LEABHARLANN CHOLÁISTE NA TRÍONÓIDE, BAILE ÁTHA CLIATH | TRINITY COLLEGE LIBRARY DUBLIN
Ollscoil Átha Cliath | The University of Dublin

Terms and Conditions of Use of Digitised Theses from Trinity College Library Dublin

Copyright statement

All material supplied by Trinity College Library is protected by copyright (under the Copyright and Related Rights Act, 2000 as amended) and other relevant Intellectual Property Rights. By accessing and using a Digitised Thesis from Trinity College Library you acknowledge that all Intellectual Property Rights in any Works supplied are the sole and exclusive property of the copyright and/or other IPR holder. Specific copyright holders may not be explicitly identified. Use of materials from other sources within a thesis should not be construed as a claim over them.

A non-exclusive, non-transferable licence is hereby granted to those using or reproducing, in whole or in part, the material for valid purposes, providing the copyright owners are acknowledged using the normal conventions. Where specific permission to use material is required, this is identified and such permission must be sought from the copyright holder or agency cited.

Liability statement

By using a Digitised Thesis, I accept that Trinity College Dublin bears no legal responsibility for the accuracy, legality or comprehensiveness of materials contained within the thesis, and that Trinity College Dublin accepts no liability for indirect, consequential, or incidental, damages or losses arising from use of the thesis for whatever reason. Information located in a thesis may be subject to specific use constraints, details of which may not be explicitly described. It is the responsibility of potential and actual users to be aware of such constraints and to abide by them. By making use of material from a digitised thesis, you accept these copyright and disclaimer provisions. Where it is brought to the attention of Trinity College Library that there may be a breach of copyright or other restraint, it is the policy to withdraw or take down access to a thesis while the issue is being resolved.

Access Agreement

By using a Digitised Thesis from Trinity College Library you are bound by the following Terms & Conditions. Please read them carefully.

I have read and I understand the following statement: All material supplied via a Digitised Thesis from Trinity College Library is protected by copyright and other intellectual property rights, and duplication or sale of all or part of any of a thesis is not permitted, except that material may be duplicated by you for your research use or for educational purposes in electronic or print form providing the copyright owners are acknowledged using the normal conventions. You must obtain permission for any other use. Electronic or print copies may not be offered, whether for sale or otherwise to anyone. This copy has been supplied on the understanding that it is copyright material and that no quotation from the thesis may be published without proper acknowledgement.

THE CHOICE OF LAW IN TORTS

Thesis submitted in partial fulfilment of the requirements of the degree of Ph.D. at the University of Dublin, Trinity College.

By

JOHN AHERN

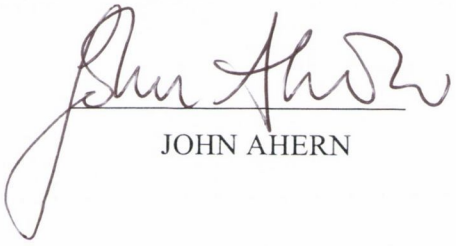
TRINITY COLLEGE
2 4 MAY 2013
LIBRARY DUBLIN

Thesis 9867

DECLARATION

I hereby declare that this thesis has not been submitted as an exercise for a degree at this or any other University and it is entirely my own work.

I agree to deposit this thesis in the University's open access institutional repository or allow the Library to do so on my behalf, subject to Irish Copyright Legislation and Trinity College Library conditions of use and acknowledgement.



JOHN AHERN

To my partner, Laura; parents, Terence and Ana;

and brother, Brian

SUMMARY

In today's increasingly global village, facilitated by the widespread availability of telecommunications, air, rail and road links, it is easy to make the assumption, particularly in multistate entities such as the United States of America and the European Union, that, from north to south and east to west, the provisions of substantive law would remain unchanged, unified and homogenous across those entities. The reality of today's global village is, however, very different.

The reality is that the world is, and these multistate entities are, in fact a collection and assemblage of individual states, federal states and semi-sovereign, quasi-federal, entities each with a particular governing regime subject to particular state interests and public policy considerations. As such, it is necessary to revert to public international law to delineate the reach of each individual entity in the context of their governing competence. The traditional understanding of multistate interaction is that the reach of state governance ends at state boundaries, borders and fringes where the effective control of physical territory ends.

However, it is at the fringes of state authority, in a physical, factual and legal sense, where the limits of traditional state laws are tested, particularly in the context of interactions between the traditional laws of multiple states. It is at the fringes, legally and conceptually, where a distinct body of law, private international law, attempts to govern, domestically, instances of multistate interaction and their implications towards questions of jurisdiction, choice of applicable law and recognition of foreign judgments.

This thesis aims to consider questions of applicable law in the context of multistate torts and other non-contractual obligations across a number of states and jurisdictions; The United States of America, The European Union, Australia, The United Kingdom, Canada, Ireland. More practically, this thesis aims to consider the relative state of rule-driven regimes versus approach-based ones and their role going forward with the view that approach-based regimes have been proven flawed, stagnant and in need of reform.

In pursuit of that aim, this thesis will set out, in Chapter 1, a brief introduction to private international law and choice of law for torts, in particular. It will set out a statement and brief discussion of the competing choice of law ideologies to be considered in detail throughout this thesis. It will outline, in brief, the ultimate hypothesis of this thesis. Additionally, it will identify the typical characteristics and sample tort fact patterns that attract attention from a private international law perspective and will be considered throughout this thesis.

Chapter 2 will focus, in extensive detail, on choice of law for torts in the United States of America. It will consider the development, evolution, rise and fall of various competing approaches and rule-driven regimes and their present state in that jurisdiction. It will additionally consider, in detail, the substance of the competing approaches and rule-driven regimes with the aim of identifying and elaborating on particular aspects therein.

Chapter 3 will consider similar issues in the other, mentioned, common law regimes; Australia, The United Kingdom, Ireland and Canada. It will consider the present position with respect to choice of law for torts and consider distinguishing aspects of those regimes again with aim of elaborating on particular aspects.

Chapter 4, finally, will consider, in detail, the European position with respect to choice of law for torts and non-contractual obligations. It will consider the position in light of preceding submissions and attempt to identify areas of similarity or concern in a regime that has yet to be tested in the European Court of Justice.

Ultimately, this thesis aims to consider the overall position with respect to choice of law for torts while individually considering the constituent components in arriving at an overall assessment in the wider, global, context.

The law is stated as of 2 August 2012.

ACKNOWLEDGEMENTS

I wish to acknowledge my sincere and grateful thanks to my supervisor, Professor William Binchy, by whom I had the privilege of being lectured in Tort Law and the Conflict of Laws as an undergraduate student in Trinity College Dublin. His time, availability, support, encouragement and wisdom have been as unwavering as they have been abundant. I consider myself privileged to have worked with Professor Binchy as a student, supervisee and, latterly, as a colleague.

In the final three years of researching this thesis I have been an Adjunct Lecturer in Law at Trinity College Dublin. I wish to thank all of my colleagues who have encouraged, supported and tolerated me in the completion of this thesis, particularly Professor Hilary Biehler, Professor Ivana Bacik, Dr. Neville Cox, Dr. Caoimhín MacMaoláin, Dr. Liz Heffernan, Mr. David Prendergast and Ms. Patricia Brazil.

I wish to especially thank Ms. Catherine Finnegan and Ms. Kelley McCabe for their support and encouragement throughout this thesis, their goodwill and friendship played a large part in facilitating its completion.

I would like to thank my brother, Brian Ahern, for his boundless good humour, support and encouragement. He has contributed immeasurably.

I would like to thank my parents, Terence and Ana Ahern, without whom this would not be possible. I am indebted to them for their love and support during the course of my education and this thesis. I owe them an enormous debt of gratitude.

Finally, and most importantly, I would like to thank my partner, Laura O'Donnell. This thesis would not have been completed without her unending love. She has carried me through the lows over the past months and years, and motivated me to persevere. I would not be here without her.

TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION		1
1.1	Introduction to Private International Law	1
1.1.1	Concept of Tort	2
1.1.2	Choice of Law	6
1.1.3	Function of Choice of Law Rules	8
1.2	Jurisdictions Chosen for Consideration	10
1.2.1	The United States of America	12
1.2.2	The United Kingdom and Ireland	13
1.2.3	Australia and Canada	14
1.2.4	Europe	14
1.3	Hypothesis	15
1.4	Sample Scenarios	16
CHAPTER 2: THE UNITED STATES OF AMERICA		18
2.1	Earliest Approaches	18
2.2	Beale and the Genesis of the *Lex Loci Delicti* Rule	26
2.2.1	Nature of Law in Private International Law	29
2.3	Construction of the First Restatement	30
2.4	Contradictions	36
2.5	Sample Scenarios Considered	39
2.6	Contemporary Critics and the Foundations for Revolution	40
2.6.1	Professor Cook	41
2.6.2	Professor Cavers	56
2.7	Revolution	64
2.7.1	Governmental Interest Analysis	65
2.7.1.1	Conclusions	89
2.7.1.2	Sample Scenarios Considered	91
2.7.2	The "Better/Proper Law"	92
2.7.2.1	Conclusions	110
2.7.2.2	Sample Scenarios Considered	120
2.8	The Second Restatement	121
2.8.1	Characterisation within the Second Restatement	140

2.8.2 The Rule in the Second Restatement 148
2.8.3 Criticisms of the Second Restatement 151
2.8.4 *Babcock v. Jackson* 155
2.8.5 Continuing Impact of the Second Restatement and *Babcock v. Jackson* 167
2.8.6 New York and *Neumeier v. Keuhner* 177
2.8.7 Sample Scenarios Considered 180
2.9 Conclusion 183

CHAPTER 3: OTHER COMMON LAW JURISDICTIONS 185
3.1 The United Kingdom 185
3.1.1 Substantive Matters 186
3.1.2 Procedural Matters 189
3.1.3 Statutory Reform 190
3.1.4 English Torts 191
3.1.5 The General Rule 192
3.1.6 Exceptions 192
3.1.7 Public Policy Exception 195
3.1.8 Sample Scenarios Considered 195
3.2 Australia – A Marked Departure 197
3.2.1 *John Pfeiffer Pty Ltd v. Rogerson* 197
3.2.2 Reasonable Expectation 199
3.2.3 Legal Certainty 199
3.2.4 *Regie National des Usines Renault SA v. Zhang* 200
3.2.5 *Neilson v. Overseas Projects Corporation of Victoria Ltd* 202
3.2.6 *Amaca PTY Ltd v. Bernard George Frost* 206
3.2.7 Sample Scenarios Considered 207
3.3 Canada 210
3.3.1 *Grimes v. Cloutier* 211
3.3.2 *Lucas v. Gagnon* 211
3.3.3 *Tolofson v. Jensen* 213
3.3.4 *Hanlan v. Sernesky* 216
3.3.5 The need, and search, for a better rule 217
3.3.6 Rule proposition in Canada 218

3.3.7 Conclusions 221
3.3.8 Sample Scenarios Considered 222
3.4 Escape from the *Lex Loci Delicti* at Common Law 225
3.4.1 Characterisation of the Question 226
3.4.2 Characterisation of the Connection to the Forum 227
3.4.3 Distinction between matters of substance and procedure 229
3.4.4 A Flexible Exception 231
3.4.5 Public Policy 235
3.5 *Renvoi* 237
3.5.1 *Neilson v. Overseas Projects Corporation of Victoria Ltd* 238
3.5.1.1 The Whole Law Approach 238
3.5.1.2 Double *Renvoi* 239
3.5.1.3 Single *Renvoi* 240
3.5.1.4 No *Renvoi* 240
3.5.2 Difficulties posed by *Renvoi's* Modern Resurrection 241
3.5.3 The Homing Tendency 245
3.5.4 Going Forward 246
3.6 Ireland 252
3.6.1 Sample Scenarios Considered 256

CHAPTER 4: EUROPE 257
4.1 Early History 258
4.2 Parliament's Legislative Role 263
4.3 The Regulation – Rome II 272
4.3.1 *Certainty v. Flexibility* 273
4.3.2 *Owusu v. Jackson* 280
4.3.3 Autonomy of Meaning 288
4.3.4 Scope of the Regulation 292
4.3.5 Non-Contractual Obligations 293
4.3.6 Civil and Commercial Matters 301
4.3.7 The General Rule 305
4.3.8 Exceptions to the General Rule 313
4.3.8.1 Common Habitual Residence 314
4.3.8.2 The Closer Connection Escape 320

4.3.9 Forum Influence – Overriding Mandatory Provisions, Public Policy and Damages 323
4.3.9.1 Public Policy 323
4.3.9.2 Overriding Mandatory Provisions 327
4.3.9.3 Damages 328
4.3.9.4 *Kelly v. Groupama* 330
4.3.10 Specific Example – Product Liability 333
4.4 Sample Scenarios Considered 340
4.5 Conclusion 342

CONCLUSION 345

CASE LIST 348

BIBLIOGRAPHY 358

INTRODUCTION

It is important, at the very beginning of this thesis, to identify to component elements of private international law and to distinguish them. Questions of jurisdiction, choice of law and the enforcement of judgments are the three constituent elements of private international law. This thesis aims to consider only the issue of choice of law. This thesis aims to consider that issue in the context of interstate torts and other non-contractual obligations by examining the competing approaches of multiple competing regulatory regimes and ideologies.

This chapter will set out a brief introduction to private international law and choice of law in torts, in particular. It will set out a statement and brief discussion of the competing choice of law ideologies to be considered in detail throughout this thesis. It will outline, in brief, the ultimate hypothesis of this thesis. Additionally, it will identify the typical characteristics and sample tort fact patterns that attract attention from a private international law perspective. It will also, through identifying the competing, global, approaches to choice of law in tort, set out the structure of this thesis.

1.1 INTRODUCTION TO PRIVATE INTERNATIONAL LAW

The existence of private international law, otherwise known as the conflict of laws, is rooted in existence of individual countries and their individual, unique, legal systems. Moreso, it is the need to facilitate interaction between individual states and legal regimes that creates, in simple terms, the need for private international law.

Conflict of laws, or private international law, provides rules for dealing with cases which contain a foreign element - where some aspect of the case has connections with a country other than that of the forum. More precisely, private international law can be described as a body of domestic law charged with determining the appropriate court in which an action ought be heard, the appropriate law to be applied by the designated court and, in separate proceedings, the enforcement of a foreign judgment within the territorial boundaries of a state. In any particular case rules of private

international law may require that the rights and liabilities of the parties be decided, not by the law of the forum, the *lex fori*, but by another country's law.

As such, it is important to stress that private international law is relevant only where there exists a cross border element in a relationship. Further, it is important to identify the distinction between public international law and private international law. The former aims to govern the relationship between sovereign entities and is, purportedly, universal and homogenous in nature amongst sovereign entities whereas the latter aims to govern the relationship between private entities and is also unique to each state. This is to say that every country, in theory, has a private international law regime unique in nature.

This thesis, as already identified, aims to consider the question of applicable law in torts. However, it is important identify that this thesis is not limited to the voluntary selection of an applicable law by a party, or the parties, in a legal relationship. Rather, this thesis considers the issue of applicable law in its totality.

1.1.1 *Concept of Tort*

Given that this thesis aims to consider the private international law issue of choice of law in the context of torts, it becomes essential to consider the general meaning and understanding of tort and its relationship with private international law. From the outset it is important to note that attempting to arrive at a clear and concise definition for a tort can be difficult. The word "tort" traces its origins to the Latin word *"tortus"* which carries the meaning "twisted" or "wrung". Over time, particularly in the English form, "wrung" became "wrong" and in the legal context "tort" vanished from the normal lexicon and assumed the technical meaning it carries today.

While it can be said that there is a generally accepted view of the concept of tortious liability and what a tort actually is, it cannot be said that there is a universally agreed or accepted definition of precisely what a tort is. When viewed purely from a common law perspective it might be asserted that a tort could be understood as a civil wrong for which there is a general remedy in damages. More expansively, it might be asserted that a tort is a breach of a civil duty between private individuals or parties

that generates a civil cause of action between the parties. Similar and varied formulations have been repeatedly offered by leading historical scholars in the field of tort law:

> An act or omission, not a mere breach of contract, and producing injury to another, in the absence of any existing lawful relation of which such act or omission is a natural outgrowth or incident.[1]

> Tortious liability arises from the breach of fiduciary primarily fixed by the laws; such duty is toward persons generally, and its reach is redressible by an action for unliquidated damages.[2]

> A civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation.[3]

However, attempts to positively define a tort as a simple "wrong" cannot be entirely successful as it assumes that a harmful event must have occurred for a cause of action to arise. What then of the interlocutory action in tort? Must parties actually suffer before the law is available to them for their protection? Additionally, attempts to negatively define a tort are similarly unsatisfactory. While it can be accepted, at common law, that a tort is not a crime nor does one arise as a direct result of a contractual relationship, it is submitted that the suggestion that a negative definition of tort is acceptable is, instead, unacceptable:

> Never did a name so obstruct a true understanding of the thing. To such plight has it brought us that a favourite mode of defining a tort is to declare merely

---

[1] Cooke, A Proposed New Definition of a Tort (1899) 12 Harv L.Rev 335, 336

[2] Winfield, *Province of the Law of Tort* (1931) 32

[3] Salmond, *Law of Torts* (10th ed. 1945)

> that it is not a contract. As if a man were to define chemistry by pointing out that it is not physics or mathematics.[4]

However, it cannot be said that there is universal consistency with respect to this objection. The European scheme of harmonised regulation, following the adoption of the Rome II Regulation,[5] is premised on the idea that a tort is but one of a range of categories of liability under the wider, negative, concept of non-contractual obligations. Indeed, even within the "harmonised" framework of the Rome II Regulation there is uncertainty and ambiguity surrounding the concept of tort for European purposes. Aside from, and in addition to, the difficulty touched on above, the European private international law regime introduces ambiguity originating from the equally authentic and authoritative language versions of the Rome II Regulation that exist. Set out immediately below is an indicative example:

French:	Faits Dommageables	-	Harmful Act
German:	Unerlaubte Handlungen	-	Unlawful Act
Italian:	Illeciti	-	Illegal Act
Spanish:	Hechos Dañosos	-	Harmful Act

Nevertheless, while an acceptable definition of a tort may be difficult to arrive at it is certainly easier to identify function of tort law. Identified insightfully by Professor Binchy and Judge McMahon, tort law emerged from the growth in social activity and contact between persons and purportedly serves to balance the interests of parties.

> Since human beings are social animals they pursue their interests in a social context. Inevitably, this pursuit brings them into contact and into conflict with other persons pursuing their interests. This contact and conflict, of course, is not a new social phenomenon, but in the past century and a half, because of

---

[4] Wigmore, *Select Cases on the Law of Torts* (1912) 1

[5] Regulation EC No. 864/2007 on the law applicable to non-contractual obligations (Rome II)

> increased urbanisation, growth in population, greater and more sophisticated technology and a deeper sensitivity, interpersonal conflicts have increased in numbers and have become more complex in nature. As a result these conflicts now require more careful and more frequent resolution.[6]

Further that:

> In any society, it is inevitable that these interests, to conflict. In cases of conflict, cultures that we choose to call primitive determined who should prevail with sword and club; and there is recent melancholy evidence that the law of the jungle is not yet departed from the affairs of the nations. But in a civilised community, it is the law which is called upon to act as arbiter. The administration of the law becomes a process of weighing the interests for which the plaintiff demands protection against the defendant's claim to untrammelled freedom in the furtherance of the defendant's desires, together with the importance of those desires themselves. When the interest of the public is thrown into the scales and allowed to swing the balance for or against the plaintiff, the result is a form of social engineering. A decision maker might deliberately seek to use the law as an instrument to promote the greatest happiness of the greatest number, or instead might give greater emphasis to protecting certain types of interests of individuals as fundamental entitlements central to an integrity of person that the law upholds above all else. This process of weighing the interests is by no means peculiar to the law supports, but it has been carried to its greatest lengths and has received its most general conscious recognition in this field.[7]

It is the objective of balancing party interests that must, ultimately, come to the fore in the judicial mind in any substantive adjudication. However, it must also come to the fore in the subject matter of this thesis: The Choice of Law in Torts.

---

[6] McMahon & Binchy, *Law of Torts* (Butterworths 3rd ed. 2000), 1

[7] *ibid* at 2; Keeton, Dobbs, Keeton, Owen, *Prosser and Keeton on Torts* (5th ed. 2000) 16 - 17

1.1.2 *Choice of Law*

Operating as the second element, or stage, in private international law questions that must be dealt with by a court considering cases involving foreign elements, choice of law has been described as:

> One of the most vexed questions in conflict of laws.[8]

The aim rules and principles governing choice of law is simply to determine the most appropriate law to determine the fact pattern at hand. It is, however, the identification and weighing of indicia of appropriateness that vexes the mind, muddies the water and has caused choice of law to be additionally labelled as:

> One of the most baffling subjects of legal science.[9]

There are many reasons for difficulties to be encountered in understanding choice of law and further still, making reasoned choices on the basis of the principles discovered. One reason arises from the connecting factors to a fact pattern that lead a court to determine that the action contains a foreign element, further still the relevance and relative importance of those connecting factors once identified. The typical connecting factors include: domicile; habitual residence; ordinary residence; nationality of the parties; temporary presence in a jurisdiction; the place where the event giving rise to the damage occurs; the place where the damage is suffered.

Another reason for difficulty is that the forum might recognise multiple tortious issues within the primary action with the law of the connected countries differing as to the substantive provisions under the headings of the issues identified. For example, issues of damages, capacity, burdens of proof. Should all these issues be determined by one, singular, law?

---

[8] *Chaplin v. Boys* [1971] AC 356 per Lord Denning

[9] Cardozo, *The Paradoxes of Legal Science* (1928) 67

Further still, difficulties may arise where a forum court might be directed, by operation of its choice of law rules, to consider imposing liability where it is alien to the forum court. How should a forum proceed? Should it defer to the interest of the foreign law in imposing liability to the detriment of the forum's policy decision not to impose liability? Is a forum court mandated to act contrary to its domestic policy objectives? Should the competing interests of the affected states be weighed in addition to, or in place of, individual party interest or expectation?

Further still, in complex cross border situations, where the originating event and place of actual damage do not coincide or when either the choice of law rule or the substantive rule refers to the place where the tort occurred as opposed to the more specific variations, the multiplicity of connecting factors and impacted interests presents particular difficulties. A typical modern example of this situation might be the electronic publication of potentially defamatory content through the internet or broadcast media.

