since it refers to "the law of the place where it [the act] was done": (1870) L.R. 6 Q.B. 1, 29. The continental systems also appear to favour the place of acting rule, although modern French doctrine appears, at least in certain circumstances, to favour the place of the result: Batiffol et Lagarde, Droit International Privé, Tome II (7th ed., 1983), s. 561; Morse, p. 115.

delict.[409] According to this view the law of tort and delict does not exist to deter the wrongdoer from harmful conduct, or to punish him for it (this being the province of the criminal law), but to provide a means whereby the equilibrium between the claimant's interests and the wrongdoer's interests may be maintained and, if upset, readjusted. Since the equilibrium will be upset by the wrongdoer's conduct (whether intentional or not) it is the claimant's interests which stand to be adversely affected, and it is therefore the law of the place of result, not that of the place of conduct, which should apply. It is, in other words, thought to be just that the rights of a person who has suffered injury should be regulated according to the law of the country where the injury occurred - which, in the usual case, will be a country with which that person is independently connected, probably through habitual residence.

4.71 The countervailing argument, which supports the application of the law of the place of acting (at least where results were not foreseeable in the place where they in fact occurred) is that the actor must be taken to act in accordance with the standards of his own environment, and that he should be judged according to those standards. It would therefore be wrong to make the actor liable according to the law of the place of result if his conduct and the results which flowed from it would give rise to no liability under the law of the place of acting.[410] This argument must presumably be based in fact on the view that the law

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409 Morse, pp. 118-119. Although we believe this view to be commonly accepted, it is not unanimous, as is pointed out by Webb and North, (1965) 14 I.C.L.Q. 1314, 1357-1358. Contrast, for example, Salmond and Heuston on the Law of Torts (18th ed., 1981), p. 11: "[t]he law of torts exists for the purpose of preventing men from hurting one another..."; Fridman, "Where is a Tort Committed?" (1974) 24 U. Tor. L.J. 247, 278: the law of torts "is primarily concerned with determining what sort of conduct should be capable of being castigated as wrongful and therefore potentially actionable".

410 This argument is stated by Morse, pp. 113 and 119; and is put (for example) by Rheinstein, "The Place of Wrong: A Study in the Method of Case Law", (1944) 19 Tul. L.R. 4 and 165; and by Fridman, (1974) 24 U. Tor. L.J. 247.

of the place of conduct is the most appropriate law to apply, irrespective of the accident of liability, for the law of the place of result might not, after all, impose liability, while the law of the place of conduct might do so.

4.72 A strict place of conduct rule would, however, ignore the fact (if it were so) that the actor foresaw or even intended results in the place where they in fact occurred. In such a case the actor could not properly claim to be prejudiced by the application of the law of the place of result. Supporters of the place of acting rule therefore concede that, if the rationale of the rule is that the actor must be taken to have acted in accordance with the standards of the community, the relevant communities must include those where the actor could reasonably expect that his conduct might result in harmful consequences.[411] If results were foreseeably produced in the place where they in fact occurred, the law of the place of result would apply, and not the law of the place of acting.[412]

4.73 Whether it is the place of acting or the place of result which should be considered as the locus delicti in a multi-state case seems to us to depend very much upon the type of tort or delict in question and upon the circumstances of the case. The argument in favour of applying the law of the place of conduct is clearly strong where the actor's conduct is influenced by his having taken the law into account before undertaking an activity and where it was not foreseeable that results would be produced in another country. It is strongest where the actor is placed under a duty

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411 E.g., Rheinstein (1944) 19 Tul. L.R. 4, 25-27; and see Fridman, (1974) 24 U. Tor. L.J. 247, 262.

412 This seems to be the effect of article 129(2) of the Swiss proposals. Contrast article 45(2) of the Portuguese civil code, according to which the law of the state of injury applies instead of that of the place of principal activity in cases where the actor could foresee the occurrence of damage in that state, but only if the law of the state of injury holds the actor liable and the law of the state where he acts does not. See Appendix.

(as opposed to a mere licence[413]) to act or not to act in a particular place or in a particular way: in such a case it seems unjust to him to subject him to the law of another country (irrespective of whether or not the law of that country would in fact impose liability).[414] However, the arguments for applying the law of the place of conduct seem weaker, and the arguments for applying the law of the place of result stronger, where the actor's conduct was not consciously influenced by the law of the country where he acted, and also in any case where the actor foresaw that his conduct might produce results in another country.

4.74 The place of conduct rule fails to take into account the interests of the claimant, whose expectations will (at least after the event, if not before) be based on his rights and liabilities under the law of the country where he was harmed and with which he will usually be independently connected. (If he were not so connected there might in the circumstances of the particular case be grounds for not applying the lex loci delicti at all, as we envisage below.[415]) This argument is in our view a strong one in the case of a tort or delict where what is in issue is the redistribution of losses, but "... there is value in paying some consideration to the purpose behind the rule of law which characterises the conduct in question as tortious",[416] and the essential element in a tort or delict is not always the redistribution

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413 As in Interprovincial Co-operatives Ltd. v. The Queen (1975) 53 D.L.R. (3d) 321. See para. 5.70 below.

414 The first United States Restatement provided that "[a] person who is required by law to act or not to act in one state in a certain manner will not be held liable for the results of such action or failure to act which occur in another state": section 382(1). Section 382(2) went further and similarly exempted the actor where he acted "pursuant to a privilege conferred by the law of the place of acting". These provisions are remarkable because they are wholly inconsistent with the philosophy underlying the adoption elsewhere in the first Restatement of the "place of last event" rule, described below at para. 4.85.

415 Paras. 4.92 ff.

416 Webb and North, (1965) 14 I.C.L.Q. 1314, 1357; and see Cheshire and North, p. 289.

of monetary losses: some torts and delicts, for example, are actionable without proof of damage.[417] In such cases the law may seem to be more deterrent or "admonitory" than compensatory in its objective,[418] and thus aimed more at the conduct of the wrongdoer than at the loss suffered by the claimant; and if this is so it may be right to judge the matter according to the standards of justice of the place of conduct, not of the place of harm.

4.75 One way out of the dilemma of defining the locus delicti in terms either of the place of acting or the place of result would be to adopt what may be termed an "elective solution".[419] The essence of an elective solution is that where elements of the train of events occur in different countries, a choice is made, either by the claimant[420] or by the court, between the various legal systems with a claim to application. Where the choice is made by the court, the law selected is that most favourable to the claimant.

4.76 This method does not appear to have a great deal of support.[421] It seems to us to suffer from three major defects. In the

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417 The E.E.C. Draft Convention deals separately with events resulting in damage or injury (article 10) and events not resulting in damage or injury (article 13): see Appendix.

418 A distinction advocated by Ehrenzweig: "The Place of Acting in International Multistate Torts: Law and Reason versus the Restatement", (1951) 36 Minn. L.R. 1.

419 See Morse, pp. 124 ff.

420 It would be possible for the choice to be made by the wrongdoer, but the same arguments apply. We envisage, however, that if both of the parties to an action agree on the applicable law, then that law should apply: see para. 4.21 above.

421 Cook supported it: The Logical and Legal Bases of the Conflict of Laws (1942), ch. 13. See also Cowen, "The locus delicti in English private international law", (1948) 25 B.Y.I.L. 394; Carter, (1965-66) 41 B.Y.I.L. 440; and Morse, p. 125. It is used in the Federal Republic of Germany, and is adopted for certain purposes in the Swiss proposals: articles 131, 134 and 135: see Appendix.

first place, to favour one party so crudely over the other does not seem the right way to reach the appropriate equilibrium between the interests of the claimant and those of the alleged wrongdoer. Secondly, the applicable law would never be known until the choice had been exercised: this is unsatisfactory for the alleged wrongdoer, and would not tend to promote settlements. Thirdly, it may well be impossible to decide on an objective basis or at all which law is, in fact, most favourable to the claimant. In such a case, if the choice were the court's, it would have to choose on the basis of criteria which it would be impossible to formulate in advance. This seems unsatisfactory. If the choice were the claimant's, this objection is of less weight, since it would be open to him to make his own choice which did not depend on an objective assessment of favourability.

4.77 We have therefore reached the view that this is not a suitable solution to the problem of the multi-state tort or delict in the context of a lex loci delicti rule. Our view is that it is necessary to provide rules which select either the place of acting or the place of result as the locus delicti in a multi-state case. We consider first the torts and delicts with which this Part is principally concerned - namely personal injury, death, and damage to property. We then consider whether a general rule can also be formulated for other types of tort and delict. In Part V we consider whether other particular types of tort and delict require special definitions of the locus delicti in a multi-state case. It should be borne in mind throughout this section that the problem of defining the locus delicti arises only where elements in the train of events occur in different countries. It does not arise at all where the whole train of events occurred in a single country.

(iv) Definition of the locus delicti in multi-state cases of personal injury, death, and damage to property

4.78 Whatever may be true of other types of tort and delict, we have formed the provisional view that the arguments in favour of applying the law of the place of result are stronger than those in favour of applying the law of the place of conduct in the types of tort and delict with which this Part is principally concerned, namely personal injury, death, and

damage to property. In such torts and delicts the primary purpose of the law is to secure a redistribution of loss by means of compensation; and they are also likely to arise from accidents. In such cases the expectations of all the parties and the purposes of the law will usually make it entirely appropriate to apply the standards of justice of what might be loosely termed the "claimant's law", not those of the "wrongdoer's law", in the resolution of a dispute between them.

4.79 This view may be described as "claimant oriented" rather than "wrongdoer oriented", and this is in our view the correct emphasis in cases of personal injury, death, and damage to property. It is, however, important to note that a definition of the locus delicti in terms of the place of result is claimant-oriented only at the choice of law level. Neither a place of acting rule nor a place of result rule favours either party in terms of the final result of a dispute, since the final outcome will depend upon the content of the domestic law applied.

4.80 Our conclusion that the locus delicti should be considered as the place of result in multi-state cases of personal injury, death, and damage to property is, in our view, supported by practical considerations. In the first place, as we have mentioned above,[422] a place of acting rule would be unsatisfactory unless qualified by a test of foreseeability. However, the introduction of such a qualification into the definition of the locus delicti would in our view be undesirable. It would always be potentially unclear whether the law of the place of acting or the law of the place of result was to prevail, for this might always require an investigation into the question of foreseeability. Further, the liability of the alleged wrongdoer under the substantive applicable law (however selected) might well depend in any event upon a test of foreseeability provided for by that law; in such a case the introduction of another different notion of foreseeability at the earlier choice of law stage seems likely to lead to complication and confusion. By contrast, a place of

422 Para. 4.72.

result defin tion does not require to be qualified by a test of foreseeability. It rests on the ground that the conduct of the wrongdoer should be jud ged according to the standards of the place where results were in fact produced. In cases of personal injury, death, and damage to property this is in our view right in principle.

4.81 Secondly, although both the place of conduct and the place of result raise p oblems of definition, it is the place of conduct which raises the greater difficulty. It may, for example, be impossible to ascertain where the cor duct took place; but, more significantly, opinions may also differ as to how the relevant conduct should be defined. For example, if damage occurs because a car had defective tyres, does the negligent conduct consist in driving the car in that condition, or in failing to inspect the tyres before setting out?[423] In some cases decided for jurisdictional purposes, the English courts have produced curious definitions of conduct. For example, in Castree v. E.R. Squibb & Sons Ltd.[424] the substantial wrongdoing was said not to be the defective or incorrect manufacture of a German product, but "putting on the English market a defective machine with no warning as to its defects".[425] Finally there is

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423 Webb and North, (1965) 14 I.C.L.Q. 1314, 1319 n. 23.

424 [1980] 1 W.L.R. 1248.

425 Ibid., 1252. This follows Distillers Co. (Biochemicals) Ltd. v. Thompson [1971] A.C. 458, where the wrongdoing was a "failure to give a warning that the goods would be dangerous if taken by an expectant mother in the first three months of pregnancy" (ibid., 469): see Collins, "Some aspects of service out of the jurisdiction in English law", (1972) 21 I.C.L.Q. 656, 663-666. Cf. Buttigeig v. Universal Terminal & Stevedoring Corporation [1972] V.R. 626 and Macgregor v. Application des Gaz [1976] Qd. R. 175. In George Monro Ltd. v. American Cyanamid & Chemical Corporation [1944] 1 K.B. 432, Goddard L.J. thought the case concerned "the sale of what was said to be a dangerous article without warning as to its nature" (p.439); while Du Parcq L.J. said that "the corporation put on the market a dangerous substance with written instructions to use it in a dangerous way" (p.440), and described this as an act of "commission" (ibid.): Webb and North, (1965) 14 I.C.L.Q. 1314, 1326 n. 50. See also Adastra Aviation Ltd. v. Airparts (N.Z.) Ltd. [1964] N.Z.L.R. 393.

the problem of localising an omission.[426] An omission may be something that could have been done: but what if it could have been done in any of a number of places? Alternatively, it may be something that should have been done: but if so, by whose law is the duty to act imposed?[427] What if more than one law imposed a duty to act?

4.82 In the cases of personal injury, death, and damage to property the policy reasons for applying the law of the place of result would appear to indicate that this should be the place where the conduct of the wrongdoer first impinged upon the claimant or his property, not where the injury became apparent or where the consequential loss occurred, since these may well depend upon where the claimant himself chooses to go. Accordingly, in cases of personal injury and damage to property, the locus delicti would be the country where the person or property was when the injurious or damaging event occurred, even though its full effects became apparent only later. In cases of death, the relevant place must in our view be the country where the deceased was when he was fatally injured, not where he actually died.[428] A definition of the locus delicti in these terms will, we believe, be clear and simple, and represents the correct balance between the interests of the claimant and those of the wrongdoer in cases of personal injury, death, and damage to property.

(v) Definition of the locus delicti in other multi-state cases

4.83 The question now arises whether defining the locus delicti as the place of result will be appropriate for multi-state torts and delicts other than personal injury, death, and damage to property. We consider

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426 See Rabel, The Conflict of Laws, Vol. 2 (2nd ed., 1960), pp. 312-313.

427 The Portuguese civil code says that "... in the case of liability for omissions, the applicable law shall be the law of the place where the party responsible should have acted" (article 45(1): see Appendix).

428 This is implicit in Koop v. Bebb (1951) 84 C.L.R. 629.

a number of particular torts and delicts in Part V below; but our provisional conclusion is that a general definition in terms either of the place of acting or of the place of result which is applicable to all torts or delicts not involving personal injury, death or damage to property would be unsatisfactory. We have two reasons for this view. The first is that, as we have said, the policy reasons for applying either the law of the place of conduct or the law of the place of result differ from one tort or delict to the next, but we do not believe that it would be practicable to conduct an investigation on a case-by-case basis into the policy or purposes of the substantive laws in conflict.[429] As between the place of conduct and the place of result our view is that, on the whole, the policy considerations which we have outlined above would tend to favour the place of result in more cases than simply personal injury, death, and damage to property; but we are not confident that such a definition would be suitable in all cases.

4.84 Our second reason is that a tort or delict not resulting in personal injury, death, or damage to property may well involve complex facts, in that there may be no single place of conduct and no single place of result. An example might be that cited as (iv) in paragraph 4.64 above: the case of an international conspiracy.[430] Further, problems of definition will, if anything, be greater, since outside the field of personal injury, death and damage to property, the place of result as well as the

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429 We have discussed options which would involve such an investigation above, at paras. 4.36 - 4.54. See also Kahn-Freund, (1969) 53 I Ann. Inst. de droit international at pp. 451-452, where he questions whether it is possible to define the locus delicti in the light of a distinction between liability for fault and liability for risk, or between admonitory torts and enterprise liability.

430 An example of such a case is Petersen v. AB Bahco Ventilation (1979) 107 D.L.R. (3d) 49, and see also Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2) (C.A.), 6 March 1981 (unreported), per Lord Denning M.R. The facts of Lonrho appear from the report of the appeal to the House of Lords: [1982] A.C. 173. British Airways Board v. Laker Airways Ltd. [1984] 3 W.L.R. 413 also concerns an alleged conspiracy.

place of conduct may be hard to define. A definition which incorporates the idea of causation does not appear to be desirable. Although in most cases it will be perfectly clear what results have been caused by the wrongdoer's conduct, the introduction of this idea at the choice of law level is bound to lead to uncertainty in difficult cases. Further, questions of causation may be thought best left to the substantive applicable law: two notions of causation in the same case, one for choice of law purposes and one for substantive purposes, might (as with the idea of foreseeability discussed above[431]) seem too complicated. A definition in terms of "damage", "harm", "loss" or "injury" may be misleading,[432] either because none of these things may in fact be present, in which case it would be meaningless to define the place of result by reference to any of them, or because the claimant may suffer different types of damage or loss, which, while arising out of the same event, may occur in different places. Further, the location of economic loss may prove elusive.[433]

4.85 An apparently attractive way of defining the locus delicti was adopted by the first United States Restatement. Section 377 provided that -

> "[t]he place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."

This definition seems to avoid all difficulties by using a general principle which can easily be applied to the particular tort or delict in question. However, such a definition is unsatisfactory, for it is now seen to be circular: the last event cannot be identified except by reference to a system of law, but the system of law applicable cannot be selected until the last event has been identified. There might also be more than one

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431 Para. 4.80.