With the ever-increasing internationalisation of daily life the difficulties expressed above have become, and will continue to become, of greater concern to ordinary individuals, politicians and judges alike. Described prophetically by Morris in the following terms:

> 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 programs 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.[10]

1.1.3 *Function of Choice of Law Rules*

Apart from the theoretical complications of reconciling the competing elements above and the ideologies to be touched on below, it is important to consider the real function and rationale of choice of law rules. Inherent in arriving at a determination as to the appropriateness of an applicable law option is the requirement that at some stage in the process, be it express or not, some form of policy selection must be engaged in by a forum court. That forum court must address function interests, party interests, systemic interests and forum governmental interests in attempting to determine which party, or which choice of law, emerges. However, in engaging in a policy selection the forum must invariably attach value to and weigh the competing factors. Further still, its decision is coloured by those values and priorities. These realities are not unexpected.

As such, it might be argued the one particular function of choice of law rules is to provide justification for a desired selection of applicable law. More than simply providing justification for a selection, it might be further argued that an aim of choice of law rules is to impart reason to the decision made, to legitimise the selection of one law over the other.[11]

However, given the above it is suggested that Judge Cardozo's following words ought ring loudly in the ears of any court engaging in a choice of law process:

---

[10] Morris, *The Conflict of Laws* (3rd ed., 1984) 301

[11] Reed, The Anglo-American Revolution in Tort Choice of Law Principles: Paradigm Shift or Pandora's Box? (2001) 18 Arizona Journal of International and Comparative Law 867, 869

> We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.[12]

In addition to the cynical perception of the role and function of choice of law rules expressed above, there are a number of alternative functions that might be argued and advanced instead. It is no coincidence that these functions mirror the competing ideologies that are the subject of this thesis.

Might the function choice of law rules be a very simple one – the selection of the best law in a given fact pattern? While an admirable aim, in an interstate, multi-jurisdiction, environment it becomes virtually impossible for a forum court to make an impartial and objective determination as to which law is the best law without guidance. Guidance, were it available to a forum court, might pre-dispose it to determining the "better" according to criteria other than what is appropriate in a given fact pattern. Where guidance is not offered, a court is free to label any decision is makes as the "better law" and yields uncertainty and unpredictability in the eyes of parties.

It might also be argued that another potential function of choice of law rules is to bring private international law closer to the realm of public international law through the advancement of comity between nations as an underpinning ideal. It must, however, be suggested that choice of law is the wrong limb of private international law to suggest as advancing the alignment of public and private international law. It is suggested that this is better achieved through a strict regime with respect to the recognition and enforcement of foreign judgements.

A third potential function of choice of law rules is to advance the governmental, or state, interests connected with the determination of an action through a consideration of the potential impacts on state policy goals and objectives. In the context of an exercise in interest analysis premised on the advancement of state interest is it inevitable that the interests of the parties, those whose interests are purportedly

---

[12] *Loucks v. Standard Oil Company of New York* (1918) 120 NE 198, 201

balanced and protected by the substantive tort rules, stand a great risk of falling away against the weight of state, collective, interests. Should a forum even attempt to divine the policy objectives underpinning a foreign law it is faced with applying?

A further potential function might be the unwavering advancement of party legitimate expectation. In this regard it must not be forgotten that tort law is inherently private law concerned with the determination and assessment of liability between private individuals where there is a civil, private, duty owed between those private individuals. Should state, public, interest weigh in a court's mind or should the court focus primarily on the parties? Against this is must be recognised that there is invariably an element of public interest in the regulation and deterrence of certain kinds of conduct but should that public interest be the primary factor when a court is engaged in a choice of law process as opposed to the typical substantive analysis?

In the European context it might be argued that a further function of private international law generally, and choice of law rules in particular, is to advance the systemic interests of certainty and predictability as functional considerations rather than substantive systemic interests.

Finally, might it be the function of choice of law rules to singularly advance the interests of the forum through the selection and application of the *lex fori* only?

Against the lure of systemic predictability it must be questioned whether justice is served by the mechanistic implementation and application of a rule-driven regime? Should flexibility in the interests of individual justice be at the core of a modern choice of law regime? If so, which of the competing functions/ideologies best serves this – one, another, all?

1.2 JURISDICTIONS CHOSEN FOR CONSIDERATION

This thesis aims to consider the choice of law in torts by tracing the development of modern choice of law doctrine, first, in the most prolific incubator for private international law scholarship and judicial pronouncement – the United States of America. The consideration of the United States is intended to be in-depth and minute

in nature to serve two distinct purposes. First, to stand as an independent analysis of the choice of law regime as it stands in the United States of America today, fragmented and disjointed. Second, to serve as a comparative background against the analyses of The European Union regime, the United Kingdom position and Canada, Australia and Ireland ought be weighed.

The European Union regime was chosen as it represents the driving force of modern private international law scholarship today since a period of stagnation began in the United States of America following the adoption of the Restatement (Second) of Conflict of Laws in 1971. Further, the regime in the European Union represents a radical departure from that in the United States of America but also for member states such as the United Kingdom and Ireland. Finally, the consideration of the European Union regime is intended to serve as the second main component of this thesis.

The United Kingdom was chosen for consideration as it represents the second main source of private international law, and choice of law thought, at common law after the United States of America. Its principles, much like those of the European Union regime, are markedly different from those in the United States of America and the analysis serves the same dual purposes as that of the United States of America – to stand alone but also to be weighed against the other, distinctly different, regimes considered.

The regimes in Australia and Canada were chosen as examples of common law jurisdictions with a private international law, and choice of law, heritage aligned with that of the United Kingdom but where marked divergence has been seen versus the continuing position in the United Kingdom. The primary purpose in examining those jurisdictions is to mark the differences to the United Kingdom and the United States of America but also to show that, at common law, rather than there being a gradual alignment of ideologies and approaches as a product of increased internationalisation there has, in fact, been a distinct schism in the approaches taken with, for example, Australia now employing a strict *lex loci delicti* rule akin to the rule staunchly advocated by Professor Beale in the United States in the early twentieth century but long-since banished from that jurisdiction.

Finally, Ireland was chosen primarily because this thesis has been written by an Irish author reading at an Irish university, The University of Dublin Trinity College. As such, it would be inappropriate to exclude Ireland from the cohort of jurisdictions selected. Further, choosing Ireland serves the secondary purpose of highlighting the relative lack of jurisprudence in Ireland with respect to private international law generally and choice of law specifically. It remains the case that, at best, due to the time elapsed since a choice of law decision in the Irish court only an educated guess can be made that Ireland would like adopt a position similar to that of the United Kingdom in a fact pattern that does not involve the compulsory application of the European Union regime under the Rome II Regulation.

The following paragraphs will briefly touch on each of the above for the introductory purposes.

1.2.1 *The United States of America*

At its earliest beginnings, the private international law and choice of law regimes in the United States of America were founded on the public international law ideals of the comity between nations, the mutual respect between states but more fundamentally, that the *lex loci delicti* ought govern.

In the early decades of the twentieth century Professor Beale adopted and developed these ideas and evolved Huber's acquired rights doctrine into a mechanistic, black-letter, application of the *lex loci delicti* in virtually all instances, the Restatement (First) of Conflict of Laws in 1934. The essential rationale underpinning the conversion of the acquired rights doctrine into a strict *lex loci delicti* rule was that the right of action, once acquired in the state of the tort, attached and vests in the individual and owing to the public international concept of comity that right then follows the individual.

Following initial enthusiasm toward the First Restatement soon dwindled and the doctrine was subject to significant criticism and attack from scholars such as Professors Cook, Ynetma and Cavers. Those writers criticised the mechanistic and unyielding nature of the First Restatement. Criticisms centred on a perception that the

extreme territorialism exhibited by Professor Beale's First Restatement essentially undermined the authority of the forum by placing foreign law on a superior footing to that of the forum by compelling its adoption, without recourse to judicial discretion in appropriate circumstances, whenever a foreign element was present in an action.

Following from, and building on the destruction of the First Restatement, Professor Currie advocated a shift from the blunt jurisdiction-selecting *lex loci delicti* rule in that Restatement to a more nuanced approach favouring a regime of governmental interest analysis and balancing. A factor in the approach proposed by Professor Currie was the importance of flexibility and means to avoid the strict application of a mechanistic regime other than reverting to "escape" devices such as characterisation and *renvoi*.

The cause of flexibility was then taken up by Professor Leflar, whose suggested approach has become know for one aspect, the selection and application of the "better law" in a given fact pattern. With the First Restatement subject to criticism for its extreme rigidity the observation that Professor Leflar's approach might represent the ultimate in, perhaps inappropriate, flexibility cannot be avoided.

Following Professor Leflar's inherently flexible approach a Second Restatement of Conflict of Laws was adopted by the American Law Institute. The approach contained in the Second Restatement was one promoting the selection of the law of the state with the most significant relationship to the action based on a specified criteria set. In parallel to the approach adopted by the Second Restatement was the seminal New York decision in *Babcock v. Jackson* in which the New York court asserted that a "center of gravity" approach was most appropriate.

Before moving from the United States of America it must be stressed that the approaches set out, very briefly, above did not serve to replace the preceding approach. The situation remains that each of the approaches applies in some manner across the fifty states of the Union.

1.2.2 *The United Kingdom and Ireland*

The position in the United Kingdom and Ireland is one based around the decisions of *The Halley,*[13] *Phillips v. Eyre*[14] and *Chaplin v. Boys*[15] asserting an approach different to that in the United States of America. The approach is one that might be characterised as a variant of the acquired rights approach with the qualification that rather than the law following the party in the manner in which Professor Beale advocated, the traditional common law approach has been to apply the law of the forum once the right of action has been acquired under the foreign law. The test from the cases mentioned above has become known as the double-actionability test in which for action to proceed in the forum under the *lex fori* it must be actionable in the forum had the event taken place there and also not "justifiable" in the country in which it actually took place.

1.2.3 *Australia and Canada*

Already touched on above, Australia and Canada have seen a marked divergence from the *quasi-lex fori* common law approach inherited from the United Kingdom to an approach focused squarely on the *lex loci delicti* as the most appropriate ideology for the purposes of a federal unit, in both instances. The respective decisions of *John Pfeiffer Pty Ltd v. Rogerson*[16] and *Tolofson v. Jensen*[17] represent judgments of pointed criticism and reflection on appropriate choice of law methodologies.

1.2.4 *Europe*

---

[13] *The Halley* (1868) LR 2 PC 193

[14] *Phillips v. Eyre* (1870) LR 6 QB 1

[15] *Chaplin v. Boys* [1971] AC 356

[16] *John Pfeiffer Pty Ltd v. Rogerson* [2000] HCA 36, (2000) 172 ALR 625, (2000) 203 CLR 503

[17] *Tolofson v. Jensen* [1994] 3 S.C.R. 1022

As activity in private international law subsided in the United States, after the adoption of the Second Restatement, activity in Europe began to gather pace. After a generation of stalled attempts and fault-starts at adopting a European measure the Rome II Regulation was adopted in 2007. To summarise briefly the effect of the Rome II Regulation is to appropriately describe it as a generational shift in private international law thinking. Today, in a common and harmonised fashion, exists a single general rule – the *lex loci damni.* However, in contrast to the rigidity of Professor Beale's First Restatement, the Rome II Regulation implements a complex and nuanced regime that accommodates variations on the rule for particular fact patterns and an ultimate escape where an otherwise applicable law is manifestly incompatible with the public policy *(ordre public)* of the forum.

In this regard the European choice of law regime represents lessons learned from the experiences of the United States merged with aims of certainty and predictability tempered by the needs of individual justice. However, the European regime under the Rome II Regulation is far from perfect, as illustrated below.

1.3 HYPOTHESIS

Private international law, generally, and choice of law, specifically, in the United States of America is as fragmented and ambiguous today as it was a generation ago. More fundamentally, however, is the inescapable observation that while the United States stood still, Europe forged ahead with its project of harmonisation, integration and homogenisation through the adoption of a common *lex loci damni* general rule undoubtedly influenced by the resurgence of the *lex loci delicti* in other jurisdictions. In this regard it submitted that Europe stands more United than the United States of America and can, and ought to, serve as impetus for renewal and reform there. The time is undoubtedly right for a return to the drawing board in the United States of America.

The more general, and more important, conclusion reached in this thesis is that in the absence of harmonisation and integration of substantive law, private international law, and choice of law for torts in particular, is unacceptably fragmented and disjointed at a global level. In the increasingly global village, coherent, elaborate and refined rule-

based regimes, of the kind promulgated in the United Kingdom and European Union, and adopted in similar terms at common law in Canada and Australia, are absolutely vital to further the interests of the Unions in the old and new worlds, and otherwise sovereign states.

1.4 SAMPLE SCENARIOS

In considering each of the above it is intended to refer, periodically, to sample scenarios to assist in illustrating the principles considered throughout this thesis.

Scenario A – Traffic Accident

Bob, from State A, has been working in State B for the past nine months. However, Bob's family remains in State A and he travels home to State A every weekend to visit his wife and children In addition, Bob works for a State A company and is paid in State A although it appears as though he will continue to work in State B for some time.

Bob drives his car across the border into State C and parked his car on a motorway lay-by. Bob was sitting in his car when it was struck by another vehicle. At the time Bob felt no ill-effects but his injuries manifested on his return to State B. He could not work for 6 months due to his injuries. The second vehicle was registered in State D but its driver was a citizen of State E.

Scenario B – Publication of Defamatory Material

Frank, from State X was a musician of some talent and a minor celebrity across a number of countries. A leading tabloid publication, RedTop, from State Y, in which Frank was a well known and respected personality, obtained what they claimed were incriminating, indecent, photographs of Frank.

RedTop was circulated in print in State Y only but all material was simultaneously published on their website, redtop.com, and accessible in 4 different languages. Frank was unaware of any publication of the photographs until his agent informed him his

European tour had to be cancelled because of insufficient ticket sales. In addition, his record sales also declined across the globe.

Scenario C – Products Liability

Thomas, from State 1, underwent open-heart surgery in Ireland. The procedure was for the replacement of heart valves with artificial ones manufactured in State 2. A surgeon from State 1 carried out the procedure using the heart valves originating from State 2. The domestic distributor in State 1 acquired the heart valves in State 2 and was responsible for their importation. Unfortunately, the new valves disintegrated causing Thomas significant internal injuries.

THE UNITED STATES OF AMERICA

As a starting point in the examination of modern private international law and choice of law approaches, it is necessary to consider the evolution and development of choice of law in torts in the United States of America. The United States is the most significant jurisdiction that must be considered as its evolution and changing attitudes, over the course of a century, represent the richest, single, source of jurisprudence and scholarly debate in modern private international law and choice of law to date.

What is particularly significant about the United States of America is that its development as an elaborate private international law regime can, today, be seen as a microcosm and proving ground for modern private international law on a global scale. It must be remembered during the course of the following chapter that the United States of America, for the purposes of private international law, cannot be regarded as a single jurisdiction. The Union represents a union of fifty states each with a unique and individual private international law regime.

This chapter aims to trace and minutely examine the historical origins of choice of law theory in the United States of America, and also examine its evolution over the course of the last century and the fundamental shifts in judicial and scholarly thinking. More fundamentally, this chapter aims to consider whether there exists any unity in the choice of law regimes in the United States or even whether prevailing trends can be identified. In addition, this chapter aims to serve as the backdrop against which the consideration the remaining common law regimes, and that in the European Union, can be considered.

2.1 EARLIEST APPROACHES

The earliest traces of the incorporation of ideas such as comity and acquired rights into the corpus of United States law can be traced to the latter stages of the 18th-century with evidence of Huber's concepts of comity between nations cited in the

Supreme Court of the United States of America in 1788[1] and forming part of the decision of the court in 1797.[2] The court in *Camp v. Lockwood* had submitted to it:

> He observed, that he did not controversial the general doctrine advanced by the opposite council, that the law of nations, is the law of nature applied to the nations, but he distinguished between the necessary and voluntary law of nations, which arises *ex comitate* and insisted that the laws of a nation actually enforced, are every where obligatory, unless they interfere with the independency of another legislature for common conveniency renders it necessary to give a certain degree of force to the statutes of foreign nations.[3]

Further that:

> If nations, unconnected by any time, thus indirectly give effect to the laws of each other, the principle upon which it is done, most with greater strength prevail in the case of a political union like that of the American states.[4]

Although largely ignored by the Supreme Court it is nevertheless significant that, even in the early stages of a united federal union of states, ideas of multi-jurisdictionalism and the interaction between those jurisdictions were being considered. The state Supreme Court asserted its position as acting on behalf of a sovereign state and on behalf of a greater union guided by purposes:

> The objection to the courts of this state, as a sovereign independent state, interposing to prevent the recovery of the debt, on account of the confiscation of it in another independent state, is in a great measure obviated by the statement which I have before me of the peculiar relation that these states

---

[1] *Camp v. Lockwood* (1788) 1 US (1 Dall) 393

[2] *Emory v. Grenough* (1797) 3 US (3 Dall) 369 n(a)

[3] *op. cit.* n 1 at 398

[4] *ibid*

> stand into one another. Though free and independent states, they appear not to be such distinct sovereignties as have no relation to each other but by general treaties and alliances, but are bound together by common interests, and are jointly represented and directed as to national purposes, by one body as the head of the whole.[5]

In *Emory v. Grenough* the court, in a decision amounting to not much more than a note, included with approval a substantial extract from Huber's treatise on the acquired rights theory. The maxims of Huber's theory, as they appear in the judgment, are reproduced below:

> First. The laws of every empire have force within the limits of that government, and are obligatory upon all who are within its bounds.
>
> Second. All persons within the limits of government are considered as subjects, whether their residence is permanent or temporary.
>
> Third. By the courtesy of Nations, whatever laws are carried into execution, within the limits of any government, are considered as having the same effect everywhere, so far as they do not occasion prejudice to the rights of the other governments, or their citizens.[6]

Huber's maxims, along with his core concepts, appeared to direct judicial thinking in early American private international law on an ongoing basis for well over one hundred years, until criticisms of the doctrine's attempts to place in coexistence the absolute territoriality of a sovereign state with an apparent ability to exact a parallel foreign effect overtook this earliest of doctrines. Professor Beale, also responsible for the drafting of the American Law Institute's First Restatement of the conflict of laws in 1934, sought to move on from and develop the comity concept by advocating a newer concept with origins in England and Europe, acquired rights.

---

[5] *ibid* at 403

[6] *op. cit.* n 2 at 370

Professor Beale, in 1901, constructed his version of Dicey's acquired rights approach in the following terms:

> A right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called in question anywhere.[7]

Professor Beale's assertion represents a significant departure from the existing status quo in the United States. It also represents a distinct simplification of a, later elaborated, majority opinion in the Supreme Court of Holmes J in *Slater v. Mexican National Railroad Co.*[8] The particularly tragic fact pattern of *Slater* represents an excellent example of the classic example of a cross-border tort. The action was originally brought, before the Circuit Court for the Northern district of Texas, by Texan citizens against a Colorado railroad company. The action concerns, and attempts to recover damages for the death of an employee of the railroad company, a Texan, who was working in Mexico at the time. As such, while working on the premise that both Texas and Colorado are individual states for the purpose of this action, there are three distinct jurisdictions and potentially applicable laws at issue. The core, and highly significant, question the court had to consider and answer was whether Mexican law, the *lex loci delicti*, should be applied in a Texan court. For the majority, Holmes J set out the *locus classicus* of the acquired rights theory:

> As Texas has statutes which give an action for wrongfully causing death, of course there is no general obligation of policy to enforcing such a liability there, although it arose in another jurisdiction. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operated outside its own

---

[7] Beale, *Cases on the Conflict of Laws* (1901) 517

[8] *Slater v. Mexican National Railroad Co* (1903) 194 US 120

> territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligation*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation but equally determines its extent.[9]

Judge Holmes' assertion is revolutionary in the same vein as Professor Beale's more elegant statement of the newly favoured approach. The effect of the majority decision was to require, as a matter of course, the enforcement of a foreign right in a forum court once it has been validly acquired according to foreign law. Further to this, once questions surrounding that foreign right arrive at the shore of the forum court, the new approach requires that that court determines those questions in accordance with, and through, the enforcement of the foreign law.

The further significance of the majority decision is that it implies a reformulation in the manner in which rights, or causes of action, are perceived. In the wake of the majority decision it is arguable that once a cause of action has arisen in a state its manifestation changes from being territorial in nature to being personal in nature. At that point, it is submitted that the right becomes bound to the plaintiff and the *lex loci delicti* becomes equally bound to the plaintiff in the eyes of a foreign state subscribing to the acquired rights theory. It is important to remember that in the eyes of the originating state, despite the fact that its law might not be applied in another state, it is not through any legislative or other means attempting to project its law and its application onto, and into, another state. Instead it is the "receiving" state that is applying the foreign law of its own volition.

The second significant implication of the majority decision is that it, apparently, removes the distinction between matters of substance and matters of procedure. The removal of the distinction between matters of substance and procedure has the elegant and convenient effect of removing questions of characterisation from the judicial

---

[9] *ibid* at 126

equation. While it serves the purpose of ensuring consistency in the applicable law, it also has the effect of relegating forum interests to a position inferior to the interests of the originating state. The majority decision does not speak of an exception to the application of the foreign law in all aspects of an action but the attempted elimination of the traditional forum control over the extent of liability as a procedural matter is significant as it removes an important measure of control against a burdensome imposition on forum domiciliaries. So it appears that under this early theory of acquired rights, the interests of the forum stand on an unsure footing.

At this stage, it is important not to overlook the dissenting opinion in the court. Three justices expounded a wholly different approach to that elaborated by the majority in this decision. The Chief Justice, Harlan and Peckham JJ, refused to be moved by the innovation of the majority and instead favoured adherence to the traditional approach. The justices set out the chronology of the leading jurisprudence of the traditional English approach, i.e. the double action ability rule. The dissent asserted:

> ... It was held unanimously by the courts of Exchequer and of the Exchequer chamber that the objection that by the foreign law compensation and damages could not be recovered until certain penal proceedings had been commenced and determined there, was an objection to procedure merely, and not a bar to the action in England. And many of the judges were of opinion that an action was maintainable for any act which would have been a tort if done in England, and, whether actionable or not, was unjustifiable or wrongful, in a broader sense, under the law of the foreign country where the act was done... This case has never been overruled...[10]

The dissenting opinion continued with its exposition of the central points of the traditional English approach by citing the classic cases: *Machado v. Fontes;*[11] *Phillips*

---

[10] *ibid* at 132 - 133

[11] (1897) LR 2 QB 231

v. Eyre;[12] *The Halley*[13] and approving the formulation of the test adopted in the United States in *Huntington v. Atrill*:

> By our laws, a private action may be maintained in one state, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the state where the suit is brought.[14]

What is significant, when considering both the majority and dissenting opinions in the decision, is the fundamental shift away from the traditional English double-actionability test towards something more pragmatic and less forum centric.

The decision in *Slater* also represents a final adoption, and crystallisation, of the slightly earlier case of *Alabama Great Southern RR Co v. Carroll.*[15] The facts of this case also revolve around a cross-border rail related action. The plaintiff in the action, an Alabama plaintiff employed as a break operator, was injured when railroad cars wer uncoupled from each other across the state border in Mississippi. Evidence was submitted which attributed the incident to an insufficient, negligent, inspection of the railcars by other employees in Alabama. The employee plaintiff sued the railroad company, his employer, in his domicile, Alabama. The plaintiff naturally favoured, and argued for, the application of Alabama law to the dispute given the common domicile of the parties and Alabama being the forum. There existed a fundamental difference in liability between the states of Alabama and Mississippi. Alabama permitted action against employers through the enactment of an employer's liability statute rendering employers liable to employees for negligent acts of other employees, in this instance the employees who negligently inspected the railcars. However, Mississippi did not subscribe to such an approach, rather it continued to follow the

---

[12] (1870) LR 6 QB 1

[13] LR 2 PC 193

[14] *op. cit.* n 8 at 134

[15] *Alabama Great Southern RR Co v. Carroll* (1893) 11 So. 803

older common law fellow–servant rule preventing liability attaching to employers for similar acts.

The court, when determining whether Alabama or Mississippi law should apply, affixed ultimate importance on "the place of the last event" in its deliberations. The court asserted:

> It is admitted, or at least it cannot be denied, that negligence of duty unproductive of damnifying results will not authorise or support a recovery. Up to the time the train passed out of Alabama, no injury had resulted. For all that occurred in Alabama, therefore, no cause of action whatever arose. The fact which created the right to sue, the injury without which confessedly no action would lie anywhere, transpired in the state of Mississippi. It was in that state, therefore, necessarily that the cause of action, if any, arose; and whether a cause of action arose or existed at all or not most in all reason be determined by the law which obtained at the time and place when and where the fact which is relied on to justify a recovery transpired.[16]

As such, the court felt it more appropriate to apply the law of the "place of the last event," the *lex loci delicti,* as opposed to its own law, the law with which all parties to the action were connected. It must be noted that evidence submitted to the court indicated that the fact that the injury took place in Mississippi as opposed to Alabama was a mere happening of chance. As such, given the importance placed on the place of the last event by the Alabama court, it cannot but be noticed that the event giving rise to liability might simply be an unfortunate accident that coincidentally occurred in some other state, with no positive instigating act or negative omission generating normal liability. Chance, it would seem, did not smile on the plaintiff. In fact, this remains the position today in Alabama[17] and nine other states[18] in the United States.

---

[16] *ibid* at 806

[17] Symeonides, Twenty-Fourth Annual Choice of Law Survey (2011) 58 Am J Comp L 303, 330; *Fitts v. Minnesota Mining & Manufacturing Co* (1991) 581 So. 2d 819; *Fitzgerald v. Austin* (1997) 715 So. 2d 795

It must be noted, at this stage, that a critical omission from the courts of opinion was an elaboration of the meaning of "event." In the context of choice of law from non-contractual obligations in the European Union today under the Rome II Regulation, the meaning of "place of the (harmful) event" assumes a particular significance and will be considered later, below.

2.2 BEALE AND THE GENESIS OF THE LEX LOCI DELICTI RULE

Seizing on a surge in judicial enthusiasm for a break from the English common law position, Professor Beale, in his capacity as a reporter for the American Law Institute, incorporated this new concept into the First Conflicts Restatement in 1933 and further elaborated on this new direction in American conflict of laws scholarship in his treatise on the subject two years after the publication of the First Restatement.[19]

The Restatement set out a *lex loci delicti* approach founded on the combination of territoriality and acquired rights as underpinning principles. Both the Restatement and Professor Beale's elaboration in his treatise asked a similar question as to the nature of law, or rather the nature of the common law in the context of cross-border matters. As a fundamental assertion, Professor Beale set out the proposition that:

> The conception of the common law has always been the conception of a territorial law. No law is administered as such by the courts except the territorial law.[20]

Further that:

---

[18] Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, Virginia, West Virginia, Wyoming

[19] Beale, *A Treatise on the Conflict of Laws* (1935)

[20] *ibid* at section 5.2

> By its very nature law must apply to everything and must exclusively be applied to everything within the boundary of its jurisdiction.[21]

The assertions above were carried into, albeit in a modified and softer tone, into the First Restatement which provided a general guiding position asserting that:

> No state can make a law which by its own force is operative in another state; the only law in force in the sovereign state is its own will, but by the law of each state rights or other interests in that state may, in certain cases, dependent upon the law in force in some other state or states.[22]

With respect to the choice of law rule contained within the restatement, section 378 provides that:

> The law of the place of wrong determines whether a person has sustained a legal injury.[23]

The combination of sections 1 and 378 craft a position that is rigid and dogmatic, which places at its centre the idea that the place of occurrence of an event must govern at all times, and at all costs. The most obvious and accessible criticism of such an unyielding position with respect to an applicable law is that it deliberately excludes the possibility that some other state might have an interest in the effective regulation of the conduct subject to consideration. The position rejects the portability of law to the extent that persons, be they citizens or subjects, might be subject to a personal law forever attached to those persons.

---

[21] *ibid* at section 4.12

[22] Restatement (First) section 1

[23] *ibid* section 378

The natural question to ask at this point is whether or not a forum court should apply any law other than its own at any stage? It is at this stage that the second of the mentioned guiding principles of Professor Beale's thesis comes to the fore. The internationalisation of the principle of national territoriality through the acquired rights doctrine.

Section 384 of the Restatement provides the centrepiece of the exercise:

1. If a cause of action in tort is created at the place of wrong, a cause of action will be recognised in other states.
2. If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state.[24]

With such a striking statement in the Restatement it is clear that there is significant ambiguity within what is, at first glance, unambiguous, the meaning of the "place of wrong." To this end section 377 is instructive defining the "place of wrong" as:

> Where the last event necessary to make an act or liable for damages for an alleged tort.

Taken in the round, and at first glance, it would appear that Professor Beale constructed section 384 in a fashion that justifies the application of a foreign state's law in a forum provided that the law of the foreign state, the *lex situs*, recognises the event in question as generating liability. However, taken with the rigid and unyielding territorialism elaborated in the Restatement, in section 1, how then could Professor Beale justify the application of a foreign law?

In reconciling this apparent incompatibility of doctrines, Beale set about, in his treatise rather than the restatement, re-inventing perceived wisdom and considering in a sophisticated and seminal fashion his fundamental perception of law, its origin and

---

[24] *ibid* section 384

justification, in the context of private international law and a multitude of conceptual ideas.

2.2.1 *Nature of Law in Private International Law*

Against the backdrop of a desire to reconcile conflicting doctrinal attractions Professor Beale considered the nature of law itself and particularly in the context of private international law at the time.

> Law, therefore, is made in part by the legislature; in part is rests upon precedent; and in great part it consists in a homogenous scientific, and all embracing body of principle; and our correct definition of law in general must apply to all these varieties of law. Sir Frederick Pollock has met this necessity in a definition which may be succinctly stated as the sum of the rules binding members of the state as such.
>
> If this definition can be criticised, it is in the statement that the rules of law bind individuals. Parties are bound, not by the law, but by obligations created by the law. To confuse the law and the legal obligation is like confusing the law and the decision. "All law is concerned with the acquisition or the preservation or the restriction of rights" if for the idea of rules binding apparently we substitute the idea of law creating the obligation, we arrive in substance at the definition first proposed.[25]

Professor Beale's criticism of the varying subtleties of the multitude of definitions of the nature of law is stunning not in its execution but rather in its effect. Professor Beale separated the varying forms of law (doctrine, creed, precedent, legislation) from their resultant rights. However the real significance lies in the assertion that "parties are bound, not by the law, but by obligations created by the law." The significance here is that once separated from the originating law the obligation then becomes a fact, a binding fact but a fact nonetheless.

---

[25] *op. cit.* n 19 at section 3.5

Professor Beale followed this through to conclusion by asserting that despite his new theory, mandating the recognition and application of a foreign element in a "territorial" landscape, due to his separation of law from rights that the right (fact) then bound the person becomes the element enforced. Essentially, Professor Beale advocated the recognition of foreign facts rather than foreign law:

> It is quite obvious that since the only law that can be applicable in a state is the law of that state, no law of a foreign state can have there the force of law. If, therefore, the Conflict of Laws of the state provides that a question at issue shall be determined in accordance with the foreign law, that means that it shall be determined by the court acting solely under its own law, and that the terms of the foreign law constitute a fact to be considered in the determination of the case.
>
> If, then, the law of a state says that a question, for instance the succession to movables, is to be determined in accordance with the foreign law, this does not mean that the foreign law will be applied as law but that those provisions of the foreign law indicated by the rule will be used as facts in the devolution of the estate according to the law of the forum. The law of the forum is the only law that prevails as such. The foreign law is a fact in the transaction.[26]

Through the combination of separating rights from their founding laws, asserting that laws in fact do not bind and that those rights are recognised as matters of fact in a forum court, Professor Beale achieves a conveniently elegant, albeit highly artificial, means of expanding the horizon of the American approach towards foreign elements in cross-border issues.

2.3 CONSTRUCTION OF THE FIRST RESTATEMENT

[26] *ibid* section 5.4

As a product of the American Law Institute, and applicable to this day, it is worth examining and elaborate on the particular role that Beale did, or did not, play in the final construction of the Restatement given that the connection between the Restatement and his treatise, as a source of elaboration, is especially strong. The American Law Institute appointed a panel of ten advisers to the reporter, Professor Beale consisting of a mix between private international law lawyers and subject matter specialists in other areas. On the face of it, it might appear that this combination of subject interests would lend itself to a frank and unbiased consideration of the matter at hand, however on closer inspection this would appear not to be the case. Of the ten, only two were not former students of Professor Beale and none of the ten were recorded as being critics.

The closeness of connection between the Restatement and the treatise is particularly illustrated by accounts of the methodology employed by Professor Beale and his advisers when it came to approaching the restatement. First, perhaps unsurprisingly, in the context of any exercise in legislative reform or Restatement it was asserted that:

> In order to enable the work to be prosecuted expeditiously in the early stages of formulation, it is desirable that the reporter should have his own way in determining the theoretical bases of the initial report and be permitted to select a group of advisers of congenial or antagonistic views, as he may deem advantageous.[27]

However what is not clear, and what is of particular significance, is the question of whether due rigour was given to the examination and consideration of approaches alternative to those expounded in the treatise. The director of the American Law Institute wrote that:

> The method of work was to first go over the draft of the treatise... When the treatise has been advanced far enough to be substantially satisfactory to the conflict of laws group the draft of the Restatement

[27] Ynetma, The Restatement of the Conflict of Laws (1936) 36 Col. L.Rev 183, 195

> paralleling the treatise is considered... And so back and forth until both have reached a stage of development which justifies their being reported to the council.[28]

Further, Professor Yntema critically wrote in his early review of the Restatement in 1936:

> To preclude misconception, be it said at once that the scheme of operations is apparently well calculated to facilitate the work of the original reporter; that efforts have been made to ensure a certain measure of outside criticism; and that, in the case of the Restatement of the law of conflict of laws, there was at the outset a temporary representation of the critics of the vested rights theory on the advisory committee... But these are considerations which do not apply with cogency to the later stage of inspection and criticism, upon the result of which the formal approval of each Restatement of the law should depend. At this late stage, there is no particular reason, apart from the ubiquitous considerations of expediency, to leave the cards in the hands of the original reporter or to indulge a predisposition towards the acceptance of any particular draft until it has been rigorously tested.[29]

Professor Ynetma continued in conclusion:

> It is to be added that the features of the American Law Institute and of the Restatement of the law, as at present conceived, to which attention has been directed as militating against the adequate formulation of law, in the organisation of the Institute, the emphasis upon public acceptance of the Restatement rather than upon the necessity of resolute incisive criticism of the projects as a condition of their formal approval; in the Restatement of the law, the adoption of the unfortunate theory that the law should be restated as it is, without a showing of the precedents, without reference to legislative trends,

---

[28] Director's Report (1923 – 1924) 2 ALI Proceedings 245

[29] *op. cit.* n 27 at 195

> without systematic study of the available factual or comparative evidence on the many doubtful issues at stake, are in one sense incidental. They were not contemplated in the original plan.[30]

Criticism of Professor Beale's new approach will be discussed in greater detail below but in the context of the design and production of the Restatement, the treatise and the particularly pointed criticism from Professor Yntema above, it must be considered whether the process of the American Law Institute was inherently biased towards Professor Beale's thesis. Already mentioned is the fact that the advisers to the reporter had for the most part previous connections to Professor Beale which might be characterised as subordinate to the reporter. The fact is, from examination of the minutes of the annual meetings of the American Law Institute, that there appeared to be no rigorous challenge or discourse surrounding the core concepts of the restatement.

Further, it appears that the linchpin rule of the First Restatement approach, the *lex loci delicti* rule, was not considered in any fashion at the annual meetings of the Law Institute.[31] Further again, and building on the issue of the composition of the advisory committee to the reporter, question must be asked of the level of positive engagement with contemporary critics of Professor Beale by the American Law Institute during the process of drafting the restatement. The most prominent contemporary critic of Professor Beale and his theory of acquired rights as a founding basis for a strict *lex loci delicti* rule was Walter Cook. The specific criticisms levelled by Professor Cook at Professor Beale's new regime will be considered in greater detail in the following sections but in the context of the drafting process of the Restatement it is significant to note that Professor Cook was absent from all but the earliest of annual meetings of the American Law Institute. Insignificant of itself but taken with the reason for his later absence it cannot but be concluded that active criticism and input into the substance of the Restatement in its gestation stage was not embraced by the reporter. In Professor Cook's own words:

---

[30] *ibid* at 223

[31] (1931 – 1932) 10 ALI Proceedings 70 - 101

> This word of caution needs to be uttered because the present writer has more than once found that the point of view here expressed is at times seriously misinterpreted by some who do not share it. For example, when some years ago the present writer at the meeting of the American Law Institute ventured to suggest that very possibly the word "domicile," as used in the conflict of laws cases, may not have precisely the same scope in different rules having different purposes, he was interpreted by one speaker as having taken the view that "you cannot draw any generalisations." Now of course any such statement would be obvious logical and philosophical nonsense.[32]

Professor Cook's words masked what had elsewhere been described more bluntly and comprehensively. Professor Bingham described the "interpretation," as Cook referred to it, as the following:

> It was a very skilful manoeuvring, reminiscent of the best traditions of English parliamentary debates, to overcome a temporary obstruction in the smooth course of expeditious adoption of the product of the labours of the reporter by a numerous assemblage of lawyers containing only a few experts. Obviously adequate scholarly examination of the details of the problems suggested by Mr Cook's remarks by such a body of men in a very small amount of time which could be devoted to the discussion of this one of some hundreds of problems to be canvassed by them was impossible. Mr Scott's remarks admirably accomplish their purpose; but that purpose was not scholarly exposition or adequate scientific rebuttal of Mr Cook's points.[33]

Professor Bingham did not offer further comment on his perception of the purpose of Scott's riposte to Professor Cook's comments but it would seem appropriate to suggest that the intention was to dismiss rather than engage. Professor Cavers,

---

[32] Cook, "Substance" and "Procedure" in the Conflict of Laws (1933) 42 Yale LJ 333, 340

[33] Bingham, (Book Review) (1937) 85 U Pa L.Rev 857, 860

ranking with Professor Cook as a leading contemporary critic of Beale whilst also ranking amongst the cohort of former students of the reporter, alluded to the deficiency in process in his brief review of the Restatement upon publication. Professor Cavers' fuller position will be considered below but at this stage it is appropriate to consider his brief reflections:

> The reporter and his associates faced a situation more forbidding than that presented to the authors of any other restatement. Their problem was not merely to extirpate provincialisms from a body of doctrine which had achieved general acceptance nationally. Their duty, as they conceived it, compelled them to restate as "the law" what emphatically was not law in a great many jurisdictions, and to resolve many questions for which answers were to be found in the decisions of a very few states.[34]

Professor Cavers' brief, yet descriptive, passage is useful in shining further light on what was the true manner of operation of the Reporter and his advisory committee. Without reading too much into the above passage it is suggested that a number of themes can be drawn from it that underpinned many of the criticisms of the restatement. First, that Professor Beale was ultimately determinative in the substance of what was produced from the exercise in restatement. Second, that the Restatement inappropriately focused on a singular approach and the assertion of it as the correct representation of the law at the time.

Professor Cavers' concluding remarks are useful in further understanding the extent to which the propositions and assertions of the Restatement mirror those personally held by Professor Beale.

> In making evident my belief that this Restatement will not prove the disciplinary influence it was designed to be, I have reckoned without regard to an extrinsic factor of great significance. I referred to the impending publication of Professor Beale's long-awaited treatise on the conflict of laws.

---

[34] Cavers, Restatement of the Law of Conflict of Laws (1935) 44 Yale LJ 1478, 1480

> Keyed for use with the Restatement, it will put flesh and blood on the bare bones of that work. One can look for argument in the treatise where one finds assertion in the restatement; discussion in lieu of comment; case analysis instead of illustration... Indeed I predict that use of the treatise will tend to the atrophy of the restatement.[35]

In his particularly pointed, and abrasive, comments Professor Cavers identifies the fundamental problem of the inadequacy of the final Restatement due to the inappropriate weight attributed to the particular views of the reporter, evidenced by the inescapable link between the Restatement and the reporter's treatise.

2.4 CONTRADICTIONS

Given the above, and before considering individual critics, it is worth turning to Professor Beale's treatise and considering particular difficulties and contradictions raised by his treatment of existing private international law[36] and pursuit of fundamental change in the United States.

The first, and most pertinent, contradiction that must be considered strikes at the very core of the *lex loci delicti* concept as elaborated through the combination of the Restatement and Professor Beale's treatise, the international element. In his consideration of the legal nature of private international law, or the conflict of laws as termed in the United States at the time, Professor Beale considered the international element in a direct and deliberate fashion.[37] He asserted:

> It is sometimes urged that the doctrines of the conflict of laws have an international sanction, binding to some extent upon the various states. This view is not today seriously held and cannot be sustained. It has never been

---

[35] *ibid* at 1482

[36] sections 5 - 6

[37] section 5.1

> adopted by any common law authority. Nevertheless, there has been a disposition to soon in the case of the rules of the conflict of laws that they have an international source and that in the nature of things they should be the same throughout the world.[38]

Further, in considering the previously dominant principle of comity as an underpinning principle of private international law, he seized upon a perceived over empowerment of the judiciary to influence "political" decisions. Couched in language somewhat dismissive of Judge Story's thesis elaborating comity as a justification for recognition of foreign law, Professor Beale claimed that the incorporation of foreign law into that of the forum without a legislative basis represented "enlightened self interest."[39] In essence, Professor Beale's central criticism of comity as a legitimate grounding theory lay in its discretionary application and nature:

> If we examine more nearly how the principle of *comitas gentium* was carried out, we see with amazement that it was in truth nowhere properly applied, or at least that in most cases an appeal was made to something quite different from comity. How could any reasonable results be attained with an idea so infinitely vague and unlegal? In fact, one cannot even approximate to a correct decision of the simplest case of private international law upon this principle. Where is the beginning or the end of comity? How can questions *of law* be solved according to views of policy, which are the most shifting and uncertain things in the world?[40]

It is in the resolution of this issue where Professor Beale's acquired rights approach, ultimately culminating in the *lex loci delicti* rule, exhibits simultaneously its greatest strength, weakness and ultimate paradox. The Restatement compelled the obligatory application of foreign elements, when they arose, as a matter of forum law. At first

---

[38] *ibid*

[39] *ibid* section 71

[40] *ibid*; *Farton v. Livingstone* 3 Macq 497, 548 per Lord Wensleydale

glance it would appear that a mechanism, however framed, systematically considering foreign elements would result in fairer and more balanced outcomes. However, a rigid and mechanistic system devoid of meaningful exception ultimately fulfils its design purpose but only in the most limited of circumstances. In the context of a modern and sophisticated private international law regime such an approach, it is submitted, is fundamentally inadequate as it relies on pure chance of physical location to determine the most appropriate legal regime to apply to the situation. It does not take account of meaningful connecting factors to a fact pattern such as domicile, residency, nationality or economic interests in attempting to identify a more appropriate applicable regime. It cannot be disregarded that the great benefit of Professor Beale's mechanism is the twofold certainty of recognition of foreign elements and "predictability" of applicable law but that its absolutism is fundamentally fatal as it deliberately does nothing to accommodate an otherwise overriding connection to a matter or a fundamental undesirability of outcome.

Moving on from the above argument, a further difficulty can be identified in that every scheme of compulsory recognition of foreign elements is devoid of any meaningful means of exception. As identified above, Beale advertised himself as the quintessential territorialist:

> It is quite obvious that since the only law that can be applicable in a state is the law of that state, no law of a foreign state can have there the force of law.[41]

However, despite the advertised territorialism and fidelity to national, domestic, interests it is questionable whether this is a true characterisation of Professor Beale's approach. It is somewhat ironic that through his version of ultra-nationalism, as manifested in the Restatement and his treatise, combined with his prescribed absolutist adherence to the rule, Professor Beale did in fact turn himself into an archetypal internationalist.

---

[41] *op. cit.* n 19 at section 5.4

As already mentioned, his regime has the effect of compelling the cognizance and recognition of foreign elements in a cross-border dispute and it also has the effect of eliminating any meaningful exception to the application of foreign elements by ignoring the applicability of forum public policy as means to avoid the application of laws typically deemed undesirable. The resolution of, and move away from, the position in the First Restatement will be considered in further detail below and in particular escape mechanisms from the strict scheme of the Restatement. However the Restatement, as adopted, remains unyielding in nature and strict in application.

2.5 SAMPLE SCENARIOS CONSIDERED

Without restating the facts of the sample scenarios set out in the introductory chapter, above, it is proposed to consider the likely outcome in each instance.

Scenario A – Traffic Accident

As seen above, crucial to the effective operation of the scheme of the First Restatement is the blind application of the *lex loci delicti* in all instances. In the instant fact pattern it is clear that the *locus delicti* is in State C. The application of the *lex loci delicti* rule yields the application of the law of State C to an action that Bob might take, irrespective of the fact that neither party had any connection to state C other than a temporary coincidence of location.