432 See Rabel, The Conflict of Laws, Vol. 2 (2nd ed., 1960), pp. 323 ff.

433 But see Ichi Canada Ltd. v. Yamauchi Rubber Industry Co. (1983) 144 D.L.R. (3d) 533, where for the purposes of service of a writ outside the jurisdiction, the tort of inducing breach of contract was considered as committed in the place where economic loss was suffered.

place of last event, for example where a tort or delict was actionable per se in one country and only upon proof of damage in another, and damage occurred only in the latter while the rest of the train of events occurred in the former. If the "last event" rule is unacceptable, then so also, and for the same reasons, is a definition of the locus delicti in terms of the point at which a cause of action accrued.

4.86 We are, therefore, forced to the conclusion that it is impracticable to devise a general rule which would pinpoint the appropriate locus delicti in every case. This conclusion has been arrived at by others before us. For example, Kahn-Freund thought that trying to define the locus delicti was "a futile and singularly sterile problem",[434] and that concrete answers -

> "... can be given only in the light of the nature of particular delicts ... and that they cannot be given either in general terms of 'act' or 'impact' or of schemes of cumulative or alternative systems."[435]

4.87 The only alternative seems to us to be that, except in cases of personal injury, death, damage to property, and any other cases for which special provision might be made (and which we discuss in Part V below), the court should determine the locus delicti pursuant to a general formula whereby the locus delicti would be defined as "the country where there occurred the most significant elements in the train of events", or in similar terms.

4.88 A different formula has been proposed by the Institute of International Law, which, in its resolution of 1969 (in the context of which Kahn-Freund made the observations quoted above), proposed that the locus delicti should be defined as follows:

> "a delict is regarded as having been committed at the place with which, in the light of all the facts connecting a delict with a given

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434 (1969) 53 I Ann. Inst. de droit international 469.

435 Ibid.

place (from the beginning of the delictual conduct to the infliction of the loss), the situation is most closely connected."[436]

4.89 We have reservations about the precise wording used in the Institute's resolution, since it may not co-exist happily with the idea of closest and most real connection which we propose for the general exception to the lex loci delicti rule discussed in the next section,[437] and the word "situation" appears somewhat vague, but the exact wording of the formula to be used would be for further consideration. We do, however, envisage that the train of events to be taken into account should include both the conduct and the results. The definition which we here propose would therefore not be equivalent to the "substance of the wrongdoing" test adopted by the English courts for jurisdictional purposes, which appears in practice to amount to "little more than a place of acting rule".[438]

(vi) Conclusions on the definition of the locus delicti in multi-state cases

4.90 Our provisional conclusions relating to the definition of the locus delicti in multi-state cases are, therefore, as follows:

(a) In cases of personal injury and damage to property, the locus delicti should be the country where the person or property was at the time the injury or damage was first inflicted;

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436 Article 2 of the Institute's resolution: (1969) 53 II Ann Inst. de droit international 386.

437 Paras. 4.118 - 4.123; and see Morse, p. 132.

438 Morse, p. 129. Winn J. in Cordova Land Co. Ltd. v. Victor Bros. Inc. [1966] 1 W.L.R. 793, 798, equates "the substance of the tort complained of" with "the substance of the wrong conduct alleged to be a tort". Ackner L.J. in Castree v. E.R. Squibb & Sons Ltd. [1980] 1 W.L.R. 1248, 1252 refers to "the substantial wrongdoing". See also Distillers Co. (Biochemicals) Ltd. v. Thompson [1971] A.C. 458; Buttigeig v. Universal Terminal & Stevedoring Corporation [1972] V.R. 626; Macgregor v. Application des Gaz [1976] Qd. R. 175; Multinational Gas and Petrochemical Co. v. Multinational Gas and Petrochemical Services Ltd. [1983] 3 W.L.R. 492.

(b) In cases of death, the locus delicti should be the country where the deceased was when the fatal injury was first inflicted;

(c) In other cases, subject to any conclusions reached in Part V in connection with other types of tort and delict, the locus delicti should be the country where the most significant elements in the train of events occurred. (Comments will be invited in Part V upon whether other types of tort and delict should be specifically provided for.)

Comments are invited upon these conclusions.

4.91 We should, however, conclude by again putting the question of the definition of the locus delicti in multi-state cases into perspective. Our long discussion of this problem may tend to obscure the fact that although it is difficult to arrive at a wholly satisfactory definition of the locus delicti in multi-state cases, no definition at all will be necessary where the whole train of events occurs in a single country. This, we believe, will be the majority of cases. A precise definition of the locus delicti is offered in cases of personal injury, death, and damage to property, which will in practice cover most of the remaining cases. Only in relatively few cases, therefore, would it be necessary to fall back upon the more general formula. It should also be remembered that the problem of defining the locus delicti exists even under our present choice of law rules. The problem explored here is therefore not a new one, and is not peculiar to the new choice of law rule in tort and delict which we shall propose.

(c) The lex loci delicti may not always be appropriate

4.92 We turn now to a quite different question. We have alluded above[439] to the problems which may be caused by a simple but rigid choice of law rule; and the universal application, without exception, of the lex loci delicti would certainly be such a rule, albeit one with the

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439 Paras. 4.16 - 4.18.

virtue of certainty. This rule formerly prevailed in the United States, where practical experience has shown that a rule which applies the lex loci delicti without exception is inadequate to cope with all the varied and unpredictable circumstances in which tort and delict cases arise. The courts in the United States first resorted to circumventing the lex loci delicti rule by devices such as re-classifying the issue raised in the particular case as belonging, not in the tort category, but in a different category, to which a different choice of law rule applied.[440] Following the case of Babcock v. Jackson[441] many states have now rejected the traditional rule[442] in favour of the quite different approaches which we have discussed above.[443]

4.93 The circumstances in which the application of the lex loci delicti produces results which "will begin to offend our common sense"[444] are difficult to define with accuracy. But it may at least be said that the policy reasons which support the application of the lex loci delicti become less weighty or disappear entirely when the occurrence and the parties are more closely connected with a country other than the locus delicti than they are with the locus delicti itself, and the expectations of the parties do not point in the direction of the lex loci delicti. As Kahn-Freund has put it -

> "[t]he locus delicti, that is the geographical environment of the act or conduct, is in a rapidly growing number of situations shown to be

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440 See para. 4.17 above.

441 12 N.Y. 2d 473, 191 N.E. 2d 279; [1963] 2 Lloyd's Rep. 286. See para. 4.94(2) below.

442 Estimates of the number of states which have abandoned or modified the lex loci delicti rule differ, but it appears that at least half of the states of the U.S.A. have done so: see Korn, "The Choice-of-Law Revolution: A Critique", (1983) 83 Col. L.R. 772, 776.

443 Paras. 4.35 - 4.54.

444 Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881, 885; and The Conflict of Laws (3rd ed., 1984), p. 304.

'fortuitous', that is unconnected with the social environment of the parties, or of the relationship which exists between them."[445]

A trend away from a rigid lex loci delicti rule is in fact observable in many foreign jurisdictions,[446] and there seems to be a wide measure of agreement among modern commentators that although the lex loci delicti may be appropriate in many circumstances it is not appropriate in all.[447] In Boys v. Chaplin the House of Lords was unanimous in holding that the provisions of the lex loci delicti should not apply in the circumstances of that case.

4.94 Although it is difficult to define exhaustively the situations in which the application of the lex loci delicti is not called for on any ground of policy, and may therefore be inappropriate,[448] there would appear to be three main categories of such cases.

(1) The first case is what has been termed the "insulated environment" - that is, where the occurrence and the parties

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445 (1969) 53 I Ann. Inst. de droit international at p. 439. The possibility of a fortuitous locus delicti was adverted to in Boys v. Chaplin by Lord Hodson, Lord Wilberforce and Lord Pearson: [1971] A.C. 356 at pp. 380, 388, and 405 respectively. A note of caution should perhaps be sounded about the word "fortuitous", which is not always used so carefully as in the passage cited. The word is not always a very useful description, in the first place because in the case of an accident all of its elements (and not just some of them) could in some sense be described as "fortuitous", and in the second place because the description of a particular fact as "fortuitous" may result from assumptions which remain unstated or unexamined, and may also be used retrospectively to justify the choice of one law rather than another.

446 See Appendix.

447 For particular expressions of this view, see Anton, pp. 244-247; Dicey and Morris, pp. 932-935, 944-945; Kahn-Freund, passim; Morris, The Conflict of Laws (3rd ed., 1984), pp. 315-316; and Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881. Dr. Morris's solution to this problem is discussed below at paras. 4.126 ff.

448 See Dicey and Morris, pp. 932-935, 944-945; Kahn-Freund, pp. 63-128; Morse, passim; McGregor, "The international accident problem", (1970) 33 M.L.R. 1, 15-21.

are such that they do not interact with their geographical location. An example is a tort or delict committed wholly aboard a ship in territorial waters or an aircraft in flight: there is in such a case little obvious merit in applying the law of the littoral state or subjacent country.[449]

(2) The second case to some extent overlaps the first, and is more difficult to define, although probably more common: it is where the parties already have some connection with each other before the tort or delict occurs, in consequence of which it is reasonable that their mutual rights and liabilities be regulated according to some law other than that of the country where the tort or delict happened to occur. One such connection might be a contract between the parties, where the tort or delict is closely related to the contract, but a formal relationship such as this need not be postulated. For example, where a group of friends, all from Scotland, takes a motoring holiday in Europe, under a lex loci delicti rule the liability of the driver to his passengers for an accident would be successively regulated by the law of each different country they passed through, although it might be thought that there is no reason of policy which requires this, and that it would be more sensible that the law of Scotland should regulate their mutual liability. The lex loci delicti would, however, remain appropriate if a person outside the car were injured or his property damaged. An example of this sort of case is Babcock v. Jackson.[450] Mr and Mrs Jackson and their friend, Miss Babcock, all residents of the state of New York, went for

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449 We consider these cases at para. 5.77 below. Another example is given by Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881, 885.

450 12 N.Y. 2d 473, 191 N.E. 2d 279 (1963); [1963] 2 Lloyd's Rep 286.

a weekend trip to Canada in the Jacksons' car. An accident occurred in Ontario in which Miss Babcock was injured. No other parties were involved. The lex loci delicti was clearly the law of Ontario, by which the owner or driver of a motor vehicle was not liable for injury to passengers, but in an action in New York the court held that the law of the state of New York should apply.

(3) A third type of case in which the application of the lex loci delicti may seem inappropriate, and one even more difficult to define, is where the parties have no pre-existing relationship, and the circumstances are not such that they could be said to be acting in an insulated environment, but nevertheless all, or all but a few, of the factors in the case show connections with a country which is not the locus delicti. Examples of this type of case might be McElroy v. McAllister, where every factor other than the place of the accident pointed to Scotland, or Boys v. Chaplin, where almost every factor in the case other than the place of the accident pointed to England, and where the House of Lords declined to apply the lex loci delicti in its guise as the second limb of the rule in Phillips v. Eyre.

4.95 We have, therefore, reached the provisional conclusion that the introduction of a strict lex loci delicti rule, without any exceptions, would not be a satisfactory way of reforming our present law. Comments are invited on this conclusion. Given, however, that in many circumstances the lex loci delicti is in fact the most appropriate law to apply, the question remains whether a basic lex loci delicti rule is capable of refinement in such a way as to permit the displacement, where desirable, of the lex loci delicti in favour of some other more appropriate law, while yet retaining for the whole choice of law rule a measure of certainty which is sufficiently high to be acceptable. As always, the dilemma is the correct balance between simplicity and refinement. Our view is that the lex loci delicti rule need not be abandoned entirely, as has been done in many states of the United States. What has been done in a

number of other jurisdictions[451] is to add to the basic lex loci delicti rule a number of exceptions, or rules of displacement, which in defined circumstances exclude the lex loci delicti, and apply some other law instead. Each exception is such that, so far as is possible, the law which it indicates would be more appropriate than the lex loci delicti. It is probably not feasible, within acceptable limits of certainty, to achieve in every case the application of a perfectly appropriate law. A "lex loci delicti with exceptions" approach, however, would seek to refine the basic lex loci delicti rule to the extent that appropriate results were achieved in an acceptably high proportion of cases.

4.96 There appear to be two ways in which exceptions to a basic lex loci delicti rule could be formulated. One way would be to try to base exceptions on connecting factors other than the locus delicti which, if present in a particular case, would point to a country whose system of law would be more appropriate than the lex loci delicti, while leaving the lex loci delicti to apply in the absence of such connecting factors. We discuss some possible exceptions formulated in this way in the next following paragraphs, and we refer to an exception of this type as a "specific exception". The other way appears to be to formulate a general exception which would not depend on any particular connecting factor but which would permit the lex loci delicti to be departed from in appropriate circumstances. We discuss such an exception at paras. 4.118 - 4.123.

(i) Possible specific exceptions to the application of the lex loci delicti

4.97 A preliminary point, which is relevant to all the specific exceptions which we shall discuss, is the question of the circumstances in which the exception should be triggered. There are two possibilities:

(1) the exception might operate in all the cases which fell within its boundaries, in the expectation that in a sufficiently large

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451 See Appendix.

majority of such cases the exception would result in the application of a more appropriate law than the lex loci delicti; or

(2) the exception might operate, not in all the cases which fell within its boundaries, but only in those where it would in fact result in the application of a more appropriate law than the lex loci delicti.

Our discussion of the specific exceptions assumes that they would be of the first type. We return to the second possibility below.[452]

(a) Common personal law exception

4.98 A "common personal law" exception would operate to apply the law of common nationality or habitual residence (if there was one), instead of the lex loci delicti, and is to be found in a number of the foreign choice of law rules which we have surveyed for the purposes of this paper.[453] It is also contained in the Swiss proposals,[454] and has attracted academic support.[455]

4.99 If such an exception were to be adopted, it would in our view be unacceptable to define the common personal law in terms of nationality. A nationality criterion would not work within the United Kingdom, and complications would arise if any party was stateless or had

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452 Para. 4.117.

453 In particular, the Federal Republic of Germany, East Germany, Poland and Portugal: see Appendix. The Private International Law Committee of the Civil Code Revision Office of Quebec has suggested that the basic choice of law rule in tort and delict cases should be that the law of the claimant's habitual residence should apply: see Castel, Canadian Conflict of Laws, Vol. 2 (1977), pp. 647-648; and Morse, p. 344.

454 Article 129(1): see Appendix.

455 For example, Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98. See also Korn, "The Choice-of-Law Revolution: A Critique", (1983) 83 Col. L.R. 772.

dual nationality. Although nationality no doubt coincides in many cases with habitual residence, there are many cases where it does not, and in such cases habitual residence seems to us more likely to provide a law which has a closer connection with the parties and the occurrence.

4.100 One practical disadvantage of any kind of "habitual residence" exception is that it may be difficult for one party to ascertain the habitual residence of the other: in such circumstances neither party would be sure of the applicable law. This is not, perhaps, sufficiently likely to occur as to be a serious objection to a common personal law exception; but we also have further reservations about the application of the law of the place of common habitual residence.

4.101 A common habitual residence exception could be supported on two grounds. One is that the existence of a common habitual residence is in itself sufficient to justify applying the law of that country, irrespective of whether the parties had a pre-existing connection with each other, and irrespective of the circumstances of the tort or delict. However, it seems to us that the fact that the parties to a tort or delict happen to share a habitual residence might well be just as "fortuitous" as the locus delicti itself, and the application of its law entirely contrary to their expectations. It seems likely to us that any factor which links the parties and the occurrence to a greater degree than the locus delicti does, and which justifies the displacement of the lex loci delicti, will arise less from the existence of a common habitual residence as such than from (for example) the fact that the parties were jointly engaged upon a common enterprise, or were linked by some pre-existing relationship. It therefore appears to us that the application of the law of the parties' common habitual residence as such cannot be justified on grounds of principle.

4.102 The second ground upon which a common habitual residence exception could be supported is that a common habitual residence may frequently suggest that there is a link between the parties which would render the locus delicti comparatively insignificant. This could justify the use of a common habitual residence exception on the pragmatic ground

that it would in practice result, in a sufficiently large proportion of cases, in the application of a more appropriate law than the lex loci delicti. It must be admitted that of the three specific exceptions which we discuss here and in the following paragraphs, only the common habitual residence exception could have achieved the application of English law in Boys v. Chaplin, or Scots law in McElroy v. McAllister; and the use of such an exception in a number of foreign systems may indicate that it produces acceptable results in practice. However, we are not sufficiently confident of this to conclude that such an exception should definitely be adopted. Comments are invited.

(b) Pre-existing relationship exception

4.103 We turn now to the possibility of an exception which would apply where there was a pre-existing relationship between the parties. Where there was such a relationship, the lex loci delicti would not apply; instead, the law governing or appropriate to the relationship would apply. Two questions arise in relation to such an exception:

(1) What kind of relationship should trigger the exception?

(2) Will the existence of such a relationship indicate in principle or in practice a system of law more appropriate than the lex loci delicti?

4.104 As to the type of relationship, there would appear to be a choice between, on the one hand, confining the qualifying relationships to specific legal ones, and, on the other hand, allowing any relationship to qualify, even if merely social. The latter possibility clearly raises formidable problems of definition, which in our view would be incapable of a priori resolution. In the absence of definition, however, a pre-existing relationship exception appears to us to have no advantage over the general exception which we discuss below.[456]

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456 Paras. 4 118 - 4.123.