Scenario B – Publication of Defamatory Material

In the context of interstate defamation, it is Section 377 of the First Restatement that is relevant to the instant fact pattern. In addition to the application of the bare *lex loci delicti* rule, it becomes necessary to define where that location is for the purposes of interstate defamation. Section 377 provides, in Rule 5, that:

> Where harm is done to the reputation of the person, the place of wrong is where the defamatory statement is communicated.

As such, the *locus delicti* is defined as the place where the communication takes place. In the facts at hand it is clear that there are two forms of publication, print and electronic, each with distinct results. With respect to the print publication it is submitted that it is the law of State Y that would apply. With respect to the electronic communications, it is submitted that there would be options available to a court in the determination of the *lex loci delicti*:

a. The place where from content was uploaded to a server;
b. The location of the server;
c. The place where damage was suffered;
d. The place where the content was accessed and downloaded.

Despite the options available to the court, it is submitted, that it is the place where the communication was received that prevails. In the context of an internet publication, it is submitted that the *locus delicti* would be where the content was accessed and downloaded, irrespective of Frank's domicile in State X and RedTop's domicile in State Y.

Scenario C – Products Liability

In the context of a products liability fact pattern, such as that instant, and the application of the *lex loci delicti* rule, the relevant provision of the First Restatement is § 377 again. Rule 1 provides that:

> Except in the case of harm from poison, when a person sustains bodily harm, the place of wrong is the place where the harmful force takes effect upon the body.

As such, as the harmful force took effect in State 1, the *lex loci delicti* would be the law of State 1.

2.6 CONTEMPORARY CRITICS AND THE FOUNDATIONS FOR REVOLUTION

2.6.1 *Professor Cook*

Given the difficulties identified above, concerning inadequacies and deficiencies in the design and construction of the restatement; the lack of alternative input; the lack of due consideration afforded to alternative approaches; "misstatement" or at least a misrepresentation of the law as it stood at the time, it is unsurprising that even before the full adoption of the Restatement by the American Law Institute it was already the subject of significant, vehement, criticism. Set against Professor Beale's ideas, as expounded in the Restatement and the treatise, were a number of prominent academics and a former student who was to become highly influential in his own right. Walter Cook, Ernest Lorenzen and Hessel Yntema representing the former category and David Cavers being the latter. The core of the criticisms levelled against the position in the Restatement by the cohort of early critics centers around an argument identified above, that the extreme territorialism exhibited by the position adopted in the Restatement essentially undermined the authority of the forum by placing foreign law on a superior footing to that of the forum by compelling its adoption whenever a foreign element was present in an action.

The first, and most significant, early critic who must be considered is Walter Cook whose criticisms and suggestions prophetically formed the basis for many of the subsequent developments in the latter part of the twentieth century such as government interest analysis and comparative impairment theories. Professor Cook advocated a complete rejection of the "acquired rights" theory as a legitimate source, and underpinning basis, for the recognition of foreign elements. In its place Professor Cook advocated a starkly different approach, a "local law theory."[42] Put simply, at this stage, Professor Cook's theory sets out to identify the likely granted foreign remedy, had the foreign law applied, and translate that foreign remedy into the most compatible local remedy. That is to say that the outcome of an otherwise applicable foreign law is mirrored locally.

---

[42] Cook, The Logical and Legal Bases of the Conflict of Laws (1924) 33 Yale LJ 457; Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942)

In coming towards his proposition Professor Cook engaged in a qualitative, scientific, examination of the practical reality of judicial decision, a "positive method," rather than engaging in a theoretical discourse as to the appropriateness of one or other theory, as he claimed had been the norm to that point. Beginning with an examination of typical practice in criminal law proceedings Professor Cook makes the generalisation that:

> Where A in state X sets a force in motion which injuries B in state Y, and B goes to and as a result of the injury dies in state Z, either X, Y, or Z, if it can get its hands on A, can apply its own criminal law to the case. What each will do will depend solely upon its own positive law, common or statutory, and not upon any inherent principles of "jurisdiction" limiting its powers. Its choice therefore will have to be purely pragmatic as to what, all things considered, it is desirable to do.[43]

The assertion speaks towards the inherent, and undeniable, territoriality associated with criminal law matters but Professor Cook extended the question to the associated issue of civil liability for wrongful death in a similar fact pattern:

> Can there be any rational doubt that either X, Y, or Z can if it so wishes apply its law in determining the civil as well as the criminal liability of A? It would seem not.[44]

In outlining the approach adopted by American courts, Professor Cook summarised what has become the *locus classicus* of the "local law" theory:

> The forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another

---

[43] Cook (1924) *ibid* at 464

[44] *ibid* at 466

> state or country with which some or all of the foreign elements are connected... The forum thus enforces not a foreign right but a right created by its own law.[45]

Essentially an exercise in observation, Professor Cook wrote in favour of an approach disregarding *renvoi,*[46] to be discussed in further detail *infra*, and constructing a somewhat artificial scenario to examine the foreign element. The approach advocated requires the construction of a fictitious scenario to be determined by the foreign court, according to foreign law, in which there exists no foreign element *i.e.* a purely domestic foreign case:

> The rule of decision which the given foreign state or country would apply, not to this very group of facts now before the court of the forum, but to a similar but surely domestic group of facts involving for the foreign court no foreign element.[47]

The first issue, and potential criticism, at this stage is to question, fundamentally, whether a forum court is equipped to make a determination of the likely outcome of a foreign domestic action when it itself is devoid of policy burdens and interests to which the foreign court may be subject? Professor Cook contented himself with asserting that such a determination could be reached as "...a question of fact, to be ascertained, like any other fact, by observation."[48] While satisfactory for the purposes of examining, empirically, the existing law it is suggested that mere observation alone cannot equip a court to brand as fact what is inherently a question of foreign policy more appropriately determined by a foreign court. However, Professor Cook appeared unconcerned with issues of foreign policy or other prevailing factors:

---

[45] Cook (1942) *op. cit.* n 42 at 20 – 21; Cook (1924) *op. cit.* n 42 at 469

[46] Cook (1924) *op. cit.* n 42 at 469

[47] Cook (1942) *op. cit.* n 42 at 20 - 21

[48] Cook (1924) *op. cit.* n 42 at 473

> Our statements of the "law" of a given country and therefore "true" if they accurately and as simply as possible described the past behaviour and predict the future behaviour of these social agents.[49]

Though later admitting that:

> Its validity, I must emphasize, will depend upon its value as a reasonably accurate, understandable and workable description of judicial phenomena as they have occurred in the past and as they are likely to occur again.[50]

A potential means of eliminating the uncertainty generated by exercising this prediction would be to turn to the foreign jurisdiction itself for guidance. However, it is admitted that remitting, whenever occurring, a fact pattern to a potentially hostile foreign court for the purposes of obtaining an advisory opinion to the likely outcome of a foreign action is inherently impractical, costly, unrealistic and ultimately defeating. As such it is suggested that it is in the self-interest of the forum only to reach such determinations of its own accord and not in the interest of justice. Further, should a forum court turn to a foreign court for questions of fact it would seem more appropriate to decline jurisdiction to hear the case outright on the grounds of *forum non conveniens?* However, this is outside the scope of this thesis.

At this stage it must be noted that Professor Cook's theory is generally accepted to be synonymous, and coincide, with the decision of Judge Hand in *Guinness v. Miller,*[51] a decision extensively quoted by Professor Cook:

> No court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an

---

[49] *ibid* at 476

[50] *ibid* at 478

[51] *Guinness v. Miller* (1923) 291 Fed. 269, (1924) 299 Fed 539 affirmed in *Hicks v. Guinness* (1925) 269 US 71

> obligation recognised by that sovereign. A foreign sovereign under civilised law imposes an obligation of its own as merely homologous as possible to that arising in the place where the tort occurs.[52]

At first glance, what is significant about Professor Cook's approach to questions involving foreign elements, and what sets it apart from Professor Beale's approach in his treatise and the Restatement, is the way in which the foreign element is treated in the forum, or not. Judge Hand expresses the position in the first sentence above "no court can enforce any law but that of its own sovereign." Professor Cook, himself, expressed support for this essential proposition by citing Professor Dicey in authority:

> It constantly impresses upon the minds of both writers and readers the truth of the all-important doctrine that no maxim is a law unless it be part of the municipal law of some given country.[53]

So convinced was Professor Cook of the seemingly faultless appeal of his approach that he asserted:

> In the conclusion that a court never enforces foreign rights but only rights created by its own law, I see nothing extraordinary. Indeed, if we examine into the meaning of the terms "law" and "right" as they are used by judges and lawyers, I think we shall conclude that this way of stating the matter is the only satisfactory way.[54]

It is submitted that Professor Cook's approach does indeed contain elements of distinct appeal but that it is far from faultless. Taken in the context of the competing approaches in existence at the time, the approach briefly considered above represents

---

[52] *ibid* at 770

[53] Dicey, *The Conflict of Laws* (3rd ed. 1922) affirmed in Cook (1924) *op. cit.* n 42 at 459

[54] Cook (1924) *op. cit.* n 42 at 45

a distinct departure. As set out earlier, Judge Story's distinctly internationalist approach focusing on comity as a guiding principle and justification for the recognition of foreign elements in a forum court, on the one hand, and Judge Hand and Professor Beale's extremely internationalist acquired rights approach, on the other hand, both represent outward looking inclinations to one degree or another. In contrast, however, Professor Cook's "local law" approach is at the other end of the spectrum of inclination. Professor Cook's approach is distinctly nationalist in nature with an extreme prioritisation of the forum against the interests of all others.

While Judge Story and Professor Beale both sought to create the beginnings of a system that would have at its core a degree of certainty, predictability and uniformity of decision through the deliberate incorporation into the forum of foreign law, Professor Cook did not appear to prioritise those factors and, in fact, claimed them almost unattainable:

> Many writers on the conflict of laws believe that the chief object should be uniformity of decision, irrespective of the forum in which suit may be brought...What has been pointed out is that in view of the actual state of affairs, it may turn out that uniformity is an unattainable ideal in many situations; this, because of the varying views in different countries as to the conflict of laws. If so, to try to obtain it when means are not available is no more sensible than for a baby to cry for the moon.[55]

Turning from an oblique reference to Professor Beale, the concepts of the First Restatement and brandishing those ideals as unattainable, Professor Cook becomes more direct and scathing in his criticism:

> "The guiding motto in the life of every natural philosopher should be, seek simplicity and distrust it." In thus quoting from Whitehead, I do not intend to ignore the "normative" aspects of law. What I mean to suggest is that the

[55] Cook, An Unpublished Chapter of the Logical and Legal Bases of the Conflict of Laws (1943) 37 Ill L.Rev 418, 420

> seemingly simple and extremely broad principles of the Restatement and of writers like Beale and Story, are inadequate because (1) considered merely as descriptions of what courts have done they are inaccurate and misleading; and (2) as guides for the courts dealing with "new" cases they are too simple and far too broad to furnish an adequate basis for reaching socially useful decisions.[56]

As such, in considering the totality of Professor Cook's approach to choice of law questions a number of themes can be identified:

1. The importance of the *lex fori*;
2. An abandonment of internationalism as a priority;
3. Wariness of a rule driven scheme;
4. The importance of a desirable outcome.

The first two of the identified themes were considered, above, with the final two manifesting themselves in the passage reproduced immediately above. In seeking simplicity, and distrusting it, Professor Cook aims to shy away from the simplicity offered by hard and indelible rules as, particularly in the context of the First Restatement, those rules are ultimately mechanistic, unforgiving, inconsiderate and blind to otherwise relevant and perhaps prevailing factors. In this sense Professor Cook advocated a somewhat discretionary approach more similar to Judge Story's comity ideal than to Professor Beale's acquired rights scheme.

In the second of Professor Cook's perceived inadequacies of the scheme of the First Restatement, two important concepts can be identified - the importance of flexibility and the importance of wider justice. In identifying a rule driven approach as inadequate for the purposes of considering "new" cases, Professor Cook identifies a hallmark characteristic of the common law - the binding precedence of existing "rules" unless otherwise deemed inapplicable or overwritten by prevailing considerations. It would be an exhibition in legislative and academic arrogance to

---

[56] *ibid* at 422

purport to take account of, and provide for, all possible variations in potential fact patterns in a rule driven scheme.

In taking account of the interests of a wider justice Professor Cook referred to "socially useful decisions" as being a primary consideration for a court. In the context of a rejection of the mechanistic scheme resultant from the Restatement the differing priority is stark. As illustrated earlier, Professor Cook considered in some instances the obtainability of true certainty and predictability of outcome as a fantasy and adherence to a mechanistic scheme, unwavering in the face of intervening factors, in pursuit of the goal of certainty and predictability of outcome as striking at the very purpose of law in general and the common law in particular. That is to say that the need to do justice in a given situation, and so taking into account all the relevant factors in order to arrive at a "socially useful decision," should rank above the purported precision of all-encompassing rules.

Professor Cook's realism and pragmatism in the face of unbridled constructivism served to plant the seeds of discontent and disquiet with the scheme of the First Restatement for the following thirty years and the marked change therein over the past fifty years. Further, it is submitted that it also serves to highlight, with time tested perspective, the pitfalls of attempted precision, particularly relevant in the context of the modern European choice of law picture.

Before turning from Professor Cook to consider Professor Cavers, it is worth considering a subtle difference between the often synonymously mentioned concepts of Professor Cook and Judge Hand discussed above. To briefly restate the passages for consideration – Professor Cook asserted:

> The forum thus enforces not foreign right but a right created by its own law.[57]

Whereas Judge Hand asserted:

---

[57] Cook (1942) *op. cit.* n 42 at *20* – 21; Cook (1924) *op. cit.* n 42 at 469

> No court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognised by that sovereign.[58]

The distinction, subtle but significant, is that Professor Cook's formulation of the local law theory requires no foreign right to exist for an equivalent local "right" to be created or outcome effected. The learned judge's approach, on the other hand, required that a right positively exist in the foreign state and it then should serve as the template for the forum equivalent.

The significant element of the distinction comes from the "domestic action" component of the question of "fact" surrounding the foreign element. Professor Cook asserted that it is appropriate to consider past outcomes and likely future outcomes in the foreign court in fact patterns of a purely domestic nature:

> The rule of decision which the given foreign state or country would apply, not to this very group of facts now before the court of the forum, but to a similar but surely domestic group of facts involving for the foreign court no foreign element.[59]

Whereas Judge Hand's approach, at first glance, requires the opposite – a prediction of what a foreign court would do in the specific, cross-border, fact pattern. This particular difference, between the commonly asserted positions of Professor Cook and Judge Hand, placed them at differing ends of the same scale of appreciation of what a foreign court might do. First, as already mentioned, the approaches require a consideration of different fact patterns. Second, to satisfactorily discharge of the requirements of Judge Hand's question would require not just a consideration of the substantive foreign law but also the choice of law rules of that foreign court in question. It would appear difficult for a forum court to accurately and authoritatively arrive at a realistic and credible conclusion to such a question. Indeed similar

---

[58] *ibid* at 770

[59] Cook (1942) *op. cit.* n 42 at 20 - 21

criticisms have been levelled against the latterly resurgent concept of *renvoi*, discussed below.

Professor Cavers indeed questioned the legitimacy of the assumption of coincidence between Professor Cook's theory and that of Judge Hand.[60] In attempting to consider, and potentially reconcile, the apparent distinction between the supposedly synonymous notions, Professor Cavers identified the point of intersection in the concepts as, when Judge Hand refers to a positively created foreign right, if the intended target of consideration is the foreign rule of decision, as opposed to the right, the two theories would align. Pointing to a significant New York federal decision in 1934 as a proving ground for a distinction, he suggests first that there is no distinction between the approaches. Judge Hand identifies the key issue in the cross-border vicarious liability case as:

> The sole question, here as always, is how far the court of the forum will adopt the law of another place as the standard for its own legal consequences. A court of New York would certainly impose a liability similar to that which Ontario imposed, if the defendant in that province gave consent to Clemens's possession; the act took place there, and such a liability is not abhorrent to her own notions of justice. Again, if the defendant, knowing of the Ontario statute, had sent Clemens into that province with the car, or authorized him to take it there, we cannot suppose that New York would hesitate...When a man goes into a new state he exposes himself to its laws; when he sends property there, it is similarly exposed; when he causes anything to occur there, he subjects himself to such legal consequences as that state may impose. And if he sends an agent there, he becomes at least one cause...[61]

The facts in *Scheer* were typical of the ideal two state scenario, namely that an employee of the New York domiciled defendant corporation drove a vehicle owned by the corporation not only across state boundaries, but across national boundaries, by

---

[60] Cavers, The Two "Local Law" Theories (1949) 63 Harv L.Rev 822, 826

[61] *Scheer v. Rockne Motors Corp* (1934) 68 F 2d 942

travelling to Ontario and injuring a plaintiff also from New York. It is also worth noting that the injured plaintiff was a guest passenger in the vehicle at the time of the accident but it cannot be said that the conflict of law question involves a consideration of "guest passenger statute" type claims. Where the difference, and the significant factual question, arose was in the corresponding provisions purporting to affix liability on the owner of the vehicle rather than the driver. Ontario law had the effect of affixing liability on the owner of the vehicle, the corporation, for negligent driving irrespective of whether there existed an authorisation to drive the vehicle, whereas New York law, in order to fix liability on the owner of the vehicle, required explicit authorisation to drive the vehicle before any liability could attach.

In approaching the issue and in the process creating one of the first specific exceptions to the *lex loci delicti* rule of the First Restatement, Judge Hand declined to apply and enforce Ontario law, as the place of the injury, ultimately on the basis that, in the absence of any evidence establishing whether authorisation existed for the taking of the vehicle to Ontario, imposition of liability in the forum, according to the *lex loci delicti,* would amount to an unfair surprise[62] for the defendant corporation:

> It is indeed true that a principal may subject himself to liability from the acts of an agent whom he despatches to another state into which he never goes himself. He may make him an instrument of his will as much as though he used inanimate means; if he does, he will be liable according to the law of the place where his purposes are effected, as much as though he were himself there present.[63]

It is not wholly unexpected that a New York court, when considering the subordination of its law in favour of some other foreign law, might turn to the underlying principles of its own threatened law in an attempt to save it. It cannot be avoided that the above assertion, of the instance in which the vicarious liability might attach in a cross-border session, mirrors the underlying principles of the forum, New

---

[62] *Siegmann v. Meyer* (1938) 100 F 2d 367

[63] *Scheer op. cit.* n 61

York. However, also unavoidable is the strict and unyielding nature of the *lex loci delicti* rule in the Restatement. That rule does not overtly provide for a reversion to the principles of the forum to avoid what might be an inconvenient application of foreign law. Judge Hand went further by turning to established principle from the Supreme Court of the United States[64] and simultaneously affirming yet distinguishing from that principle to fall back to the forum:

> Provided that the result be not too distasteful to the *mores* of the forum, we think that the state where the damage occurs may impute liability to one outside, if he be in fact the voluntary author of it though the sequence between his conduct and the damage would be too remote under ordinary principles.[65]

Two things must be noted from the above: first the reference to the sensitivities of the forum; and second the connection with the Restatement's provisions concerning absentee defendants:

> When a person authorises another to act for him in any state and the other does so act, whether he is liable for the tort of the other is determined by the law of the place of the wrong.[66]

Before considering the apparent disconnect between Judge Hand's assertion and Cook's elaboration, it is appropriate to consider the basis upon which, as mentioned, the facts at hand were distinguished from the Supreme Court decision in *Young v. Masci*. The relevant distinction was made on a matter of fact rather than a matter of law. There were two significant distinctions made, first that in *Young* the events took place wholly within the United States of America as opposed to a fully international setting in the facts at hand, and second that in *Young* an unrestricted permission was

---

[64] *Young v. Masci* (1933) 289 US 253, 53 S.Ct 599, 77 L.Ed 1158

[65] *Scheer* (1934) *op. cit.* n 61

[66] Restatement (First) section 387

granted by the owner defendant. There was no evidence offered in the facts at hand as to the extent of the permission afforded to the employee concerned.

In carving an exception to the "strict" application of the *lex loci delicti* it is submitted that a significant, unsustainable, inconsistency with the scheme of the Restatement and prior decision was generated. The inherent unsustainability of the distinction made between the particular facts before Judge Hand and the Supreme Court decision in *Young* lies in the absence of evidence in support of the point of distinction. The court was not presented with evidence demonstrating an absence of consent, rather it was simply not shown evidence in support of a consent. However, it must nevertheless be accepted that the distinction was made.

Despite the fact that Judge Hand and Professor Cook have, subsequent to the decision in *Scheer*, been taken to have elaborated the same notion, the critical distinction, and often overlooked disconnect, between them lies in the issue of jurisdiction. In the instant case, in determining the choice of law question, Judge Hand asserted:

> The wrongful act here in question took place in Ontario; it was Clemens's driving; Ontario might of course make him liable. But in imputing his liability to the defendant that law had to reach beyond its borders, for the only acts by which the defendant connected itself with him were in New York.[67]

Further asserting that:

> ...the charge gave it [Ontario law] extra-territorial effect, as much as though that province had pretended to fix liability upon Clemens for injuries suffered in New York. As this went to the very heart of the case as it was presented to the jury, the judgment must be reversed.[68]

---

[67] *Scheer* (1934) *op. cit.* n 61

[68] *ibid*

Following the above assertions, concerning the forum consideration as to the proper exercise of foreign jurisdiction as a determinant factor for the application of the foreign law as the applicable law in the forum, it must first be observed that this question was, in fact, the critical question for Judge Hand in the determination of this case. What strikes first is that this assertion bears an uncanny resemblance to the position described with regards to the acquired rights concept, above. Second, when examining the judgement of Judge Hand it is evident that consideration was not given to the outcome, in an Ontario court, of an identical fact pattern in order to determine whether right had been acquired or not. Third, most significantly, is the importance placed on jurisdiction as a determinative factor is not representative of, nor synchronises with, Professor Cook's conception of a local law theory.

Had Professor Cook's version been used as the template, the New York court would have faced an entirely different set of questions. The New York court would not have been put in the position of asking whether or not the foreign law, the *lex loci delicti*, had adequate connection to apply. The court would not have had to consider what the likely outcome of an identical fact pattern would have been had the case actually been heard in an Ontario court. The court would not have had to consider whether a right had been created by the Ontario Court, a right sufficient to justify the recovery in the forum. The question a New York court would in fact had to have answered, if following Cook's version of the local law theory, would have been what the generally accepted likely outcome would have been had a similar incident occurred in an entirely Ontario focused context, and based on past decisions. The answer to this question would have generated not a right recoverable in New York but a rule of decision to guide the New York court in the determination of a local right.