4.105 A pre-existing relationship exception would therefore, in our view, have to be based on a legal relationship. However, it does not seem to us that all such relationships can qualify. It would seem to be manifestly absurd that a pre-existing legal relationship between the parties should always be sufficient to justify the displacement of the lex loci delicti, and the application instead of the law governing the pre-existing legal relationship, if the relationship in question was unconnected with the tort or delict. The mere existence of a pre-existing legal relationship could, again, be just as "fortuitous" as the locus delicti. For example, the most obvious case of a pre-existing legal relationship is perhaps a contract, but it cannot in our view be right that a tort or delict which was entirely unconnected with the contract but which was committed by one contracting party against the other should be decided by the proper law of the contract as such. (There might be other reasons for applying the law which happened also to be the proper law of the contract, but the mere existence of the contract should not of itself be conclusive.) The problem would become incapable of solution if there were two contracts between the parties, governed by different proper laws. The existence of a special legal relationship, such as (for example) those of trustee and beneficiary, lessor and lessee, solicitor and client, or even husband and wife, does not in itself seem to us to give rise to a case for displacing the lex loci delicti.

4.106 What is therefore necessary, if such an exception is to work, is a relevant pre-existing legal relationship. This again introduces a problem of definition. It does not seem to us practicable to enumerate in advance what pre-existing relationships would be relevant. A decision as to what was or was not relevant would, in the final analysis, have to be left to the court. This being so, a "pre-existing relationship" exception, even if confined to legal relationships, does not in fact seem to us to have any advantage over a more general exception such as that discussed below.[457]

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457 Paras. 4.118 - 4.123.

4.107 However, one way of confining such an exception would be to adopt a provision such as that contained in the Swiss proposals, namely that -

> "...where a wrongful act constitutes an infringement of a pre-existing legal relationship between wrongdoer and victim, a claim based upon that act is governed by the law applicable to that legal relationship."[458]

It is thus not enough that there be "une relation quelconque avec un rapport préexistant":[459] there must be not only a pre-existing legal relationship, but also an act which is in breach of that relationship. The obvious case is of a tort or delict which is also a breach of contract.

4.108 It is not entirely clear to us whether the Swiss provision is intended simply to operate as a choice of law rule whereby the claim in tort or delict and the pre-existing legal relationship would be governed by the law of the same country, or whether it is intended to prevent the claimant from relying on any claim in tort or delict, and to require him to rely on any remedy arising out of the pre-existing legal relationship. We do not believe the latter would be practicable in the United Kingdom. Although, on the other hand, there is clearly an argument based on convenience in favour of deciding a claim in tort or delict and a claim in (for example) contract by the law of the same country, if both claims spring from the same incident, there does not seem to us to be any reason of principle why the claimant (or indeed the wrongdoer) should be confined to the tort or delict rules of the country whose law also governed the contract. The tort or delict may have no connection at all with the country of the proper law of the contract. In many cases such an exception would also raise the preliminary issue of whether or not the alleged tort or delict was, in fact, a breach of contract; and the law applicable to the tort or delict could not be determined until that issue was disposed of. Further, the question of definition remains, for there

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458 Article 129(3). See Appendix.

459 Report accompanying the Swiss proposals, section 284.222, p. 157.

are relationships which do not seem to fit within this type of exception: for example, would the relationship between husband and wife count as a pre-existing legal relationship, and what would constitute a breach of it? Finally, an exception restricted in this way would in any event, in our view, cover only a small proportion of the cases in which it would be justifiable to displace the lex loci delicti.

4.109 We have for these reasons reached the provisional conclusion that a "pre-existing relationship" exception would either have to be so confined that it would be unsatisfactory and would have very little application, or that (if not so confined) it would have no advantage over the general exception which we discuss below.[460]

(c) Common enterprise exception

4.110 The common enterprise exception is more subtle than the common habitual residence exception, but would be one way of dealing with some of the "special relationship" or "insulated environment" cases to which attention has already been drawn. We are not, however, aware of provision for such an exception in the systems of foreign law which we have surveyed.

4.111 The exception would apply where a claim arose from an injury or damage which occurred in the course of a common enterprise centred in a country other than the locus delicti. In such a case the lex loci delicti would not apply: instead, the law of the country where the common enterprise was centred would govern the rights inter se of those participating in the exercise. The exception is thus aimed at some of the very situations which give rise to unacceptable results under a strict lex loci delicti rule: namely the "fortuitous" locus delicti, where neither the occurrence nor the parties to the action have any significant connection with the locus delicti, but where there is nevertheless the unifying factor described as a "common enterprise", not necessarily amounting to a pre-

460 Paras. 4.118 - 4.123.

existing legal relationship (although such a relationship would not be inconsistent with a common enterprise exception).

4.112 Clearly the idea of a common enterprise must, if it is to represent a factor which unites the parties more than the locus delicti does, apply only to cases where the parties are carrying on some activity with a common purpose which is being pursued together, not separately. (It could not be said, for example, except in the loosest sense, that the passengers in an aircraft on a scheduled flight were engaged in a "common enterprise".) Examples of a "common enterprise" might be a motoring trip[461] or any excursion undertaken in co-operation; a commercial joint venture; or a joint publication (where both the authors and the publisher could be said to be engaged in a common enterprise). However, although examples may be provided, the main problem with an exception like this is again one of definition: what is to be included within the notion of a "common enterprise", and (perhaps more difficult) how is the place where it is centred to be discovered? While it is easy to see that two or more people who are (for example) jointly engaged upon some expedition, or in writing a book, are engaged in a common enterprise, and easy to accept that their relations inter se should be governed by the law of the country which gave birth to their relationship, it is not quite so easy to define where their enterprise is centred if it includes more than one foreign element. If two Englishmen fly to Switzerland, and there hire a car and drive into France to visit a business acquaintance but have an accident in which one of them is injured, what is their common enterprise, and where is it centred? What of a hitch-hiker picked up by a family touring on the continent: is he part of a common enterprise, and, if so, is it the same one as that of the family, or a different one? It is clear that a common enterprise exception would raise formidable problems of definition, and it appears to us that with this exception, as with the pre-existing relationship exception discussed immediately above, the absence of such

461 As in Babcock v. Jackson 12 N.Y. 2d 473, 191 N.E. 2d 279 (1963); [1963] 2 Lloyd's Rep. 286. See para. 4.94(2) above.

definition would seriously diminish its advantages over the general exception discussed below.[462]

4.113 The second problem with a common enterprise exception has also been encountered before in connection with the other exceptions which we have considered. The mere existence of a common enterprise could be just as "fortuitous" as the locus delicti: a tort or delict could have little or no connection with the common enterprise upon which the parties were engaged. It would therefore be necessary either to confine the application of the exception to cases where the tort or delict was connected with the common enterprise (and we are not confident that the relevant connection could be satisfactorily defined), or to make the assumption that the existence of a common enterprise would in an acceptably high proportion of cases coincide with circumstances in which the displacement of the lex loci delicti was appropriate. We are not confident that this assumption would be justified, and there may also be cases where displacement of the lex loci delicti would be appropriate even though there was no common enterprise.

4.114 Although we believe that the notion of a common enterprise represents a more relevant and principled connecting factor than those embodied in the other specific exceptions which we have discussed above, and that given adequate definition it would in many cases indicate a law more appropriate than the lex loci delicti, our provisional conclusion is that such an exception cannot be defined in terms which would give it any advantage over the general exception which we discuss below.[463]

(ii) Our provisional conclusions on specific exceptions

4.115 The foregoing discussion highlights the problem which is raised by any attempt to introduce strict rules into the field of choice of law in tort and delict. As we have seen, the lex loci delicti has a strong prima

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462 Paras. 4.118 - 4.123.

463 Paras. 4.118 - 4.123.

facie claim to application, but a lex loci delicti rule by itself has been shown to be inadequate. Attempts to refine it by the introduction of well-defined exceptions seem to us, however, to run up against the paradoxical difficulty that no single specific exception is wide enough, in that each leaves to the general lex loci delicti rule some cases where the general rule should be displaced; and each exception is simultaneously too wide, in that it displaces the general rule in some cases where it should not.

4.116 The first aspect of this difficulty could in theory be met by adopting, not just one specific exception, but a series of them. There would probably be rather few cases where none of the proposed exceptions applied and yet where to apply the lex loci delicti would be inappropriate. However, although this may make the inclusion of all of the exceptions (and not just one or some of them) seem attractive, a new problem would be created: the possibility of more than one exception applying, each pointing to a different choice of law. The only way to resolve this problem would be to arrange the exceptions in order of priority, but it is hard to see on what basis this could be done, and the result would be a very complex set of statutory rules. We do not, therefore, find this solution attractive, but comments are invited.

4.117 The second aspect of the difficulty (namely that some cases may fall within the boundaries of a specific exception in circumstances where it would not be appropriate to displace the lex loci delicti) could be met by making the specific exceptions non-mandatory: in other words, formulating them so that the lex loci delicti would be displaced in favour of the law indicated by the exception only if it was in fact appropriate to do so in the circumstances of the case. Our provisional conclusion is that specific exceptions of this type would have, on balance, no advantage over the general exception which we discuss next.

(iii) A general exception

4.118 The alternative to a specific exception, or a series of such exceptions, appears to us to be a general exception whose operation would not be confined to any particular set of circumstances. The precise formulation of such an exception would be for further consideration, but we provisionally propose an exception which would permit the displacement of the lex loci delicti in favour of the law of the place with which not only the occurrence but also the parties had, at the time of the occurrence, the "closest and most real connection".[464] There would therefore be no requirement of common habitual residence, or of a pre-existing relationship, or of a common enterprise: the only test would be that the occurrence and the parties had their closest and most real connection with a country other than the locus delicti. In view of the difficulties of definition which we perceive in connection with the specific exceptions discussed above, we have reached the provisional conclusion that it would not be practicable to define further the concept of "closest and most real connection".

4.119 A general exception has been included in a number of schemes for choice of law in tort and delict, including the Austrian and the Swiss.[465] It was also included in Articles 10 and 13 of the E.E.C. Draft Convention,[466] and in Article 14(2) of the proposed Benelux Uniform Law relating to Private International Law, originally promulgated in 1951 and revised (without change in the tort and delict provisions) in 1969. Although the Benelux Uniform Law never entered into force as such, it

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464 This test is similar to that used in the Restatement Second, which we discuss below: see paras. 4.136 - 4.139. It is also analogous to the formula defining the proper law of a contract.

465 See Appendix. The Swiss provision is not confined to tort and delict.

466 See Appendix.

has been adopted by courts in the Netherlands[467] and in Luxembourg.[468] The scheme of the United States Restatement Second is different, but the sections dealing with particular torts and issues also contain a presumption which is subject to displacement by a test similar to the general exception here proposed.[469]

4.120 The advantage of a general exception is that it would permit the displacement of the lex loci delicti in appropriate cases, without limiting either the systems of law in favour of which the lex loci delicti could be displaced, or the circumstances in which such displacement could take place. Any system of specific exceptions such as those we have discussed above would limit both of these things, and would also raise problems of definition which would be absent from a general exception. The circumstances which give rise to tort and delict cases are so varied that a general exception appears to us to be best adapted to cope with any case which may arise.

4.121 One possible disadvantage of a general exception is that a tendency may develop for courts to apply the lex fori where possible, by resorting to the general exception in inappropriate cases; but the major disadvantage is clearly the uncertainty inherent in a general exception. Here again the tension between certainty and refinement becomes apparent. The uncertainty would be greater than for specific exceptions of mandatory application. It would also be slightly greater than for

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467 De Beer v. De Hondt, Court of Appeal, The Hague, 16.6 1955, (1956) 3 Nederlands Tijdschrift v.i.r. 290. Cf. Court of Appeal, The Hague, 28.12.1934, N.J. 1937, No. 108, which is to the opposite effect. See Appendix.

468 Luxembourg Cour Supérieure de justice, 16.6.1970, (1970) 21 Pasicrisie Luxembourgeoise 347.

469 We discuss the Restatement Second below at paras. 4.136 - 4.139.

specific exceptions which were not of mandatory application, since its potential field of application would be wider, but in our view there would be little point in introducing such exceptions: if the uncertainty inherent in specific exceptions not of mandatory application is acceptable, then so also (in our view) is that inherent in a general exception. The main choice, in our view, lies on the one hand between one or more specific exceptions of mandatory application, and on the other hand a general exception. For the reasons outlined we provisionally favour a general exception. Comments are invited.

4.122 However, we have also reached the provisional view that a general exception which was not confined in its operation would render our choice of law rule as a whole unacceptably uncertain. The fact that it is difficult to catalogue the circumstances in which the lex loci delicti should be departed from does not, in our view, justify an exception which would in practice permit the application of the lex loci delicti to become discretionary, or departure from it arbitrary; as we have said, the lex loci delict has a strong prima facie claim to application. It therefore seems to us that a threshold or trigger requirement should be built in to any general exception, which would serve to prevent departure from the lex loci delicti in the absence of strong grounds for doing so. It would thus be insufficient for displacement of the lex loci delicti that the parties and the occurrence merely had a closer and more real connection with another country than they did with the locus delicti:[470] a further requirement would be necessary. Comments are invited upon whether, in principle, such a threshold requirement should be provided for.

4.123 The formulation of such further requirement is for consideration. It would, for example, be possible to provide, in increasing order of stringency, that displacement of the lex loci delicti would not be permitted unless -

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470 This seems, however, to be sufficient for the Austrian provisions, article 13 of the E.E.C. Draft Convention, and article 14(2) of the proposed Benelux Uniform Law. See Appendix.

(a) the occurrence and the parties had only **an insignificant connection** with the locus delicti, and also a substantial connection with another country;[471] or, alternatively,

(b) the occurrence and the parties had **no connection at all** with the locus delicti apart from the fact that the tort or delict was committed there, but did have a substantial connection with another country.

We seek views on the stringency of any threshold requirement which would be incorporated into the general exception. Our tentative view is that to require the total absence of connection with the locus delicti apart from the commission there of the tort or delict would go too far, and that an acceptable balance between certainty and flexibility would be achieved by permitting the lex loci delicti to be displaced in favour of the law of the country with which the parties had the closest and most real connection, provided their connection with the locus delicti was insignificant and their connection with the other country substantial, as in alternative (a) above. Comments are invited.

(iv) A possible cumulative scheme

4.124 We have so far discussed the specific exceptions and the general exception as if they were mutually exclusive. However, a possible alternative scheme would include both types of exception, but would make them cumulative. In other words, the lex loci delicti would provide the basic rule, but would be automatically displaced in favour of such system of law as was indicated by any applicable specific exception. (If more than one specific exception were included, it would be necessary to arrange them in order of precedence. As we have already mentioned, we find it hard to see on what basis this could be done.) The general exception would then apply as a residual or "safety-net" provision; it would be capable of displacing the lex loci delicti if no specific exception applied, and would also be capable of displacing the system of law indicated by any applicable specific exception. In both cases the

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471 As in article 14 of the Swiss proposals and perhaps also article 10 of the E.E.C. Draft Convention: see Appendix.

displacement, subject to any threshold requirement, would be in favour of the law of the country which had the closest and most real connection with the occurrence and the parties. Under such a scheme the general exception should fall to be used only rarely. This cumulative scheme is the one which is adopted by the Swiss proposals.[472] Our provisional view, however, is that such a statutory scheme would be undesirably complex, and should not be adopted in the United Kingdom. Comments are invited.

(v) The relationship between the general exception and the definition of the locus delicti in multi-state cases not involving personal injury, death, or damage to property

4.125 It seems to us that the identification of the locus delicti in a multi-state case should be separate from the question whether the lex loci delicti (as thus identified) should be departed from in the circumstances of the particular case, in accordance with an exception to the lex loci delicti rule. The identification of the locus delicti in a multi-state case should therefore take into account only the particular distribution of the elements in the train of events, and no account should be taken of any other factor, such as the characteristics of the parties and their relationship. Factors such as these should, we believe, be relevant only to any exception to the lex loci delicti rule. However, in view of the similarity of the formulae which we propose for the general exception to the operation of the lex loci delicti rule, and for the definition of the locus delicti itself in a multi-state case not involving personal injury, death, or damage to property,[473] it must be conceded that if our provisional proposals were accepted, the operation of the definition of the locus delicti and the operation of the general exception (although in theory separate) might in practice tend to merge in some multi-state cases. We do not believe that this would in fact give rise to any problem, or that it should in every multi-state case be compulsory to separate rigidly the definition of the locus delicti and the operation of the general exception.

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472 Article 14. See Appendix.

473 See above, paras. 4.83 - 4.89.

4. The "proper law of the tort" and the Restatement Second

4.126 We now turn away from the lex loci delicti rule and consider, finally, a completely different option for reforming our choice of law rule in tort and delict, namely the application of the "proper law of the tort". Our private international law has for many years provided for a contract to be governed by its "proper law" - that is, in the absence of choice by the parties, the system of law with which the contract had the closest and most real connection at the time it was made. The idea that liability in tort and delict should be governed by the proper law of the tort, analogous in conception to the proper law of a contract, was developed by Dr. J.H.C. Morris,[474] who expressed the view that -

> "... it seems unlikely that a single mechanical formula will produce satisfactory results when applied to all kinds of torts and all kinds of issues."[475]

4.127 The preceding discussion of other options for reform, from which it is clear to us that any mechanical formula will have to be qualified by exceptions, seems amply to demonstrate the truth of this proposition. Dr. Morris's suggestion was, therefore, that -

> "[a] proper law approach, intelligently applied, would furnish a much-needed flexibility. It may be conceded that in many, perhaps most, situations there would be no need to look beyond the law of the place of wrong, so long as there is no doubt where that place is. But we ought to have a conflict rule broad and flexible enough to take care of exceptional situations as well as the more normal ones, or else we must formulate an entirely new rule to cope with the exceptional situations. Otherwise the results will begin to offend our common sense."[476]

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474 The idea was aired in a comment on McElroy v. McAllister 1949 S.C. 110 which appeared in (1949) 12 M.L.R. 248; and more fully developed in "The proper law of a tort", (1951) 64 Harv. L.R. 881. See also Dicey and Morris, pp. 932-936; Morris, The Conflict of Laws (3rd ed., 1984), pp. 304-305.