In considering the effect and nature of the decision in *Scheer,* Professor Cavers touches on the particular preoccupation with jurisdiction exhibited by Judge Hand and accurately illustrates the difficulties with the decision:

> ... Both the New York and Ontario laws were in agreement that, but for the crossing of the Niagara River, this bailor would have been answerable for the injuries his car inflicted. Surely, then, the judge could not have allowed the bailor to escape liability simply by reason of this accident of geography... It

> seems whimsically unjust for conflict of law rules to bring about a decision frustrating both states policies. Only a preoccupation with the principles of jurisdiction would have led to a reversal of a ruling that, on the basis of the first possible finding, Ontario law should be applied.[69]

Professor Cavers concluded that:

> ... The solution of the question is not aided by casting it into terms of an enquiry whether Ontario had legislative jurisdiction to create a right in favour of the person injured there against the absent New York bailor. Yet it is just such an inquiry that is encouraged by Judge Hand's version of the local law theory and is rendered unnecessary by Professor Cook's.[70]

Judge Hand indeed appeared to harbour a preoccupation for considering jurisdiction of the foreign court as a principal determinant factor as to the applicability of that foreign law, a preoccupation later expressed again:

> Moreover, it is basic in the whole subject that legislative jurisdiction - of which this is an instance - is territorial, and that no state create personal obligations against those who are neither physically present within its boundaries, nor resident there, nor bound to it by allegiance.[71]

Given the apparent preoccupation with territorial jurisdiction, it is entirely appropriate to doubt the compatibility of doctrines held out as embodiments of a local law theory. Described as "antithetical to Professor Cook's views"[72] it would seem appropriate to belatedly, and definitively, draw a line of distinction between Professor Cook and Judge Hand as it is clear that the latter's concept bears greater similarity with the

---

[69] Cavers *op. cit.* n 60 at 828

[70] *ibid* at 829

[71] *Siegmann op. cit.* n 62 at 368

[72] Cavers *op. cit.* n 60 at 828

acquired rights concept than a truly local law ideal. Returning to Professor Cavers' overlooked distinction and assertion, it would seem appropriate to reassert the position that if:

> ... The reader agrees that Professor Cook and Judge Hand have formulated two different theories and that this difference in theory is likely,... He will doubtless wish to differentiate between the two. Convenience then will require that a distinctive name be available to designate each theory... The characteristic which distinguishes that theory is, of course, the modelling of the local right on the foreign right. To bring that characteristic to the fore... I suggest that a word be lifted from Judge Hand's famous passage in the Guinness case and last hereafter his theory be known as the "homologous right theory."[73]

2.6.2 *Professor Cavers*

Turning from Professor Cook and Judge Hand towards another significant contemporary critic of Beale, the Restatement and "jurisdiction selecting" rules, it is important to consider the role and impact of Professor Cavers in the deconstruction of the Restatement and the ignition of a revolution against it. As early as 1933, Professor Cavers sought to challenge the shift away from the "conventional" approach towards Beale's acquired rights approach and that contained in the First Restatement.[74] Professor Cavers, aside from the specificities of the acquired rights approach, set his stall early against a preoccupation with jurisdiction as a determinative factor in the choice of law question. A slightly different consideration from that contemplated by Judge Hand, Cavers approached the jurisdiction issue not from a desire to examine the purported jurisdiction of a foreign court or foreign law but with the desire to focus the choice of law question on the issue at hand rather than the appropriateness of a particular jurisdiction. This is the distinction between "rule selecting" and "jurisdiction selecting." Professor Cavers asserted:

---

[73] *ibid* at 831

[74] Cavers, A Critique of the Choice of Law Problem (1933) 47 Harv L.Rev 173

> So long as deduction from territorial postulates could indicate only one jurisdiction as a source of law in a given case, the content of that law would be logically irrelevant. Again, so long as the court was in search of a "foreign created right," it would seek appropriate jurisdiction, not an appropriate substantive rule... That rules for the determination of the appropriate jurisdiction would ignore the content of its law may not be inevitable as a matter of logic; actually it has seemed inescapable.[75]

Professor Cavers went on to characterise, pointedly, the acquired rights approach as a court merely "engaging in a blindfold test:"

> The court must blind itself to the content of the law to which its rule or principle of selection points and to the result which that law may work in the case before it.[76]

However, at the core of Professor Cavers' position was to adopt an approach far more radical than Professor Cook's. This approach was further from the conventional approach and the approach outlined by Beale in his treatise and in the First Restatement. As the nucleus of his approach, Professor Cavers considered the individual particularities of action rather than the prevailing interests of a jurisdiction. In essence, Professor Cavers was among the first to advocate a wholesale shift away from rule based "jurisdiction selecting" as the prime question towards flexible "rule selecting" in its place.

Touching on a perceived, inherent, unworkability of a strict rule-based approach as conceived in the restatement, Professor Cavers describes the judicial problem with rule-based rigidity in the following words:

---

[75] *ibid* at 178

[76] *ibid* at 180

> The court, conscious of its duty to formulate a rule applicable equally to situations where patterns of laws are different, may devise or adopt a rule which in its judgement will accommodate itself most successfully to those various patterns, deploring the while whatever harshness this rule may work in the case at bar...It is only when subsequent cases arise that the penalty is exacted. The court faced with a new case in which the only variation from its predecessor lies in the pattern of local laws may find the rule, which seemed so persuasive once, compelling it to a decision repugnant to its sense of justice.[77]

It might be argued that this description, particularly in the context of the European private international law position, is especially apt. The description describes, what is commonly perceived as, the principal difference between the common law and civilian law, as exists in the European Union today – the difference between certainty and flexibility, systemic adherence and individual considerations.

Professor Cavers, even at this early stage in the evolution of modern American choice of law theory, foresaw the critical mechanisms of escape from the rigidity of the *lex loci delicti* rule[78] but, ultimately, was convinced as to their inadequacy in meaningfully affecting the adherence to "blind" rigidity:

> These devices are either limited in scope for, although useful at times, more likely to preserve the situation from which on occasion they can afford a means of escape plan to lead to its ultimate elimination.[79]

In this Professor Cavers was fortunately less than prophetic in that the seeds of malcontent sewn by Professor Cook coupled with Professor Cavers' more radical

---

[77] *ibid* at 181

[78] Public policy exception, *renvoi*, characterization, party expectation – discussed below in the context of the shift from the First to the Second Restatement

[79] Cavers *op. cit.* n 74 at 186

suggestions eventually led to the academic revolution in modern American choice of law, though this will be discussed in further detail below. The need for change and the fundamental premise of that change was nevertheless identified:

> If the conflict of laws is to keep pace with the development in other fields of the law, courts and commentators alike must abandon the quest for rules which will work just as equally in two contradictory situations.[80]

Professor Cavers, in considering and proposing change, turned to the most basic instinct of a common law court, the need to do justice, in an attempt not just to temporarily escape the grip of the Restatement rule but to banish it entirely:

> A diagnosis having been advanced, prescription has called for... It seems more profitable to commence not with the definition of an issue but with the suggestion of a way to attack a problem no less general than that posed by Professor Lorenzen: "what are the demands of justice in the particular situation; what is the controlling policy?"[81]

In seeking to promote his aim of furthering individual justice, on the one hand, and shifting from bare jurisdiction selection to a more intricate and precise technique of selecting individual rules as they demand selection, on the other hand, Professor Cavers sought to appeal to "the finest manifestations of judicial intellection." Further, he rightly claimed that in an instance where there is a divergence from the happy coincidence of facts that generated the original rule that "there is very definitely a heightening of the court's responsibility to the parties." As such, Professor Cavers asks a hugely significant question:

> From the standpoint of the parties, however, is there not a comparable responsibility upon the court... The choice between these rules, even as a precedent for future choices, may not be of great social significance. But does

---

[80] *ibid*

[81] *ibid* at 187

> this discharge the court from a painstaking examination of the same factors whose materiality would be admitted where the case purely local one, together with those additional factors which the interstate character of the transaction raises into prominence?[82]

The question raises a number of issues that must be mentioned and considered. The first significant component of Professor Cavers' thesis is brought into view, that the interest underlying a decision of applicable law should be the interest of the parties to an action or one of the parties. This is a significant departure from the position in the First Restatement in that the aim underlying any black letter rule, aside from the desire to achieve certainty and predictability of outcome, is the creation and maintenance of an efficient mechanism of decision. Implicit in an efficiently operating mechanism is unwavering application of the mechanism and the unyielding rigidity of that mechanism in favour of systemic interests. The interest ultimately championed and protected is the "social interest." The second element of this first issue raised by Professor Cavers' question is that there might ultimately be a need, or at least an interest, in fulfilling party expectation as to the regime applicable to an action. It must be remembered that, while there are significant state interests at play, which may prevail over private interests in the selection of an applicable regime to torts, expectation must not be overlooked. As such, Professor Cavers raises the issue of the primacy of private interests over public interests, or the reverse. Although not the only perspective on this question, it is clear that the Professor Cavers has taken tentative steps towards placing private interests over and above public, state, interests in the context of private civil actions between private actors.

The second significant issue raised by Professor Cavers in his question, above, is the apparent disparity of treatment between local actions and actions with a cross-border element. The sole factor appropriate for consideration in the context of this question is directly referred to by Professor Cavers in his question, the "materiality" of issues. The point at issue turns on the manner in which the foreign law is considered and its ultimate application. A secondary, yet critical, consequence of the Professor Cavers'

---

[82] *ibid* at 188

grander thesis advocating rule selection as opposed to jurisdiction selection, is the lack of consideration appreciated to the content of potentially applicable foreign law is challenged by the assertion and question:

> The court is not idly choosing a law; it is determining a controversy. How can it choose wisely without considering how that choice will affect that controversy?[83]

In what can, certainly, be characterised as a value driven approach, Professor Cavers deliberately shuns the blind simplicity with which actions with foreign elements were treated in courts of the United States of America to that point. The aim underscoring the assertion was twofold. First, it is submitted that a significant deficiency was identified by Professor Cavers: a disparity of treatment between domestic cases and cases involving even a tenuous cross-border link does not serve the wider interests of justice. In a hypothetical scenario when two forum residents of common domicile find themselves as plaintiff and the respondent in an action occurring across state lines and where the other state does not permit recovery for a particular category of injury but the forum does, can an argument reasonably be sustained in favour of the blind application of the foreign law where fault is admitted and negligence is clear?

Were the fact pattern repeated in an entirely domestic setting a forum court would not hesitate to consider the effect and outcome of the application of the particular forum law where the "justice" of the controversy demanded. Why, then, does the simple location preclude an informed and reasoned determination as to the applicability of particular provisions? Once embarked upon the road of rule selection as opposed to jurisdiction selection, it would seem that there is a particular need for consistency of treatment between both domestic and cross-border matters.

Second, most significantly, irrespective of whether an action is domestic or international in nature that a consideration of all the factors relevant to the resolution of a "controversy" is an essential element that is desirable in the fair and robust

---

[83] *ibid* at 189

discharge of justice. It would seem somewhat curious that greater deference might be paid to foreign state legislation and its content than to domestic legislation and its content. Aside from the characterisation of an approach as jurisdiction selection or rule selection, it is submitted that there might be an even greater need to examine the content and effective application of foreign "rules" to forum residents and domiciliaries, this sentiment is effectively captured by Professor Cavers:

> Moreover, a recognition of the necessity for a thorough understanding and appraisal of foreign law should tend to diminish the parochial "affectation of superiority" which now leads the forum so frequently to reject foreign law.[84]

Ultimately Professor Cavers, in elaborating his preferred solution for the choice of law problem, identified a number of steps appropriate to consider in order to arrive at a more fair and equitable choice of applicable law:

1. Scrutinise the event or transaction giving rise to the issue before it;
2. Compare carefully the proffered rule of law and the result which its application might work in the case at bar with the rule of the forum (or other competing jurisdictions) and its effect therein;
3. Appraise these results in light of those facts in the event or transaction which, from the standpoint of justice between the litigating individuals or of those broader considerations of social policy which conflicting laws may evoke, link that event or transaction to one law or the other.[85]

The steps outlined by Professor Cavers serve to touch on a number of concepts that developed subsequent to his early criticism of the acquired rights and First Restatement approach.

---

[84] *ibid* at 191

[85] *ibid* at 192 - 193

The first point, re-emphasised, is the need to refrain from a mechanistic application of doctrinal rules to individual fact patterns. Insightfully identifying lawyers as "a rule making sect," Professor Cavers emphatically asserts that:

> ...it is equally important that rules, once formulated, do not operate to foreclose enquiry...where, as in choice of law cases, the problem is essentially complex, the rules developed must contain variables to permit some degree of accommodation to those complexities whose precise nature cannot be anticipated.[86]

While on the face of it, it might be perceived that Professor Cavers' ultimate goal was the elimination of blackletter rules it is submitted that the ultimate goal is in fact something more moderate. The true objective of Professor Cavers' thesis is not a reversion to judicial unpredictability and anarchy, but a tempering of mechanistic "slot machine" tendencies with a consideration of the individual particularities of justice. Professor Cavers, in this regard, argued strongly in favour of a renewed faith in flexibility and the judicial capacity and zeal for individual justice by analogizing the competing choice of law regimes with the traditional distinctions between the common law and civilian law, and drawing the link to the civilian law origins of the conflict of law as an entire concept, as discussed earlier in this thesis:

> Nothing in the proposed approach is inconsistent with the continuance of the doctrine of *stare decisis*, properly conceived. Indeed, to borrow Professor Oliphant's phrase for use in a context which seems emphatically to justify its employment, that approach would accelerate "the return to *stare decisis*." The conflict of laws emerged in Anglo-American law at a time when the *stare decisis* of the common law was being converted into the *stare dictis* of contemporary jurisprudence, and the older conception of *stare decisis* was alien to its civilian heritage.[87]

---

[86] *ibid* at 193 - 194

[87] *ibid* at 196

In the context of modern European private international law it is significant that even in the 1930's the challenge posed by the internationalization of law generally, first, the internationalization of private international law, second, and the compatibility between the common law and civilian law, third, was raised. This issue will be discussed in greater detail below but to briefly highlight the modern relevance of the crossover of traditions, Professor Briggs pointedly asserts:

> ...the result is not an English private international law, but a private international law which will operate, among other places, in English courts. Private international law and lawyers are now having done to them what was done almost 40 years ago to the system of weights and measures. We are finally being made to go metric. We are all in Rome now.[88]

The second and third points of Professor Cavers' self-summary sets the footing for the subsequent theories of comparative impairment analysis and "better law," to be discussed in greater detail below, but it would be unfair to the brand Professor Cavers' alternative to the Restatement as purely a "better law" approach. As submitted above, the position seeks not to banish a rule-derived system in favour of discretion but it seeks to temper a rule driven approach with broader principles of individual fairness balanced against systemic interests.

In the final analysis of Professor Cavers' early critique of the Restatement, the difference between it and the Restatement is startling. Professor Cavers argued that an exercise in blind mechanistic application of rules only concerned with jurisdiction selection was untenable. It is submitted, and will be discussed below, that time has proven Professor Cavers correct in his critique of the Restatement and that his endeavours in attempting to rekindle the enthusiasm for judicial dexterity and subtlety were prophetic and ultimately ground-breaking, serving as the searchlight guiding later forays against the restatement.

2.7 REVOLUTION

[88] Briggs, When in Rome Choose as the Romans Choose (2009) 125 LQR 191, 195.

In the decades following the adoption of the First Restatement and Professor Beale's concurrent treatise on the matter, there grew a significant body of criticism against the restatement. Much of the dissatisfaction with the Restatement was evidenced by the increasing willingness of courts to resort to elaborate mechanisms to escape the application of the mechanistic regime of the restatement: characterisation, renvoi, public policy objections. However, rather than considering the *judicial revolution* in the United States alone, it is appropriate to consider the *academic and scholarly revolution* against the doctrinal precepts of the Restatement, once described as "the late-Victorian idol,"[89] before considering the judicial application. As such, there are a number of significant alternative approaches that must be considered in this context: the governmental interest analysis approach advocated by Professor Currie; the *lex fori* approach advocated by Professor Ehrenzweig; the "better (proper) law" approach advocated by Professor Leflar; principles of preference advocated by Professor Cavers. Finally, and in addition to the individual commentators, the American Law Institute produced a Second Restatement presenting an entirely different position from the first: a most significant relationship test. In considering the academic and judicial revolutions in the United States it is important to note that, together with the last remaining states utilising the First Restatement[90], the approaches mentioned form the corpus of what is today a fragmented, inconsistent and mildly incoherent approach to the choice of law for torts in the United States of America today.

2.7.1 *Governmental Interest Analysis*

In a climate, originating in the 1960s, where the industrial mechanisation of the choice of law apparatus by the First Restatement and Beale's treatise began meeting increased judicial resistance in important cases such as *Romero* v. *International Terminal Operating Co.*[91], *Clark* v. *Clark*[92] and the seminal cases of *Babcock* v.

---

[89] Ehrenzweig, A Counter-Revolution in Conflicts Law? From Beale to Cavers (1966) 80 Harv L.Rev. 377, 377

[90] Symeonides *op. cit.* nn 17, 18

[91] *Romero* v. *International Terminal Operating Co* (1959) 358 US 354

Jackson[93], *Reich v. Purcell*[94] and *Bernhard v. Harrah's* Club,[95] there began a trend away from the *lex loci delicti* and the scheme of the Restatement towards alternatives.

The California State Supreme Court asserted in *Reich v. Purcell:*

> Moreover, as jurisdiction after jurisdiction has departed from the law of the place of the wrong as the controlling law in tort cases, regardless of the issue involved that law no longer affords even a semblance of the general application that was once thought to be its great virtue. We conclude that the law of the place of the wrong is not necessarily the applicable law for all tort actions brought in the courts of this state.[96]

Similarly New York State Supreme Court in *Babcock v. Jackson* asserted:

> Be that as it may, however, reconsideration of the inflexible traditional rule persuades us, as already indicated, that, in failing to take into account essential policy considerations and objectives, its application may lead to unjust and anomalous results. This being so, the rule, formulated as it was by the courts, should be discarded.[97]

The California State Supreme Court affirmed the distaste for the rigidity of the First Restatement by asserting in *Bernhard v. Harrah's Club*:

> As we have made clear on other occasions, we no longer adhere to the rule

---

[92] *Clark v. Clark* (1966) 106 NH 351

[93] *Babcock v. Jackson* (1963) 12 NY 2d 473

[94] *Reich v. Purcell* (1967) 67 Cal.2d 551

[95] *Bernhard v. Harrah's Club* (1976) 546 P.2d 719

[96] *Reich v. Purcell op. cit.* n 94 at 555

[97] *Babcock v. Jackson op. cit.* n 93 at 484

> that the law of the place of the wrong is applicable in a California forum regardless of the issues before the court. Rather we have adopted in its place a rule requiring an analysis of the respective interests of the states involved — the objective of which is "to determine the law that most appropriately applies to the issue involved."[98]

The common trend in these decisions was, aside from the rejection of the First Restatement, a desire to weigh competing factors and interests against other private and public interests in search of a more appropriate, individually selected, applicable law.

The first approach that must be considered is the "governmental interest analysis" approach advocated by Professor Currie,[99] characterized as a "gentle scholar"[100] the "father of the governmental interest approach."[101] At the time of the publication of his *Selected Essays* the landscape was described in grim terms by Chief Justice Traynor:

> He entered upon the fusty panorama of conflicts...things were in a state. Most observers who had come upon the scene were baffled, if not blinded. Though none were born baffled in conflict of laws, most achieved bafflement early or had it thrust upon them. Baffling, said the judges; Baffling, said the lawyers; Swamp, said the professors; and Echo answered *lex loci.*[102]

In a damning description of the experienced effect of the regime of the Restatement and its effect in advancing the cause of conflicts as a discrete and accessible subject matter, the Chief Justice went on to summarise the status quo under the First

---

[98] *Bernhard v. Harrah's Club op. cit.* n 95

[99] Currie, *Selected Essays on the Conflict of Laws* (1963)

[100] Chief Justice Traynor, Book Review (1965) 14 Duke LJ 426, 436

[101] *Bernhard v. Harrah's Club op. cit.* n 95

[102] Traynor CJ *op. cit.* n 100 at 426

Restatement:

> Her answering service was of supreme simplicity, but not less confounding for that. It evinced little concern to develop fair and rational answer is comparable to those developing in other branches of the law. The answers have an assurance, however, that many came to equate with a beneficent reassurance of certainty. The impression of stability was beguiling, but all was turmoil inside the premises. Nevertheless, conflicts were far enough removed from the ordinary life of the law that few were heard to say, though some do say it, that the premises were unsound.[103]

Chief Justice Traynor insightfully asserted, in the later case of *Reich v. Purcell*, what can be taken to be a guiding principle underpinning the revolution in general and of Professor Currie's approach in particular. While referring to Leflar's "proper law" approach which will be discussed in greater detail below, it is submitted that the "latitude"[104] afforded by a simple extraction of what is felt to be the "proper" law applicable to the action is not unbridled freedom as Professor Currie elaborates it:

> Ease of determining applicable law and uniformity of rules of decision, however, must be subordinated to the objective of proper choice of law in conflict cases, i.*e.,* to determine the law that most appropriately applies to the issue involved.[105]

Turning then to Professor Currie himself and his fundamental reappraisal of accepted choice of law doctrine in the United States of America. "Cut[ting] swath after swath across babble and cant in conflict of laws,"[106] Professor Currie's rejection of the

---

[103] *ibid*

[104] *ibid* at 427

[105] *Reich v. Purcell* (1967) 432 P.2d 727, 555

[106] *ibid*

"petrified forest"[107] of territorialism and its mechanistic tendencies as embodied in the restatement. It is this particular characteristic of Professor Currie's thesis that first marks it out as exceptional in the context of contemporary American conflicts doctrine.