475 Morris The Conflict of Laws (3rd ed., 1984), p. 304.

476 Morris "The proper law of a tort", (1951) 64 Harv. L.R. 881, 884-885.

The essence of his proposal is that -

> "[i]f we adopt the proper law of the tort, we can at least choose the law which, on policy grounds, seems to have the most significant connection with the chain of acts and consequences in the particular situation before us."[477]

4.128 Dr. Morris's approach to finding this law involves taking into account a number of factors apart from the place where the tort or delict occurred (if there can be said to be such a place), such as the social "environment"[478] of the tort or delict, the extent to which the tort or delict was connected with the place where it occurred, the particular issue involved, and the purposes of the laws in conflict and the interests of the states involved. The proper law is thus found by taking into account both geographical and other indicators.

4.129 The proper law approach has been widely discussed and an approach akin to it appears to have been adopted in Norway.[479] We are however not aware that it has been adopted as such as the basic choice of law rule in any other country, although its adoption has been suggested in Canada,[480] where a Special Committee of the Conference of Commissioners on Uniformity of Legislation in Canada had by 1963 been led -

> "... to accept the arguments of Professor Morris, first, that a proper law principle, intelligently applied in the area of foreign torts, would furnish flexibility where it is much needed, and second, that it

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477 Ibid., 888.

478 Dicey and Morris, p. 934.

479 Transactions of the 11th session of the Hague Conference on Private International Law (Traffic Accidents Convention), Vol. III (1970), pp. 47-48.

480 Draft Foreign Torts Act (1966). Text and discussion in Castel, Canadian Conflict of Laws, Vol. 2 (1977), pp. 643-646 and in Morse, pp. 325-326. See Report of Proceedings of the 48th Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1966), p. 62.

would facilitate a more rational means of solving the foreign torts problem than does either the rule in Phillips v. Eyre or the place of wrong rule."[481]

The influential United States Restatement Second, which we discuss below,[482] can also be seen as a particular manifestation of the proper law approach; and in England and Wales it has been approved by Lord Denning.[483]

4.130 Flexibility is the great attraction of a simple choice of law rule which would apply the law which had "the most significant connection with the chain of acts and consequences".[484] This simple rule would allow a judge to apply the law which appeared most appropriate in the circumstances before him. It would be possible to concentrate on the particular facts; the temptation to re-classify an issue so as to avoid treating it as an issue in tort or delict would be reduced;[485] and such an approach would also wholly avoid the exceptions which, as we have seen above, appear to us to be a necessary part of any choice of law system based upon a more closely defined general rule. Further, the proper law approach entirely does away with the problems raised in trying to define a locus delicti, since it does not assume that there is a locus delicti. The proper law approach is also attractive in that it seeks to apply the most appropriate law in every case.

4.131 However, the attractions of a bare proper law rule are purchased at a high price. The great disadvantage of the proper law approach on its own is its uncertainty. The idea of the proper law of the

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481 Read, "What Should be the Law in Canada Governing Conflict of Laws in Torts?" (1968) 1 Can. Leg. Stud. 277, 289.

482 Paras. 4.136 - 4.139.

483 Boys v. Chaplin [1968] 2 Q.B. 1, 26 (C.A.); Sayers v. International Drilling Co. N.V. [1971] 1 W.L.R. 1176 (C.A.).

484 Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881, 888.

485 See above, para. 4.17.

tort was almost at once criticised on this ground;[486] Ehrenzweig has spoken of "the 'give-it-up formulas' of the 'proper law' ";[487] and it was on this ground that the House of Lords in Boys v. Chaplin were worried about the proper law approach.[488] We make proposals which attempt to deal with this point below.[489]

4.132 Dr. Morris himself has refuted the charge of unacceptable uncertainty by pointing to the field of contract, where the demands of certainty are much more stringent than in the field of tort and delict, and where our private international law has developed the idea of the proper law with apparently perfectly acceptable results.[490] There are, however, two points to be made here. The first is that the validity of this comparison with the field of contract appears to us to be doubtful to the extent that the parties to a contract may expressly choose the governing law, even though in many instances they do not.[491] Where they do not, there is nevertheless a principle which may be used implicitly in the search for the proper law of a contract, namely the intentions to be imputed to the parties. No such principle is available in the field of tort and delict, where a proper law would have to be chosen on the basis of the circumstances alone. Secondly, it is also necessary to bear in mind that our reformed choice of law rule is intended to be cast from the outset in statutory form, unlike the choice of law rule in contract, which grew up

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486 Gow, "Delict and private international law", (1949) 65 L.Q.R. 313, 316.

487 Ehrenzweig, Private International Law, General Part (1967), p. 72.

488 [1971] A.C. 356, 377G - 378A per Lord Hodson, 381C - D per Lord Guest, 383G per Lord Donovan, 391B - E per Lord Wilberforce, 405G - H per Lord Pearson.

489 Paras. 4.136 - 4.142.

490 Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881, 883, 894; and The Conflict of Laws (3rd ed., 1984), p. 305.

491 Boys v. Chaplin [1971] A.C. 356, 377-378 per Lord Hodson.

over the years through a gradual accretion of judicial decisions. Although the proper law of the contract approach has, in effect, now been reduced to writing and incorporated into a convention,[492] a proper law of the tort or delict rule would not have the benefit of the same background, and although such a rule might in theory have grown up in the same way as the proper law of the contract, it did not in fact do so. A statutory rule would, we believe, have to contain more than a simple assertion that the proper law of the tort or delict was to apply: such a rule would merely be a statement of the desired result and would provide no guidance about how to reach it. That guidance would in our view have to come from a statutory framework, and the further question therefore arises of what form this statutory framework should take and how far it should extend.

4.133 Our provisional conclusion is, therefore, that a pure proper law rule, without elaboration, would be unacceptably uncertain, and unsuitable for statutory reform. Comments are invited on this view. The question remains whether a proper law rule could be adapted in order to make it acceptable. There appear to us to be two ways in which this might be done.

4.134 The first way would be to add to the basic proper law rule a list of factors, stated in general terms and without reference to any particular type of tort or delict, which would be taken into account when identifying the proper law in any particular case. In the field of contract, an analogous approach has been adopted in the United Kingdom in relation to the concept of reasonableness provided for in section 11 (for England and Wales and for Northern Ireland) and section 24 (for Scotland) of the Unfair Contract Terms Act 1977. Schedule 2 to that Act provides

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492 E.E.C. Convention on the Law Applicable to Contractual Obligations (1980), (1982) U.K. Treaty Series Miscellaneous No. 5, Cmnd. 8489. The United Kingdom has signed, but not yet ratified, this convention.

guidelines for the application of the reasonableness test by listing five "matters to which regard is to be had in particular" when determining whether a contract term satisfies the requirement of reasonableness. In Canada, the draft Foreign Torts Act[493] proposed in 1966 by a Special Committee of the Conference of Commissioners on Uniformity of Legislation in Canada, which provides that "the local law of the state which has the most substantial connection with the occurrence and with the parties"[494] should apply, lists four "important contacts"[495] for a court to consider in determining whether a state has such a substantial connection.

4.135 We have, however, reached the provisional conclusion that the addition to the basic proper law rule of a list of such factors or guidelines would not of itself be sufficient to introduce into the basic rule an acceptable degree of certainty. It would be desirable to arrange the factors to be taken into account in order of importance, but we can see no principled way in which this could be done, since the importance which should be attached to each factor would differ from case to case. Further, a mere catalogue of the factors present would not necessarily point in the direction of any particular system of law.

4.136 A different way of building on the proper law principle would be to provide presumptions as to the applicable law for certain defined types of tort or delict. A scheme which combines what is effectively a basic proper law rule with a series of presumptions is contained in the United States Restatement Second, which, indeed, has the support of

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493 See para. 4.129 above.

494 Clause 1: see n. 480 above.

495 Clause 2: see n. 480 above.

Dr. Morris himself.[496] This we regard as a more promising approach, and the Restatement has been relied upon in a number of United States decisions.[497] The Restatement Second covers the whole of the conflict of laws, but as far as tort and delict is concerned it in effect seeks to apply the proper law, but provides a more detailed set of rules by which to find the proper law in a particular case. It differs, however, from a proper law rule in that it starts off with a set of basic general principles: these apply throughout, and not only to the provisions on tort and delict.[498] These general choice of law principles are, in section 145, incorporated into the general choice of law rule for torts and delicts, which is -

"(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant

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496 Morris, book review, (1973) 21 Am. J. Comp. L. 322, and see The Conflict of Laws (3rd ed., 1984), p. 305. On the Restatement generally in this context, see Morse, pp. 259-263.

497 For example, Ingersoll v. Klein 46 Ill. 2d 242, 262 N.E. 2d 593 (1970); Pancotto v. Sociedade de Safaris de Mocambique, S.A.R.L. 422 F. Supp. 405 (1976); Crim v. International Harvester Co. 646 F. 2d 161 (1981). Such an approach has been suggested in Australia: Pryles, "The remission of High Court actions to subordinate courts and the law governing torts", (1984) 10 Syd. L.R. 352, 377-378, following Poznia v. Smith (1982) 56 A.L.J.R. 707, 714 per Mason J.

498 These resemble the "choice-influencing considerations" which are discussed above at paras. 4.51 - 4.54. The basic general principles are laid down in section 6 and are as follows:

"(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied".

relationship to the occurrence and the parties under the principles stated in [section] 6.

(2) Contacts to be taken into account in applying the principles of [section] 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue."

4.137 The Restatement Second then goes on from this basic choice of law rule in tort and delict to provide more specifically for particular torts and delicts, or issues in tort and delict. For example, section 146 provides:

"In an action for a personal injury, 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 under the principles stated in [section] 6 to the occurrence and the parties, in which event the local law of the other state will be applied."

Further detailed rules are provided, covering different types of tort or issue.

4.138 The approach of the Restatement Second has not escaped criticism. As with a basic proper law rule, the most serious charge against the Restatement is, of course, that of uncertainty,[499] since the general rule of section 145 contains no indication of how the relative importance of the contacts there listed is to be assessed, nor any

499 See, e.g. Ehrenzweig, (1965) 113 U. Pa. L.R. 1230, 1243 and (1968) 17 I.C.L.Q. 1, 8.

indication of what other contacts might be relevant; and the same is true of the list of choice of law principles in section 6. However, in our view, the Restatement answers this criticism by providing further, more precise, rules for individual torts and delicts and issues in tort and delict, while retaining throughout the "most significant relationship" test as the basic rule.

4.139 We have reservations about the usefulness of the general principles contained in section 6 of the Restatement; and the Restatement provides a set of rules which we believe may be rather too detailed for our purposes.[500] We have nevertheless reached the provisional conclusion that a proper law approach combined with presumptions as to the proper law for particular types of tort and delict represents a possible option for reform of our choice of law rule.

4.140 The basic rule which we provisionally propose would be that the applicable law should be that of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection. To this basic rule would be added a number of rebuttable presumptions. The question of what those presumptions should be has, we believe, already been partly answered in another context above. In our discussion of the definition of the locus delicti for the purposes of a choice of law rule based on the lex loci delicti,[501] we reached the view that there were strong reasons of policy for applying, in a case of personal injury or damage to property, the law of the country where the person was when he was injured or the property was when it was damaged; and, in a case of death, the law of the country

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500 Hancock, writing in the Canadian context, thought inter alia that the Restatement was "far too elaborate and detailed for Canadian purposes at the present time": Report of Proceedings of the 48th Annual Meeting of the Conference of Commissioners on Uniformity on Legislation in Canada (1966), p. 60.

501 Paras. 4.61 - 4.91 above.

where the fatal injury was received.[502] These reasons of policy are not altered merely because of a different formulation of the general rule. Accordingly, our proposal is that the following presumptions should be added to the basic proper law rule: the country with which the occurrence and the parties had the closest and most real connection would, unless the contrary were shown, be presumed to be -

(1) in a case of personal injury or damage to property, the country where the person was when he was injured or the property was when it was damaged;

(2) in a case of death, the country where the deceased was when he was fatally injured.

These presumptions would, of course, not be confined to multi-state cases: they would apply in all cases; and in practice would, we believe, leave few torts and delicts to be dealt with according to the general proper law rule. We consider below, in Part V, whether any further presumptions should be added to the list, but we here invite comment on the proper law approach with presumptions which we have proposed.

4.141 In connection with the proposed presumptions, a further question arises. It will be recalled that, in the context of the "general exception" to our proposed lex loci delicti choice of law rule, we discussed whether there should be a threshold which would require to be surmounted before it was permissible to depart from the lex loci delicti rule and apply the general exception instead.[503] A similar question arises here: should there be a threshold which would require to be surmounted before it was permissible to depart from any presumption? In other words, how easy should it be to rebut the presumptions? Our provisional view, upon which comments are invited, is that there would be little point in providing presumptions if they were very easily rebutted, and this would also reduce

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502 Paras. 4.78 - 4.82 above.

503 Paras. 4.122 - 4.123 above.

the degree of certainty of the proper law scheme as a whole. We therefore propose that a threshold requirement should be introduced. The height of this threshold is for consideration, and comments are invited. We considered this question also in the context of the lex loci delicti option, and there reached the view that the threshold should at least insist that the parties and the occurrence had an insignificant connection with the locus delicti, and a substantial connection with another country.[504] Our provisional view is that the corresponding threshold for our proper law proposals should be at least as high: that the presumptions should not be departed from unless the parties and the occurrence have an insignificant connection with the country indicated by the presumption, and a substantial connection with another country. Comments are invited.

4.142 Our provisional conclusions relating to the proper law option are, therefore, that a proper law rule, combined with a number of presumptions (which would be rebuttable, although not easily so) as to the place with which the occurrence and the parties had the closest and most real connection, represents a possible option for reforming our choice of law rule in tort and delict.

D. SUMMARY

4.143 In this Part of our consultation paper we have considered eight different options for reforming our present choice of law rule in tort and delict. We reached the provisional conclusion that six of them would not be acceptable. These were:

(i) the lex fori alone [discussed at paras. 4.24 - 4.29]

(ii) the lex fori with exceptions [discussed at paras. 4.30 - 4.34]

(iii) governmental interest analysis [discussed at paras. 4.36 - 4.45]

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504 Para. 4.123 above.

(iv) principles of preference [discussed at paras. 4.46 - 4.50]

(v) choice influencing considerations [discussed at paras. 4.51 - 4.54]

(vi) the lex loci delicti alone [discussed at paras. 4.55 - 4.60, 4.92 - 4.95]

We invited comments on our views on these options.

4.144 Either of the remaining two options could, we provisionally concluded, provide a satisfactory reformed choice of law rule in tort and delict. We considered these options primarily in connection with personal injury, death, and damage to property: we consider other types of tort and delict in Part V below. These remaining two options are as follows, and we invited comments on our views on them.

Model 1: The lex loci delicti with exception

General rule

The lex loci delicti applies.

Definition of the locus delicti for multi-state cases

[Discussed at paras. 4.61 - 4.91]

(i) personal injury and damage to property

the locus delicti is the country where the person was when he was injured or the property was when it was damaged;

(ii) death

the locus delicti is the country where the deceased was when he was fatally injured;

(iii) other cases

the locus delicti is the country in which the most significant elements in the train of events occurred.

Rule of displacement

[Discussed at paras. 4.118 - 4.123]

The lex loci delicti may be displaced in favour of the law of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection.

[The question of a threshold requirement is discussed at paras. 4.122 - 4.123]

Model 2: The proper law

General rule

The applicable law is that of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection.

Presumptions

[Discussed at paras. 4.136 - 4.141]

In the case of the following types of tort or delict, the country with which the occurrence and the parties had the closest and most real connection is presumed to be, unless the contrary is shown:

(i) personal injury and damage to property

the country where the person was when he was injured or the property was when it was damaged;

(ii) death

the country where the deceased was when he was fatally injured.

[The question of a threshold requirement is discussed at para. 4.141]

4.145 We explore the implications of these two options more closely in Part V (in connection with different types of tort and delict) and in Part VI (in connection with a number of issues which arise in tort and

delict cases). The two options have the same objective: that is, the selection in an acceptably high proportion of cases of the system of law which it is most appropriate to apply. Moreover, we think that in the great majority of cases they would in fact lead to the same result. In some senses each option is the converse of the other, in that the lex loci delicti option starts with a basic rule which is refined by means of an exception framed in proper law terms, while the proper law option starts at the other end but contains presumptions in a number of cases that the lex loci delicti applies. However, the two options are different in conception: they are based on different assumptions, their machinery is quite different, and they differ in their inherent certainty.

4.146 The fundamental questions which arise out of this Part of our consultation paper, and upon which we seek views, are -

(a) whether either of these options is acceptable;

(b) if so, whether (apart from matters of detail) the technique of one of our suggested options is to be preferred over that of the other - matters of detail are discussed in the next two Parts of our consultation paper; and

(c) if not, what other rule should be adopted.