In rejecting territorialism it might be argued that Professor Currie exhibited nihilistic tendencies towards accepted contemporary choice of law notions. The context in which territorialism was reject must be noted first. Professor Currie asserted:

> I regard choice of law rules as an obstruction to clear analysis and hence to progress[108]...we would be better off without choice of law rules[109]

and further that:

> the rules of the traditional theory...have not worked and cannot be made to work[110]

ultimately, and boldly asserting that the traditional private international law system be:

> ...scrapped...without entertaining vain hopes that a new "system" will arise to take its place.[111]

To combat the ineffectiveness of the "traditional" rules and the "petrification" of the Restatement Professor Currie advocated a return to a "domestic method" prioritizing

---

[107] Traynor CJ, Is this Conflict Neessary? (1959) 37 Tex L.Rev 657, 670

[108] Currie *op. cit.* n 99 at 616

[109] *ibid* at 183

[110] *ibid*

[111] *ibid* at 185

forum interests:

> ...just as we determine by that process how a statute applies in time, and how it applies to marginal cases, so we may determine how it should be applied to cases involving foreign elements.[112]

It is noticeable that this approach might, at first glance, be likened to a pure *lex fori* approach, i.e. the rejection, already mentioned, of territorialistic tendencies in favour of domestic law and methods of construction and interpretation. What is also noticeable at this stage is that, through this *volte face* in the promoted approach, Professor Currie goes beyond a mere return to the *lex fori* as the preferably applicable law. Professor Currie, in fact, looks to regress beyond the notions of internationalism championed by Story *et. al.*, above, to one of inward looking nationalism. A desire eloquently paraphrased by Chief Justice Traynor:

> It is no longer possible to play super judge when there is no superlaw.[113]

In essence, Professor Currie championed a return to a common law untouched by continental European ideas of rule driven certainty:

> The method I advocate is the method of statutory construction, and of interpretation of common-law rules, to determine their applicability to mixed cases. While there are some general principles to guide us, statutory construction must always be an *ad hoc* process. The distinctive virtue of the common law system is that it also proceeds on an *ad hoc* basis. I am proud to associate myself with the common law tradition.[114]

Professor Currie, apparently so disenchanted with the First Restatement and the facile

---

[112] *ibid* at 184

[113] Traynor CJ, War and Peace in the Conflict of Laws (1976) 25 ICLQ 121, 122

[114] Currie *op. cit.* n 99 at 657

simplification it embodies, advocated a wholesale rejection of any attempt to form generalisations. Commenting on the seminal decision of Fuld J in *Babcock v. Jackson:*[115]

> ...efforts to find short cuts and syntheses should be sternly discouraged. We are beginning to recover from a long siege of intoxication resulting from overindulgence in generalities; for a while, at least, total abstinence should be enforced.[116]

In this much a parallel may be drawn with Professor Cavers' desire to return to the pre-eminence of *stare decisis* as opposed to *"stare dictis,"*[117] but unlike Professor Cavers' "principles of preference"[118] following from his, already discussed, criticisms of the First Restatement, Professor Currie never relented in his blanket rejection of rule driven approaches to choices of law.

However, despite a rejection of territorialism and territorial contacts as the appropriate connecting factor, jurisdiction selection as a concept and a perceived inescapable gravitation towards the *lex fori,* it would be too much to label Professor Currie's thesis as introverted and inconsiderate of the demands of the modern global reality as it existed in the 1960's:

> [T]o assert a conflict between the interests of the forum and the foreign state is a serious matter; the mere fact that a suggested broad conception of a local interest will create conflict with that of a foreign state is a sound reason why the conception should be reexamined, with a view to a more moderate and restrained interpretation both of the policy and of the circumstances in which

---

[115] *op. cit.* n 93

[116] Currie, Comments on *Babcock v. Jackson* (1963) 63 Colum L.Rev 1219, 1241

[117] Cavers *op. cit.* n 87

[118] Cavers, *The Choice of Law Process* (1965)

> it must be applied to effectuate the forum's legitimate purpose.[119]

What is clear is that Professor Currie was conscious of, and driven by, the need to exist in an international environment but that the tools and the method by which that existence was both achieved and maintained should be domestic in nature. As such, Professor Currie mirrors Professor Cook's approach,[120] to a certain extent, and advocates a reliance on domestic statutory construction and interpretation methods as the basis underpinning any choice of applicable law:

> The method I advocate is the method of statutory construction, and of interpretation of common-law rules.[121]

As such, and correlating with interest analysis as being an inherently rule selecting approach, Professor Currie advocated that a direct examination of the substantive content of the potentially applicable laws was appropriate in order to uncover the policy objectives behind them. It is this inquiry into the policy objectives underpinning competing, potentially applicable, provisions that lends "interest analysis" to the title of the approach. As Professors Cheatham and Reese assert:

> A choice of law decision is, therefore, of real concern to the states involved, since in net effect it determines whose policy shall prevail in the particular case.[122]

To briefly summarise, in his own words, Professor Currie's approach before considering specific issues:

---

[119] *Bernhard v. Harrah's Club op. cit.* n 95 at 320; Currie, The Disinterested Third State (1963) 28 Law & Contemp. Prob. 754, 757

[120] *op. cit.* nn 42 - 60

[121] *op. cit.* n 113

[122] Cheatham and Reese, Choice of the Applicable Law (1952) 52 Colum L.Rev 959, 972

1. When there is a foreign element, the court should consider the policies reflected in the different laws and the relevant government interests;
2. If one state has an interest and the other does not, then the interested State's law should be applied;
3. If the court finds two states have an interest in a dispute, then (even if the forum is disinterested) the court should apply forum law.[123]

Another, and no less important, aspect of Currie's rejection of the existent mechanism is the assertion and belief that there should be no disparity in treatment between wholly domestic cases and those involving a foreign element. Despite the egalitarian appeal of such an approach, in its overall shape, it begs a number of questions that lingered in the minds of commentators and plagued the lasting success and acceptance of interest analysis a choice of law concept:

1. ...the notion that the domestic process is at all capable of producing solutions to choice of law problems.
2. ...the notion that the ordinary method of interpretation can safely and efficiently pinpoint the policies underlying the competing substantive law rules, especially the foreign ones.
3. ...the notion that the policies of a given rule of law may help determine its intended sphere of operation in space.[124]

First for consideration, and already mentioned above, is the apparent inevitability of an outcome selecting the forum's law as a result of Currie's rejection of the "traditional" approach and the regime under the First Restatement. As already suggested, it might be too much to label the approach as purely *lex fori* in nature, but can this argument be sustained? This fundamental consideration is an alternative

---

[123] Currie *op. cit.* n 99 at 1242 - 1243

[124] Symeonides, Revolution and Counter-Revolution in American Conflicts Law: Is There a Middle Ground? (1985) 46 Ohio St. LJ 549, 553

rephrasing of the first question asked immediately above,[125] though it is suggested that the question be modified to read:

> ...the notion that the domestic process is at all capable of producing solutions to choice of law problems [that select a law other than that of the forum].

The first thread in the fabric of forum favouritism is spun by the core presumption of the "domestic method" Professor Currie advocated: that the forum's law should apply automatically and only displaced should good reason be shown to displace it. The second thread can be gleaned by examining Professor Currie's own summary of his position, above,[126] and examining the extent to which, and possible scenarios in which, the *lex fori* would *not apply*. It has been suggested that the proper interpretation and implementation of Professor Currie's approach might result in a prevailing shift towards the application of the *lex fori* in the majority of circumstances:

a) a false conflict in which the forum is the interested state;
b) a true conflict in which the forum is one of the interested states;
c) unprovided-for cases;
d) a true conflict in which the forum is uninterested and cannot dismiss on the grounds of *forum non conveniens*.[127]

It has further been suggested that Professor Currie's interest analysis approach would only allow for the application of foreign law in a single, specifically limited, circumstance - a false conflict in which the forum is not interested.[128] Surely a rational analysis of competing interests would yield, at least, the possibility that an alternative

---

[125] *ibid*

[126] *op. cit.* n 123

[127] Cheatham, Griswold, Reese & Rosenberg, *Conflict of Laws* (1964 5th ed.) 447 - 448

[128] Symeonides *op. cit.* n 124 at 566

legal regime might be applied by the forum in more instances than actions in which it has no interests? Early contemporary indications were not positive in this regard.[129] *Lilienthal v. Kaufman*[130] represents an early, zealous, rejection of the mechanistic Restatement regime in favour of the "balance" promised by a return to *stare decisis*, common law, principles mentioned earlier.[131] However, *Lilienthal* is particularly useful as it illustrates the forum bias so tantalizingly offered by a return to discretionary principles. In weighing the balance between the competing state interests at play the Oregon Supreme Court asserted:

> We have, then, two jurisdictions, each with several close connections with the transaction, and each with a substantial interest, which will be served or thwarted, depending upon which law is applied. The interests of neither jurisdiction are clearly more important than those of the other. We are of the opinion that in such a case the public policy of Oregon should prevail and the law of Oregon should be applied; we should apply that choice-of-law rule which will "advance the policies or interests of" Oregon.[132]

The Supreme Court, crucially, elaborated further that:

> Courts are instruments of state policy...In litigation Oregon courts are the appropriate instrument to enforce this policy. The mechanical application of choice-of-law rules would be the only apparent reason for an Oregon court advancing the interests of California over the equally valid interests of Oregon. The present principles of conflict of laws are not favorable to such mechanical application.[133]

---

[129] *Lilienthal v. Kaufman* (1964) 239 Or 1, 16

[130] *ibid*

[131] *op. cit.* n 87

[132] *Lilienthal op. cit.* n 129

[133] *ibid*

The net effect of the Oregon Supreme Court's reasoning was to restore the primacy of the forum's interests to a position above the interests of other states. However there are a number of significant observations to be made with respect to the decision:

1. The "mechanical application" of the Restatement regime was rejected;
2. The court was held out to be an "instrument[s] of state policy;" and
3. The court should "advance the policies or interests of" the state.

Perhaps the most striking element of the observations is the degree to which the Supreme Court asserted itself, in a federal union, as the guardian of state interest to the detriment of all others. Coupled with this is the necessary politicization of the judicial process in the determination and elaboration of forum public policy and corresponding interests in any action.

It might be argued that the Oregon Supreme Court extended itself beyond the idealized application of an interest analysis approach but it is submitted, on the contrary, that there is nothing about the Supreme Court's approach inconsistent with Professor Currie's elaboration of his thesis. Aptly encapsulated by Chief Justice Traynor:

> It is one thing, he says, to consider the interests of other states in the context of interstate harmony and thus to arrive at a restrained and enlightened definition of forum policy. It is quite another to subordinate forum policy to the interest of another state or to some mechanistic principle of conflict of laws.[134]

And further still:

> If a court, whether articulating the forum's common law or interpreting statutes that are silent as to their conflicts applications, concludes that the local rule extends to the conflicts case at bar, it must apply its own rule just as it

[134] Traynor CJ *op. cit.* n 100 at 433, Currie *op. cit.* n 99 at 604

> would had its legislature specifically directed it do so. There is no room for further balancing of interests in derogation of applicable local policy.[135]

There are, however, a number of contradictions inherent in an analysis of the Chief Justice's assertion, and in light of the observations made above following the decision in *Lilienthal*, which are instead ultimately consistent with Currie's thesis. The first contradiction, apparent immediately above,[136] is central in answering the first question asked earlier in this section:

> ...the notion that the domestic process is at all capable of producing solutions to choice of law problems [that select a law other than the forum].[137]

The contradiction is that, despite a consideration of competing interests in an action, there is an apparent reluctance to accept the potential primacy of a foreign law over that of the forum. Surely, in a modern and developed private international law regime, where a court undertakes to "consider the interests of other states in the context of interstate harmony"[138] it is implicit that in the interests of interstate harmony some law other than that of the forum might apply? Professor Currie, himself, sought to soften the perceived forum bias in calling for the, above mentioned, "restrained and enlightened interpretation" of the *lex fori*:

> On the contrary, to assert a conflict between the interests of the forum and the foreign state is a serious matter; the mere fact that a suggested broad conception of local interest will create conflict with that of a foreign state is a sound reason why the conception should be re-examined, with a view to a more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum's legitimate

---

[135] Traynor CJ *op. cit.* n 100

[136] *op. cit.*

[137] *op. cit.* n 124 *et. seq.*

[138] *op. cit.* n 134

purpose.[139]

However, what appears to be the reality is that the interests of other states were weighed but did not weigh heavily in the minds of courts, commentators and champions of Professor Currie's thesis, identified by Chief Justice Traynor earlier:

> It is one thing, he says, to consider the interests of other states in the context of interstate harmony and thus arrive at a restrained and enlightened definition of forum policy. It is quite another to subordinate forum policy to the interest of another state or to some mechanistic principle of conflict of laws.[140]

Nevertheless, before answering and moving from the first question posed[141] it is crucial to examine *why* there manifested a reluctance to deviate from the *lex fori.* Sceptics and critics of the common law tradition, generally, and of interest analysis, particularly, might be tempted to portray the apparent forum favouritism as irrational and unfounded in the context of the concept of a rational examination of competing state interests. It is submitted, however, that the favouritism was justified and mandated by Professor Currie and represents a critical failing of his elaboration of an interest analysis approach:

> ... One of the prime theses of [the governmental interest analysis] approach to conflict of laws problems is that no court, state or federal, is in position to "weigh" and choose between truly conflicting interests of different states. It has previously been conceded that state's basis for asserting an interest in the application of this policy may be so attenuated as to justify its disregard for constitutional purposes. And it is clear that the courts of the state may properly take into account the possibility of conflict with the interests of other states in determining what domestic policy is and how far domestic interests extend.

---

[139] Currie, The Disinterested Third State (1963) 28 Law & Contemp Probs 754, 757

[140] *op. cit.* n 134

[141] *op. cit.* n 124

> Here we add that the "altruistic interest" of the state–its interest in extending the benefits of its laws to all persons without distinction–must yield to the specific interests of another state in effectuating the policy expressed in its law. The "altruistic interest" is of a quite different order from the interest of the state in effectuating the specific policies declared in its laws; the subordination of the former to the latter does not seem to us to involve the exercise of legislative discretion in the same sense as does the choice between conflicting state interests of a coordinate and specific character.[142]

In considering the implications of this extract it is useful to return to decision of the Oregon Supreme Court in *Lilienthal*[143] as an early example of an embodiment of the approach and useful for its distillation of same. Von Mehren identifies two critical implications that came to pass, as earlier identified, in *Lilienthal*:

> First, the methodology announces a general proposition: in principle, the forum should always apply its own domestic rule if the forum's domestic law reveals a reasonably specific policy that would be served by the rule's application in the particular case.
>
> Second, the methodology builds on an avowed view of the appropriate role of the judicial process; courts are not apt agencies to "weigh and choose between truly conflicting interests of different states."[144]

As such, it is submitted that Professor Currie's call for a "moderate and restrained" interpretation of forum policy can and should be read, with the benefit of hindsight, as little more than a veil woven to conceal an inevitable gravitation to the *lex fori*. Further, Professor Currie's assertion concerning the judicial role in any interest analysis is additionally fatal to the ultimate efficacy of interest analysis as a rational

---

[142] Currie *op. cit.* n 99 at 497

[143] *Lilienthal v. Kaufman* (1964) 239 Or 1

[144] Von Mehren, Book Review (1964) 17 J. Legal Ed 91, 94

choice of law regime in that it rigidly, and actively, prevents a forum court from considering, in a pragmatic and realistic manner, the balance between competing state interests. Professor Currie proposes that this is not a judicial function but a political one and, as such, effectively excludes foreign law, as a potentially applicable law, in all circumstances save false conflicts in which the forum is disinterested. It is fundamentally anathema to any regime overtly premised on the notion of a rational consideration of competing interests to discount all choices but the forum.

Von Mehren ultimately asserts:

> If his teachings were ever fully accepted and became the exclusive basis for handling choice of law problems American thinking would, in my judgement, have adopted a point of view that is in its way as narrow and as dogmatic as the approach of the original Restatement which Currie so effectively attacks. Moreover, Currie's analysis, which compels him to give to the forum's law such broad effects, would tend to fasten upon the international and interested communities–except to the extent that the balance can be redressed in the latter context by constitutional controls–a legal order characterised by chaos and retaliation.[145]

To return to and answer the first question posed,[146] it is submitted that:

> ...the domestic process is ***not*** at all capable of producing solutions to choice of law problems [that select a law other than the forum].

Further, that the climate of chaos and retaliation spoken of above is tempered by but one certainty: that the *lex fori* will apply almost as a matter of course. Ultimately the forum favouritism perceived by the "rigid" application of the *lex fori* results in the promotion of one of the evils private international law attempts to eliminate: forum shopping. As such, fundamental parallels must be drawn between the "rigid"

---

[145] *ibid* at 96 - 97

[146] *op. cit.* n 124 *et. seq.*

adherence to the *lex fori* under Professor Currie's interest analysis approach and that of the restatement, considered above.

Turning then to the second and third questions posed above:

> 2. ...the notion that the ordinary method of interpretation can safely and efficiently pinpoint the policies underlying the competing substantive law rules, especially the foreign ones.
> 3. ...the notion that the policies of a given rule of law may help determine its intended sphere of operation in space.[147]

It is proposed to consider these two issues together before moving from Professor Currie's interest analysis approach to the two other significant choice of law methodologies present in current American private international law: proper law; the Second Restatement. In considering the questions posed immediately above, relating to the "domestic method" of construction and interpretation of competing substantive laws be they domestic or foreign in nature, and the spatial reach, inherent in these questions, it becomes clear that the idea that it is not merely a comparison and balancing of competing laws that is the objective of the court. The true objects of comparison are in fact the underlying policies. The question then becomes, how does a court determine whether a particular substantive rule is the product of a specific policy? Common sense, if judiciously employed, would lend itself to the notion that a "domestic method" of interpretation and construction would attempt to extract an underlying policy from foreign law in the same manner in which it extracts it from domestic law. However, before embarking on a more detailed analysis and critique of the "domestic method" it is worth returning to Professor Currie himself in order to put the question in to the proper context:

> When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy

---

[147] Symeonides, Revolution and Counter-Revolution in American Conflicts Law: Is There a Middle Ground? (1985) 46 Ohio St. LJ 549, 553

> expressed in the law of the forum. It should then enquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially the familiar one of construction or interpretation. Just as we determined by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.[148]

Professor Currie went on to draw a distinction between the nature of judicial decisions concerning questions of pure statutory construction and questions involving the balancing and determination between competing interests:

> Like all statutory construction, such a decision [as the court made] is essentially legislative in character; the court is trying to decide as it believes Congress would have decided had it foreseen the problem...The profound difference between this approach and ["weighing" respective interests] consists in the fact that the process employed by the court in these cases is avowedly that of statutory construction, and legislative correction is positively invited.[149]

It is, therefore, clear that the approach can be distilled down to two main elements: avoid engaging in any sort of rational comparison of competing interests; attempt to predict or foresee a legislative result of a political process. Both of these elements, it would seem, run contrary to the common law tradition in undermining the activist role of the common law judge in cross-border, or interstate, matters. The difficulties with this premise are heightened in circumstances where there is no clear legislative promulgation for questions of choice of law.

---

[148] Currie *op. cit.* n 99 at 183; Brilmayer, Governmental Interest Analysis: A House Without Foundations (1985) 46 Ohio St. LJ 459, 463

[149] Currie *op. cit.* n 99 at 606

Were there clear legislative direction in questions of choice of law, it might be argued that the result of that direction might be far more rigid than even the idealised and pure, implementation of an interest analysis-type approach. Territorialism, the "danger" Professor Currie apparently wished to avoid, it is submitted, would be a far closer prospect in the hands of an active legislature than Currie might have been comfortable in recognising. In this regard it is vital to consider the approach in the European Union under the Rome II Regulation although this is the subject of the latter part of this thesis.

With this in mind it must be questioned whether Professor Currie's approach is truly capable of identifying policy or whether Professor Currie has fallen into the same dogmatic trap he criticised the Restatement and its proponents of succumbing to. Professors Weintraub and Brilmayer encapsulated the issue separately:

> The most important lesson taught in the first year of law school is that an intelligent decision to apply legal rule depends upon knowing the reasons for the rule.[150]

> LB: Well, do you think the court reached the right result?
> Mr. C: Yes (smile)
> LB: Why?
> Mr. C: Well...for pretty much the reasons the court gave. (much smiling in the class)
> LB: So, Mr. C, do you know what those reasons were?
> Mr. C: Yes, Professor Brilmayer. The court decided on policy. (much laughter by 140 other students and the professor)[151]

Professor Brilmayer was unconvinced of Professor Currie's form of interest analysis ability to "see the wood from the trees" and equally accuses Professor Currie of

---

[150] Weintraub, Interest Analysis in the Conflict of Laws as an Application of Sound Legal Reasoning (1984) 34 Mercer L.Rev 629, 631

[151] Brilmayer *op. cit.* n 148 at 459

resorting to irrational dogma:

> Through endless repetition and self-evident treatment, the rabbit was placed into the hat with great fanfare and then pulled triumphantly out. Every one of his examples proceeds this way.[152]

It must be noted that Chief Justice Traynor had earlier refuted a similar allegation against Professor Currie's thesis:

> On the contrary, Currie's brilliant essays have led us away from the narrow and dogmatic. They should do much to encourage consideration by the forum court of all relevant factors as it delineates the reach of local policy in conflicts cases.[153]

As Currie, it is submitted, actually purports to further legislative intent rather than engage in a rational comparison of competing interests, it must be examined what Currie makes of legislation in light of his comments welcoming it: "legislative correction is positively invited."[154] Professor Brilmayer was unconvinced of Currie's apparent comfort with legislative involvement and drew on Professor Currie's treatment of a leading contemporary case, *Grant v. McAuliffe*[155] in support. To illustrate the value of the treatment it is worth considering the context in which it arose. In *Grant*, the California Supreme Court, in 1953 as frustration with the Restatement's mechanistic rigidity was reaching a climax in that state, employed the traditional common law technique of manipulating the characterisation between matters of substance and matters of procedure to achieve, what it perceived to be, the desirable outcome in the action despite issues concerning the "full faith and credit" implications involved:

---

[152] *ibid* at 467

[153] Traynor *op. cit.* n 100 at 426

[154] *op. cit.* n 149

[155] *Grant v. McAuliffe* (1953) 41 Cal 2d 859

> Basically the problem is one of the administration of the decedent's estate, which is a purely local proceeding.[156]

Subsequent to the decision, a law revision commission in that state considered[157] such manipulation extremely undesirable in the context of survival actions such as the instant case. The commission was charged with determining whether or not California should adopt legislation redressing the manipulation of the characterisation of survival of actions. In its final analysis, the commission did not recommend the adoption of legislation on the following bases:

1. The survival issue is but a part of the larger problem of differentiating between matters of substance and matters of procedure. Any legislation in this area should embrace the entire problem and not merely one facet of it.

2. The application of the California statute in the *Grant* case was not unjustified. All of the parties were residents of California and application of the archaic Arizona law of nonsurvivability was avoided.

3. The *Grant* decision does not clearly indicate that the California courts should, or would, apply the California law of survival in all cases.[158]

It is noticeable that there was a distinct homeward bias given that all parties to the action were resident in the state of California and as such, the need to legislate out of judicial control something inherent to common law private international law, it is

---

[156] *ibid* at 866

[157] California Law Revision Commission, Recommendation and Study Relating to Choice of Law Governing Survival of Action (Feb 1957) 6

[158] Sumner, Choice of Law Governing Survival of Actions (1957) 9 Hastings LJ 128, 144

submitted, was reduced. Nevertheless, Professor Currie strongly welcomed the outcome of the review commission:

> The commission is to be congratulated on its decision not to recommend legislation on the question of what law shall govern survival of actions. The California Supreme Court is one of several courts in this country that are making serious efforts to break away from sterile formalism and to develop a rational approach to conflict of laws problems...Legislation that would have placed this vigorous court in the metaphysical irons forged by Professor Beale and the American Law Institute would have been reactionary in the extreme.[159]

It must be noted that the apparent delight with which Professor Currie welcomed the refusal to legislate placed him at odds with his own pre-emptive embracing of legislative intervention, should a legislature deem it necessary. As Professor Brilmayer went on to assert:

> This is a very strange position, indeed for one whose primary methodological goal is to further legislative purposes...Obviously, Currie was hostile to legislative revision of results that he likened if the revisions reflected premises he did not like. He preached that the greatest good is obedience to the legislative will; but he balked at following the legislature's lead when it adopted a choice of law approach of which he disapproved. [160]

Further and most pointedly:

> In contrast, he encouraged legislatures to adopt choice of law provisions as long as they did not fall under the spell of territorialist dogma. What appears to have mattered to Currie was not whether legislative purposes were fulfilled, but whether results conformed to the type of interests he recognised in his

[159] Currie *op. cit.* n 99 at 131 - 132

[160] Brilmayer *op. cit.* n 148 at 468

> illustrative applications. *So long as legislatures followed his methods, their activities were to be encouraged.*[161]

Perhaps it might to too much to blacken Professor Currie's formulation of interest analysis to the extent that Professor Brilmayer does, but her reasoning cannot be ignored nor escaped from. Currie, it seems, gave with one hand and took with the other in the context of legislative involvement in private international law matters. It seems apparent that interest analysis, in the American model, cannot fully nor faithfully be trusted to adequately determine policy interests underlying competing state interests in order to enable a rational choice of law. It is submitted that, in this context, Professor Currie had only dreamt of casting off "the metaphysical irons forged by Professor Beale and the American Law Institute,"[162] they in fact remained firmly fastened.

Turning, finally, to the third related issue of the spatial reach of particular laws, as determined by the underlying policy considerations, Professor Currie unsurprisingly asserted that where an action fell within the reach of a measure that the originating state had an interest in applying the originating law in order to give effect to the "policy" objectives therein. Professor Currie asserted that a court should:

> ...inquire whether the relationship of the forum state to the case at bar-that is, to the parties, to the transaction, to the subject matter, to the litigation-is such as to bring the case within the scope of the state's governmental concern, and to provide a legitimate basis for the assertion that the state has an interest in the application of its policy in this instance.[163]

In elaborating this position further, bearing in mind the above argument concerning Professor Currie's purported comfort with legislative involvement and purported

---

[161] *ibid* [emphasis added]

[162] *op. cit.* n 159

[163] Currie *op. cit.* n 99 at 189

modus operandi of furthering legislative intent, it is significant to note that an "interest" in the above context was not held out by Professor Currie to be purely based on legislative intent. In fact, Professor Currie expressed an "interest" as being an amalgam of multiple factors:

> Interest...is the product of (a) a governmental policy [as "interpreted" by the court] and (b) the concurrent existence of an appropriate relationship between the state having the policy and the transaction, the parties or the litigation.[164]

Further, given the forum bias already discussed[165] it perhaps unsurprising that Currie articulated the "parties," above, in language focused on the forum. In this regard it is useful to turn again to Professor Currie and, in particular, his treatment of *Kilberg v. Northeast Airlines.*[166] For illustrative purposes it is worth briefly setting out the facts and setting of that action. The action arose from an air traffic accident in which an aircraft owned and operated by the defendant company crashed en route from New York to Nantucket, Massachusetts, while carrying the deceased who had duly purchased the required ticket. The crash took place in Nantucket. It was claimed that due to the purchase of the ticket that there existed a right of recovery in tort corollary to the contractual relationship that was created upon purchase. Should the argument be sustained the net effect would have been to allow recovery in tort under New York law which was not subject to a recovery ceiling of $15,000 under the *lex loci delicti*, Massachusetts. In his essays Professor Currie described a particular New York pro-plaintiff rule of recovery as:

> ...not for the protection of all who buy tickets in New York, or board planes there. It is for the protection of New York people.[167]

---

[164] *ibid* at 621

[165] *op. cit.* nn 125 - 146

[166] *Kilberg v. Northeast Airlines* (1961) 9 NY 2d 34

[167] Currie *op. cit.* n 99 at 705

The adoption of this position serves to ultimately limit the spatial reach of an originating state's interests to a greater extent than mere forum territorialism might. In fact, it would appear that Professor Currie advocated a position purporting to limit the reach of state interest and protection to state domiciliaries, irrespective of location, with non-domiciliaries situated in the state unable to benefit from forum protection in cross-border matters. It is submitted that this is ultimately an untenable proposition, particularly when taken from the perspective of such a "protecting" forum. Professor Currie had already elaborated a position, set out by Traynor CJ and discussed above, highlighting the reluctance with which forum policy would be displaced:

> It is quite another to subordinate forum policy to the interest of another state or to some mechanistic principle of conflict of laws.[168]

It is submitted that non-domiciliaries present and residing in a state should, in fact, be categorised as "parties" for any analysis. The exclusion of non-domiciliaries in this way takes to an extreme the forum bias and homeward tendency of Currie's elaboration of interest analysis and far from preventing the subordination of forum policy from some other, it in fact encourages a subversion of forum policy by those unprotected but otherwise affected by forum law and policy. In this regard, Professor Currie's appreciation of the limits of the spatial reach of forum "policy" and "interest" is clearly deficient.

2.7.1.1 *Conclusions*

The pages above have sought to examine, in more than a superficial manner, the main pillars of governmental interest analysis as it originated in the United States of America and as it developed in that jurisdiction. On the face of it, the concept of attempting to strike a balance between the competing interests in any action seems attractive and logical. However, as discussed above, Professor Currie's elaboration of his thesis, and the early implementation and championing of the approach, quickly shone a light on the truth of the thesis. That truth is that rather than representing a

---

[168] *op. cit.* n 134

rational move away from the dogmatic and the mechanistic tendencies of the Restatement, Professor Currie indoctrinated a generation and forged his own irons, virtually unyielding in their mechanistic application.

As highlighted at the beginning of discussion, above, concerning the instances of applicability of the *lex fori,* it was suggested and questioned whether the application of the *lex fori* would truly be limited under Professor Currie's thesis:

> Application of the *lex fori*:
>
> a) a false conflict in which the forum is the interested state;
> b) a true conflict in which the forum is one of the interested states;
> c) unprovided-for cases;
> d) a true conflict in which the forum is uninterested and cannot dismiss on the grounds of *forum non conveniens*.[169]
>
> Application of some other law:
>
> a) a false conflict in which the forum is not interested.[170]

Given the discussion above it is submitted that it is clear that in virtually all circumstances the searchlight shines homeward. Professor Currie's elaboration of interest analysis, and the unbridled favouritism towards the forum, has the effect of encouraging forum shopping and is fundamentally counter-productive in the context of rational, modern, interstate conduct. It abandons the common-law tradition of in a number of respects, identified above, but fundamentally it abandons the search for individual justice in individual actions instead blindly applying the *lex fori*. Professor Currie does succeed in delivering on one of goal of modern private international law – certainty and predictability, although the certain and predictable outcome is the application of the *lex fori*.

Professor Currie's interest analysis, it is submitted, has not "led us away from the

---

[169] *op. cit.* n 127

[170] Symeonides *op. cit.* n 124 at 566

narrow and the dogmatic."[171] Chief Justice Traynor was indeed correct in that:

> It is no longer the same old fusty panorama in conflict of laws since Brainerd Currie's landing.[172]

However:

> If it is to be abandoned because of its exceedingly combative nature and its notorious forum favouritism, we would be moving in the right direction of restraining this epidemic state of antagonism which has little place in a federal system.[173]

Given that Professor Currie's interest analysis thesis applies as the singular choice of law approach in only two states today, California and The District of Columbia, it is submitted that it has already been abandoned.

> We stand today just about where we stood when Currie finished the critical portion of his analysis: knee deep in metaphysical rubble.[174]

2.7.1.2 *Sample Scenarios Considered*

Scenario A – Traffic Accident

Following the consideration of the governmental interest analysis approach advocated by Professor Currie, above, it is important to highlight that the forum court is the important consideration in determining the manner in which the approach might

---

[171] Traynor *op. cit.* n 100 at 426

[172] *ibid* at 436

[173] Symeonides *op. cit.* n 124 at 568

[174] Brilmayer, Governmental Interest Analysis: A House Without Foundations (1985) 46 Ohio St. LJ 459, 481

operate. It has been submitted that the only instance in which a law other than that of the forum might apply is where the forum is a disinterested state in which there is no actual conflict of law.

In the instant fact pattern, it is implicit that the likely forum would be State A or State B. State A was Bob's domicile and State B was where the effects of the accident were experienced and where Bob works. Given the likely selection of forum it is clear that both states have some interest in any eventual action. As such, given the above, it is submitted that a court in State A or B, if employing a governmental interest analysis approach, would not apply the law of State C, the *locus delicti,* nor of State D, the place registration and insurance of the vehicle, nor of State E, the place a citizenship of the driver of the vehicle. The applicable law would be the *lex fori* of State A or B.

Scenario B – Publication of Defamatory Material

Much like the consideration of Scenario A, above, the crucial factor in the eventual determination of the applicable law is, actually, the selection of the jurisdiction given the unlikelihood of a forum being genuinely disinterested in an action. In the instant fact pattern it is submitted that the applicable law would, again, be the *lex fori.*

Scenario C – Products Liability

In the context of the instant fact pattern, much like the preceding scenarios, it is submitted that the selection of forum is crucial in the determination of the applicable law. In this instance, it is clear that the likely forum is State 1 given the connections to that jurisdiction: domicile of the victim; place of the event; domicile of the domestic supplier company. As such, it is submitted that it is clear that State 1, the forum, is a clearly interested state and given the submissions concerning the true nature of the governmental analysis approach, the likely applicable law is the *lex fori,* the law of State 1.

2.7.2 *The "Better / Proper Law"*

Before proceeding further it is important to draw another distinction with what

preceded and the instant approach, and a distinction that is particularly relevant in the European context. The traditional approach, the Restatement and Professor Currie's interest analysis approach all approach choice of law questions with the goal of choosing an appropriately governing jurisdiction whose law should apply. In that sense the approaches considered to this point are concerned with the spatial element as they choose jurisdictions as having *the most appropriate relationship* to the fact pattern at hand as the basis for application of law as opposed to some other consideration, such as choosing a particular law as applicable or overtly seeking to facilitate a particular result. Otherwise known as "conflicts justice," the category's proponents seek to distance themselves from a consideration of the justness of outcome as the determinative factor in any decision. It is conceded that there is a particular attraction with such an approach in that it avoids an attempt by a forum to court to divine a meaning of "justice" as understood in competing states. The fundamental problem arising in such a consideration is that competing states, naturally, have different appreciations of justice by virtue of their legal regimes being framed to take cognisance and promote that domestic sense of justice. Although the writer does not, at this stage, seek to either endorse or refute such an argument both sides, nevertheless, can be forcefully argued. On one hand:

> To say that each state must seek the result which it regards as just...not only is this a denial of true justice...but also a denial of the law itself.[175]

And on the other:

> ...the courts cannot compare justice according to differing laws in order to say what satisfies the ends of justice in some abstract sense. The function which the courts of this country would be required to perform if the new English approach were adopted would, in my respectful view, be inconsistent with what we have hitherto understood to be the function and the duty of courts: the function of enforcing rights and liabilities according to the law of the forum (including private international law) and the duty to exercise jurisdiction

[175] Cavers, *The Choice of Law Process* (1965) 22

which is regularly invoked unless the invocation of the jurisdiction is oppressive, vexatious or otherwise an abuse of process.

Perhaps, given the criticisms against the over-involvement of the forum, particularly in the context of the "domestic method" of construction and interpretation, it might be appropriate to involve the forum's sense of justice as a weapon in the armoury available to judges in choosing an applicable law that yields more than simply "conflicts justice."

At the other end of the spectrum in the *lingua franca* of modern private international law is the concept of "material justice." What differentiates "material justice" from the former can be somewhat extracted from the phrase itself: individual laws are material in individual actions rather than conflicting states or jurisdictions being the predominant preoccupation. Central to the notion of "material justice" in modern private international law is a methodological and an ideological shift from the preceding concepts and doctrines that dominated previously. The ideological shift is the quasi removal of the distinction between domestic actions and actions with cross border elements to the extent that the need to do justice in either category remains the same in both instances.

This is in sharp contrast with the former category in that the need to do justice in cross border matters virtually disappears making way in favour a preoccupation with jurisdiction selection. The methodological shift apparent in the latter category, "material justice," is that the focus of attention in a forum court purportedly turns from the quasi procedural question of establishing the appropriately applicable jurisdiction, for the purposes of the relevant choice of law, to examining the substantive provisions in question and attempt to qualitatively reconcile them against a fair and equitable appreciation of the respective strengths and weakness of argument of the parties to any action. In this regard, a court or private international law regime focused on the material equity of an action is inherently more adherent to the common law traditions of ensuring an individually fair and just outcomes rather than being bound to a mechanistic schedule of rules. To distil the distinction between approaches seeking to do "conflicts justice" and "material justice" reveals the former as being

inherently rule driven and the latter being inherently result driven or to put in alternative language – systemic justice as opposed to individual justice.

Having considered this important preliminary distinction and turning to proponents of such rule driven approaches we find a number of champions of individual justice, foremost being Professor Cavers, discussed at length above,[176] and Professor Leflar. This section will consider, primarily, the "proper law" approach as set out by Professor Leflar[177] some three years after the publication of Professor Currie's essays in which his thesis on interest analysis was elaborated. Professor Leflar has since been recognised as one of the foremost thinkers in modern private international law, described by Professor Juenger as:

> ...an oracle of conflicts law also in the sense that his writings have a markedly high predictive value. It is easy to see why. Like good judges anywhere he uses common sense as his guide. When I say common sense I do not mean mere visceral reactions, but a sound instinct for what is right and what is wrong, honed by experience and reflection as well as by meticulous effort.[178]

Given the landscape of private international law in the United States at the time, and the distaste for the Restatement, it is unsurprising that there was an almost overwhelming temptation to supplant one rule driven approach for another in the same manner as Professor Currie had. Professor Leflar recognised as much but was not overwhelmed:

> There is a tendency to say that the proper way to deal with choice of law problems is to wipe the slate clean of all the old rules and theories, and start

---

[176] *op. cit.* nn 74 -88

[177] Leflar, Choice-Influencing Considerations in Conflicts Law (1966) 41 NYU L.Rev 267

[178] Juenger, Leflar's Contribution to American Conflicts Law (1980) 31 S.C L.Rev 413, 422

> afresh. This tendency assumes that the old ideas were based on such mistaken assumptions and unachievable objectives as to make them substantially useless in the light of today's better understanding and scholarship. That there is better understanding and scholarship today is certain. That the past can or should be disregarded is another matter.[179]

Instead, Professor Leflar identified "choice influencing considerations" that should guide and direct any eventual decision, although very early in his elaboration of his thesis he identified their ever-presence, that they were not new theoretical edifices:

> The major considerations that should influence choice of law have always been present and operative in the cases. They have not always been identified clearly, nor has the weight given to one or other among them always been logical or sensible.[180]

However, Professor Leflar did recognise also the possibility that any attempt to define an exhaustive list of "choice influencing considerations" might be futile:

> The process of identifying the choice influencing considerations and of attaching appropriate significance to each of them is one that will have to continue indefinitely, with little prospect of complete agreement...This process is by its very nature the basic one in choice of law analysis.[181]

Despite the apparent negativity with which the immediately above assertion was introduced to the reader it is submitted that in this instance futility is, in fact, a distinctly positive aspect, even at this early stage of the examination, in the development of a radically new approach to choice of law in the United States of America at that time. It is further submitted that it is a guiding principle that should be

---

[179] Leflar *op. cit.* n 177

[180] *ibid*

[181] *ibid*

borne in mind going forward in this work especially in the context of the European Union private international law regime. It is submitted that with a return to common law individualism of decision and equity of justice, attempts to populate an exhaustive list of guiding criteria would run against that return to discretion and flexibility. Fundamentally, an incomplete, living, list of guiding criteria would prove more useful and flexible to a court than mechanistic rigidity.

Before going any further it would be instructive to set out, briefly, the "choice influencing considerations" identified and elaborated by Professor Leflar:

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.[182]

It is also worth noting that Professor Leflar was not the only one to identify "choice influencing considerations." Professors Cheatham and Reese, with Reese also the drafter of the Second Restatement, identified nine influencing factors[183] but those were incorporated in various manners into that Second Restatement and will be considered together with it later in this chapter.

Professor Leflar was adamant that the "influencing considerations" would unshackle academics and judges from the irons of mechanistic dogma and simplicity. He considered that reasoned thought and decision would return to private international law as a result:

> If this tentative summarization is reasonably complete, it can serve as a guide in the actual determination of choice of law questions. By using it, courts can

[182] Leflar, Conflicts Law: More on Choice-Influencing Consideration (1966) 54 Cal L.Rev 1584, 1586 – 1588; Leflar *op. cit.* n 177 at 282 - 304

[183] Cheatham & Reese, Choice of the Applicable Law (1952) 52 Colum L.Rev 959

> replace with statements of real reasons the mechanical rules and circuitously devised approaches which have appeared in the language of conflicts opinions, too often as cover-ups for the real reasons that underlay the decisions.[184]

Further, and underscoring the return to discretion and individual, material, justice, Professor Leflar simply asserted:

> In addition results will occasionally be different.[185]

Turning back to the influencing considerations set out above, [186] it is interesting and significant to note that the influencing considerations do not overtly set out to favour a previously advocated approach over another. Rather, the influencing considerations exhibit a distinct divide between the grander, more aspirational, ideals of private international law on the one hand and more individualistic ideals on the other. It is clear that the first three influencing considerations represent the former while the remaining two the latter. As such, it is important to assert that, while Professor Leflar's approach has been branded purely as the "better/proper law" approach, there are, in theory at least, more factors for consideration than merely a determination of pure preference.

At this point there are a number of significant aspects to note in Professor Leflar's formulation of the influencing factors. First, Professor Leflar asserted the role of the forum as particularly important:

> Before choice influencing considerations are analysed, it is important that the controlling power of forum law be emphasised and that this emphasis be appropriately confined. The law of forum F, on choice of law, is the law that the courts of forum F will follow. This may include a *renvoi* reference to the

---

[184] Leflar *op. cit.* n 180 at 1585

[185] *ibid*

[186] *op. cit.* n 181

> conflicts law of some other state, or it may not. It may include any basis for decision, any reference or non-reference to another state's law, any broad-based rule or any free-wheeling choice in individual cases unguided by rule or principle that the forum's law-making agencies conjure up, provided only that it does not contradict the "law of the land."[187]

Further and significantly:

> No other state or nation can tell F what its choice of law shall be.[188]

It is clear, from the above, that Professor Leflar subscribed the notion that the *lex fori* should dominate *in some form*. It is significant that, even at this early stage, Professor Leflar appeared to share a variation of an earlier mentioned view with respect to the dominance of the forum, albeit in the context of law rather than policy:

> It is quite another [matter] to subordinate forum policy to the interest of another state or to some mechanistic principle of conflict of laws.[189]

It is also significant to bear the apparent weighting in mind in the context of the final two influencing factors set out above,[190] although it is with respect to the final influencing factor that any favourable weighting of forum law especially manifests itself. Where, in a regime where the better law is sought out, the *lex fori* commands then it must be questioned the criteria by which a "better law" is determined. Is that question determined by forum policy or by reference to the interests of the parties?

What is also significant in the consideration is that Professor Leflar failed to explicitly ascribe an order of priority or preference to the influencing factors. Perhaps in

---

[187] Leflar *op. cit.* n 177 at 270

[188] *ibid* at 271

[189] Traynor CJ *op. cit.* n 134

[190] *op. cit.* n 181

believing in the common law method and deliberately rejecting the mechanistic tendencies Professor Leflar was not tempted to identify an overriding influencing factor amongst the five identified:

> It is my belief that these choice of law policies, which I call choice influencing considerations, can and should be restated and defined with sufficient particularity that they themselves can be used as a practical (though not a mechanical) test of the rightness of choice of law rules and decisions.[191]

Further and most succinctly that:

> No priority among the considerations is intended from the order of listing. Their relative importance varies according to the area of the law involved, and all should be considered regardless of area.[192]

It is submitted that, on the face of it, the lack of direct guidance to the priority to be ascribed to the various influencing considerations is indeed true to the common law method but that it also represents a particular weakness of Professor Leflar's thesis. It is this weakness that has culminated in Professor Leflar's thesis becoming known by the sixth and final influencing consideration:

> Application of the better rule of law.[193]

Before going further, it is important to question whether this was ultimately inevitable or whether the "hijacking" of Professor Leflar's thesis was indeed warranted. It has been powerfully observed about the contemporary private international law landscape, and Professor Leflar, by Professor Juenger that:

---

[191] Leflar *op. cit.* n 177 at 281

[192] *ibid* at 282

[193] *op. cit.* n 182

> Although he seems quite sanguine about the current eclecticism, I am not so sure he really does condone relegating conflicts theory to the status it seems to have attained in practice, *i.e.,* to serve as a convenient source for elaborate verbal justifications needed to buttress foregone conclusions, or worse yet, as a smokescreen camouflaging the primitive desire to avoid foreign law issues.[194]

And further that:

> Such subterfuge does not come cheap. The cost is not only a loss of intellectual integrity in appellate opinions but also uncertainty that inevitably produces confusion in the lower courts... "Fumbling" and "Lumping" will not always do the trick, in particular where the various modern conflicts approaches point in different directions.[195]

Professor Juenger ultimately asserts that:

> Much confusion could have been avoided if the court had been frank instead of hiding its true reasons behind doctrinal facades that crumbled as soon as a new fact pattern compelled reconsideration.[196]

Similar observations were made by Professor Cavers in highlighting Professor Leflar's own assertion concerning judicial manipulation in modern private international law:

> Every judge and lawyer know that our courts have always engaged in this choice between laws process in conflicts cases, and that it was right for them to do so. The difficulty is in the cover-up, the pretence that the court is only

---

[194] Juenger *op. cit.* n 178 at 419

[195] *ibid* at 420

[196] *ibid* at 420

> making a choice between jurisdictions. Our experience tells us that it was, and is, better for the courts to reach the results they have reached, choosing the better law by means of the manipulative devices they have employed, than for them to disregard superiority in rules of law altogether.[197]

Professor Cavers proposed that "principles of preference" could be elaborated as the basis of a reasoned and logical private international law mechanism but that, ultimately, any preference expressed should be principled in nature. Professor Cavers characterised the effect of unprincipled preferences in the following terms:

> ...unprincipled preferences may lead out choice of law trend into that wilderness of ad hoc decisions that our critics foresee.[198]

It is submitted that this is a particularly relevant question to consider in the context of Professor Leflar's thesis and its apparent "reformulation" focusing on but one of the five influencing factors set out. In light of his assertion that preferences expressed by courts should be principled in nature, Professor Cavers considers Professor Leflar's thesis as:

> ...rather [as] an escape, another escape from a choice of law decision, but a sufficiently enticing one that note should be taken of...[199]

Professor Cavers went on to consider the important New Hampshire Case of *Clark v. Clark*[200] as it represents the first judicial foray into an adoption of the "better law" approach. *Clark* will be considered separately, below, in a discrete examination of the judicial revolution in modern American private international law as distinct from the

---

[197] Leflar, *American Conflicts Law* (1968) 258; Cavers, The Value of Principles Preferences (1971) 49 Tex. L.Rev 211 at 213

[198] Cavers *ibid* at 212

[199] *ibid* at 213

[200] *Clark v. Clark* (1966) 107 NH 351, 222 A.2d 206

academic revolution occurring in parallel. For present purposes, the priority of the influencing factors and the focus on the final factor, it is sufficient that a New Hampshire court was faced with a decision of whether to apply Vermont law. The court asserted that:

> Unless other considerations demand it, we should not go out of our way to enforce such a law...as against the better rule of our own state.[201]

Identified as significant by Cavers,[202] it is submitted that the assertion of the court, above, does little to preserve the deliberate absence of priority in Professor Leflar's thesis. Rather, the court set out a position of preference requiring "unless other considerations demand it" the application of the *lex fori* in cross border actions and further it is submitted that this results in a palpable elevation of the *lex fori* in the context of outright "quality of a law." A common law forum charged with the "advancement of the forum's governmental interests," it is submitted, is ultimately, predictably and inexorably drawn to conclusion that in cross border matters it is the *lex fori* that should be held out as the better law in the eyes of a forum court, any forum court.

Before moving from the critics of Professor Leflar's thesis to those more positively disposed towards it, it is worth considering the disconnect between domestic actions and actions with a cross border element in the context of the "proper law" approach. Professor Cavers identified this critical aspect of the "proper law" approach and connects it with the arguments submitted above in the following manner:

> In a domestic case, a court faced by conflicting rules properly chooses the better one. It is charged with developing its own state's law, and any other choice would be perverse. In a choice of law case, however, if a State X court is willing to displace its own rule of law for State Y's rule of law, it is moved to do so by facts relating the parties or the controversy to State Y and hence to

---

[201] *ibid* 107 NH 351, 357

[202] Cavers *op. cit.* n 197 at 214

> State Y's rule. These facts are not germane to the relative merits of the X and Y rules in their respective domestic legal systems. Moreover, the X court is not charged with developing Y law and would not be doing so by rejecting the Y rule for the "better" X rule. Thus, in the improbable case in which a court expressly applies Y law because Y's rule is "better," the X court would not be developing its own legal system whose inferior rule would remain unchanged.[203]

What Professor Cavers touched, but did not elaborate fully, on was the disparity of treatment and outcome possible in cases containing cross border, private international law elements, as opposed to those wholly based on national, domestic, law. Professor Cavers asserts, with forceful language, that a forum choosing another jurisdiction's law "would be perverse" but the degree of the perversion is not clear on the face of the assertion. The assertion, it is submitted, is limited, in scope to a mere categorisation of inferiority against a subordinated domestic law, should a court choose a foreign law. Professor Cavers identified and asserted the improbability of such a subordination of forum law in favour of another jurisdiction but it is submitted that the reason is twofold. The more palatable reason for reluctance on the part of a forum court to supplant its law for another is the reason identified by Professor Cavers:

> It is charged with developing its own state's law...[204]

It is submitted, however, that even this more palatable reason is one-dimensional in identifying the task a forum court is charged with. A common law court is unquestionably charged with advancing a forum's governmental interests but it is submitted that, as a common law court, it should also advance the private interests of the parties in an action. Further, it is submitted that a common law court should not disregard the principles of individual justice and fairness that form the basis of the common law tradition, in determining the "better"-ness of a law. Therein lies the

---

[203] Cavers *op. cit.* n 197 at 215

[204] *ibid*

problem. Were a common law court to make the "improbable" decision to subordinate forum law in favour of some other on the basis of its being "better" than the forum's then it would, undeniably, be failing to advance forum governmental interests and policy.

At this stage it cannot, however, be said that the result in the "improbable" case would serve to hinder forum interests but it is submitted that the difference might only be semantic. Given all of the above, it is appropriate to consider the disconnect between wholly domestic actions and those containing a cross border element and so triggering the application of a forum's private international law in the above context. Taking the mentioned scenario of the "improbable" case, where a forum actively determines foreign law to be "better" than that of the forum, a number of issues are then raised upon the application, in the forum court, of that "better" foreign law. First, there is a distinct paradox in that the forum court would be advancing the governmental interests of the foreign state through the application of the foreign law but it might also be meeting the needs of justice in the case before it.

Second, if a forum court makes a determination that its own, domestic, law is inferior to a foreign law in law in the context of an action containing cross border elements, should the forum apply that "better law" and so afford parties to cross border actions access to "better" results than parties to wholly domestic actions? In the context of the disparity of treatment between parties to wholly domestic actions and parties to cross border actions, it would seem curious that a forum court would reserve the "inferior" law for the exclusive detriment of forum domiciliaries and associated domestic actions.

Further, the impact of a decision to subordinate the "inferior" domestic law for the "better" foreign law must be considered from the domestic perspective. As established above, a central element of Professor Leflar, and Professor Currie's, approach is the consideration and advancement of the forum's governmental interest. Where a common law court has determined to assert a foreign law as "better" than domestic law it is clear that the court is no longer advancing its interest. Can such a decision, by a common law court, simply be described as "failing to advance its own

interest?" It is submitted that a decision, in the "improbable" case,[205] resulting in the assertion of a foreign law as being "better" than the domestic position actually serves to subvert the legal order of the forum and forms a basis upon which a forum court might apply a different, "inferior," regime to forum domiciliaries and forum actions.

In the event of the "improbable" assertion by a forum court, it would then be appropriate to question the reasons for the inferiority of forum law. What aspects of the foreign provisions render it superior to those in the forum? How was a foreign legislature or judiciary able to arrive at a superior position and the forum was not? Perhaps the most pertinent question would strike at the effect of that decision on the domestic position. Would the "improbable" decision in a cross border, interstate, matter translate equally to a wholly domestic issue? It is submitted that the answer to this must be in the affirmative. Were the answer in the negative it would carry the consequence of establishing a two-tier substantive regime in which parties might be able to carry with them the most favourable provisions of foreign jurisdictions while avoiding less favourable provisions of the forum.

The above is premised on the existence of some sort of governing substantive regime in a forum. While the substantive provisions of forum tort or non-contractual obligation law are not the subject of this work, for the purpose of the following paragraph a more precise identification is necessary. Where the governing substantive regime is either wholly or partly legislative in nature, there are particular issues surrounding a potential subordination of an expression of legislative intent and competence that must be considered. The first, and most significant, issue to consider is the competence of a court to selectively apply forum law by virtue of a fact pattern containing a cross border element or a characterisation of an action as being cross border in nature by virtue of some other state claiming an interest in an action. It is an unfortunate reality of legislative endeavour that imprecision and ambiguity are often the result and require judicial clarification and elaboration. However, in the context of private international law, what would be at stake is the underlying scope of application of a legislative provision as opposed to a substantive ambiguity. It is

---

[205] *op. cit.* n 203

submitted that, in the ordinary course of things, unless otherwise provided for, legislation is promulgated specifically for the purpose of applying within the territorial jurisdiction of a promulgating legislature. As such, unless otherwise provided for, a subordination of the *lex fori* in favour of a "better" foreign law would subvert a forum's legislature and, in doing so, breach the separation of powers between those two institutions.

The second issue that must be considered in this context relates to the consequence of a translation of an interstate action, subordinating the *lex fori* in favour of foreign law, to a wholly domestic action. It has been asserted that such a translation would be inevitable in the event of the "improbable" case occurring and, it is now submitted, given the instant focus on the compatibility with specifically legislative provisions, in the wholly domestic setting such a translation would again subvert the role of the legislature and could not be sustained were it attempted.

It is further, fundamentally, submitted that where there is a legislative promulgation on a particular substantive matter, that promulgation must be regarded as the expression of *governmental* policy and interest with which a forum court is charged with advancing and protecting in cross border matters.

Given the criticism levelled at Professor Leflar's thesis in the pages above, it is submitted that the asserted improbability of the "improbable" case cannot but be reaffirmed. It is further submitted that, given the unlikelihood of the "improbable" case and the ambiguity with which the fifth influencing consideration was elaborated by Professor Leflar, at this stage in the examination of the "better" law approach there appears to be an inescapable homeward pull. The *lex fori*, it appears *is always* the better law as a result of Professor Leflar's thesis.

It must be noted that, although Professor Leflar advocated the application of the better law, he did not advocate looking beyond the connected jurisdictions in search of the "best" law that might apply in a given fact pattern. Professor McDougal[206] asserted:

---

[206] Professor of Law, Tulane University

> Anyone who has read a number of choice of law cases must agree with Leflar's observation that courts frequently apply the better rule of law, even though their opinions may not state that they are applying the rule for that reason. Only someone with a myopic view of the role of the judiciary in choice of law cases would deny that courts should at least apply the better rule of law to resolve choice of law cases.[207]

Further that:

> ...courts should move one step further and apply the best rule of law to resolve choice of law cases, not simply the better rule of law...Courts can, and should, in many cases construct and apply a law specifically created for the resolution of choice of law cases. Laws designed to resolve intrastate cases usually only reflect an accommodation of local state interest. The laws do not reflect an accommodation of the additional interest that are implicit in transstate cases. For this reason, state laws, even the better of the laws of the two states, will not result in the choice of law case being resolved in the most appropriate manner, that is by application of the best rule of law.[208]

Crucial to Professor McDougal's modification of the "better" law approach is the correct identification of the best law applicable to a given fact pattern. As such, he asserts that:

> The best rule of law is one that best promotes net aggregate long-term common interests.[209]

---

[207] McDougal, Toward Application of the Best Rule of Law in Choice of Law Cases (1984) 35 Mercer L.Rev 483

[208] *ibid* at 484

[209] *ibid*

Further that:

> A court seeking to apply the best rule of law should first identify all relevant interests. The relevant interests are the interests asserted by the decision makers of all significantly affected states, any interests decision makers of the various states have asserted concerning the resolution of transstate cases, interests of the significantly affected states reflected in applicable community policies, and multistate interests of the collective community of states.[210]

Professor McDougal ultimately asserts that:

> After a court has identified all relevant interests and determined their exact scope and content, it should examine all of the interests to make certain that none are incompatible with fundamental community policies and then accommodate any conflicting and competing interests in a manner that bests promotes net-aggregate, long-term common interests. The rule of law that accommodates all relevant interests in this manner is the best rule of law.[211]

What Professor McDougal advocated, it is submitted, should be viewed as a radical departure from Professor Leflar's elaboration of a "better law" regime rather than a mere modification. What is significant about Professor McDougal's proposed regime is the renewed emphasis placed on the:

> interests of the significantly affected states reflected in applicable community policies, and multistate interests of the collective community of states.

Put in other terms, Professor McDougal advocated a renewed reliance on outward-looking internationalism as part of a modern private international law regime. What is also significant, although ultimately unworkable and untenable in the context of private international law at common law, is the twofold reliance on "community

---

[210] *ibid*

[211] *ibid*

policies" and a distilled reconciliation of the "multistate interests of the collective community of states." However, it is submitted that what Professor McDougal actually advocated can be extracted on a second reading of the quoted assertion immediately above. In the context of the United States of America, community policies and multistate interests might not indicate return to true internationalism as considered earlier in this chapter. Without expressly elaborating the position, Professor McDougal actually advocated the destruction of the existent private international regime in the United States of America in favour of something altogether more revolutionary as opposed to evolutionary. It is submitted that Professor McDougal, in fact, advocated the creation of a federal private international regime in the United States of America. However, it is further submitted that Professor McDougal's approach goes even further than the creation of a federal private international law regime. Given the Professor's formulation of "multistate interests of the collective community of states" it is submitted that what Professor McDougal also advocated was the homogenisation of state policy objectives and interests across the United States of America to the point where federal, collective, interest is identifiable and so supporting the selection of the "best law."

The net effect of a unified, federal, private international law regime would be to wipe away the need consider the conflicting governmental interests that might present themselves in an action, rather a court would instead turn to an overriding federal interest in order to determine the "best" state law to apply in a given fact pattern. As such, much like Professor Leflar's thesis became known for but one of it's constituent influencing factors, it is submitted that Professor McDougal's approach should suffer the same fate and it is further submitted that rather than being known as the "best law" approach it would more appropriately carry the moniker of "federal interest analysis."

2.7.2.1 *Conclusions*

Returning then to Professor Leflar's thesis, and contrasting it with those preceding it and Professor McDougal's "modification,"[212] it would seem that the "better law"

[212] A radical modification, *op. cit.* nn 206 - 211

approach cannot reasonably be asserted to be anything but a veiled embodiment of the *lex fori* and governmental interest analysis approaches considered above. The Minnesota court acted as such in *Milkovich v Saari*[213] in its express adoption of Professor Leflar's thesis, as elaborated originally and, affirmed in the decision of *Clark v. Clark:*[214]

> The compelling factors in this case are the advancement of the forum's governmental interests and the application of the better law.[215]

And further that:

> In our search for the better rule, we are firmly convinced of the superiority of the common-law rule of liability to that of the Ontario guest statute.[216]

For illustrative and contextual purposes it is important to set out the facts in *Milkovich v. Saari.* The instant action concerned the potential applicability of Ontario legislation in Minnesota under the existing private international law regime there. Minnesota had, earlier, rejected[217] the mechanistic regime of the First Restatement in favour of the "center of gravity" approach elaborated by the New York court in *Babcock v. Jackson,*[218] to be considered in greater detail below. The facts concerned a motor accident in Minnesota where both plaintiff and defendant were domiciled and resident in Ontario. As such, the fact pattern represents an example of the *locus classicus* fact pattern in mid twentieth century revolution in the United States of American. Further,

---

[213] *Milkovich v Saari* (1973) 203 NW 2d 408

[214] *op. cit.* n 200

[215] *Milkovich v Saari op. cit.* n 213 at 417

[216] *ibid*

[217] *Balts v. Balts* (1966) 142 NW 2d 66

[218] *op. cit.* n 93

Ontario had promulgated a guest passenger statute whereas Minnesota had no such statute.

It is submitted that it is the dissenting judgment in *Milkovich v. Saari* that buttresses the arguments advanced above. The dissent found little in favour of the application of the "better law" approach and highlight the obvious flaws of that approach, particularly in the context of the instant fact pattern. At this stage it is important to reproduce the brief dissent:

> The "center-of-gravity-of-the contacts" theory of conflict of laws has been adopted in this state...Until today, however, we have not considered the mere happening of an automobile accident in this state a sufficient contact with the forum to establish the center of gravity here. In my view, the center of gravity is in Ontario, not Minnesota.
>
> The "choice-influencing factor" in the majority opinion is simply that Minnesota law is "better law" because, unlike Ontario law, this state has no guest statute.
>
> Notwithstanding our undoubted preference for this forum's standard of liability, I am not persuaded that decision should turn on that factor alone. We may assume that these Canadian citizens have concurred in the rule of law of their own government as just, so the law of this American forum is not for them the "better" standard of justice. The litigation, indeed, was first initiated by plaintiff in the courts of Ontario and was later commenced in Minnesota as an act of forum shopping.
>
> Our own cases, of course, do not compel such a decision...The Wisconsin case of Conklin v. Horner, 38 Wis.2d 468, 157 N.W.2d 579 (1968), is a final expression of its highest court...I nevertheless am more persuaded by the dissenting opinion of two justices. Mr. Chief Justice Hallows, in dissent, appropriately observed that the so-called "methodology of analysis" is really little more than a mechanical application of the law of the forum. As he wrote (38 Wis.2d 491, 157 N.W.2d 590): "If we are going to be consistent only in

applying the law of the forum, then we are merely giving lip service to the new "significant contacts" rule."[219]

It is submitted that the dissent, in this instance, is particularly powerful and resonates with the particularly stark fact pattern in the instant case and the arguments advanced against Professor Leflar's "better law" approach. A number of distinct issues arise as a result of the dissent and warrant mention. First, *Milkovich* marked the transition between the, jurisdiction selecting, "center of gravity" approach elaborated in *Babcock v. Jackson* towards the apparent rule selecting approach of Professor Leflar's thesis. In alternative terms, the balance between conflicts justice and material justice swung from the former to the latter.

Second, the jurisdictional basis of the action before the Minnesota court coupled with the resultant rationale for the selection of the *lex fori* as the "better law" were fundamentally suspect. Minnesota, in the context of the fact pattern, was merely the state of presence at the time of the accident. There were no Minnesota domiciliaries, residents or bodies corporate connected to the action. As such, the first criticism to be levelled at the majority decision is that Minnesota was not the *forum conveniens* for the purposes of establishing jurisdiction. It is submitted that the court should have exercised its common law discretion and declared itself the *forum non conveniens* on the basis of a lack of sufficient connection to the parties to the action and any party or body impacted by a judicial decision. The submission in support of an appropriate exercise of discretion is supported by the deliberate and vexatious manner in which the plaintiff arrived to claim in Minnesota. The Minnesota court knowingly facilitated an act of forum shopping in the conscious knowledge that a parallel action was already in being in the originating state of common domicile between the parties, Ontario.

Third, the dissent implicitly identifies that the majority failed, in considering the express adoption and application of Professor Leflar's thesis, to consider any of the influencing considerations outlined by the Professor other than the final, most

---

[219] *Milkovich v Saari op. cit.* n 213 at 417 – 418 per Peterson J

commonly known of the influencing considerations, the:

> Application of the better rule of law.[220]

Expressed in the dissent as:

> The "choice-influencing factor" in the majority opinion is simply that Minnesota law is "better law" because, unlike Ontario law, this state has no guest statute.[221]

It is submitted that Judge Peterson, in his dissent, identifies succinctly the core irrationality of the accepted interpretation and implementation of Professor Leflar's thesis, that the forum court in this instance elevated the inherent, and often unmentioned, bias towards the *lex fori* above reasonable and rational indicia of "better-ness:"

> Notwithstanding our undoubted preference for this forum's standard of liability, I am not persuaded that decision should turn on that factor alone. We may assume that these Canadian citizens have concurred in the rule of law of their own government as just, so the law of this American forum is not for them the "better" standard of justice.[222]

It is submitted that *Milkovich v. Saari* is a particularly illuminating example of a misinterpretation and misapplication of an approach aspiring to achieve real "material justice" through the employ of flexible and open-ended criteria, the five choice influencing considerations.[223] It is further submitted that, in the eyes of the Minnesota court, much like any common law court so empowered, the *lex fori* will virtually

---

[220] *op. cit.* n 182

[221] *op. cit.* n 219

[222] *ibid*

[223] *op. cit.* n 182

always be the "better law", irrespective of the countervailing connecting factors that exist suggesting the more appropriate application of another, foreign, regime. It must be remembered that while criticism has been levelled at the Minnesota court for accepting jurisdiction in the action, in the preceding pages, that a proper implementation of Professor Leflar's thesis, as a position concerned with "material justice" as opposed to "conflicts justice", would require a separation of that jurisdiction determination from the applicable law determination. Clearly, given the strong forum bias, this did not appear within the contemplation of the Minnesota and it is submitted that its inability to do so represents the actual reality of judicial implementation of Professor Leflar's thesis.

As such, it is submitted that Professor Leflar thesis can, and should be, reduced to but one factor:

> ~~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.*[224]

Further, and finally, it is submitted that the remaining influencing consideration is better described as an *overriding consideration* in favour of the *lex fori*. Again, much like Professor Currie's governmental interest analysis[225] and Professor McDougal's "best law" approach, briefly considered, it is submitted and accepted that while Professor Leflar deliberately refrained from ascribing a priority to his influencing considerations that this restraint ultimately led to his thesis becoming another veiled version of the *lex fori* approach, albeit one less honest about its forum bias and one demanding less thorough and rigorous analysis of the facts, issues and policies at hand. As evidenced above, mere latent preference can amount to a justification for the

---

[224] *ibid* [emphasis added]

[225] *op. cit.* nn 96 -174

lex fori being asserted as the "better law." Professor Juenger concludes accurately that a private international law theory such as Professor Leflar's might:

> ...serve as a convenient source for elaborate verbal justifications needed to buttress foregone conclusions, or worse yet, as a smokescreen camouflaging the primitive desire to avoid foreign law issues.[226]

Given the consideration and criticisms of the three elaborated "interest analysis" type approaches of Professor Currie, Professor Leflar and Professor McDougal, in a minor fashion, it might seem desirable, if not appropriate, to declare interest analysis redundant, a defunct choice of law methodology. However, despite criticisms, "interest analysis" remains a feature of modern private international law in the United States of America. At present seven states employ "interests analysis" type regimes:[227] California, Washington DC, Arkansas, Minnesota, New Hampshire, Rhode Island and Wisconsin. Two further states employ an express *lex fori* regime: Kentucky and Michigan. As such, given the arguments above, it appears that nine states in the United States of America employ regimes that, in one or other manner, is inexorably homeward bound – the *lex fori.*

At this point, however, two caveats must be entered against the statistics above. First, in addition to the nine states, a further six states employ elements of "interest analysis" type methodologies along with elements of the traditional approach and other factors[228] into a hybrid "melting pot" methodology labelled the "combined modern approach". Those further states are Georgia, Louisiana, Massachusetts, New York, Oregon and Pennsylvania.[229] As such, fifteen states implement "interest analysis" type regimes, as considered in the pages above, in some form or another.

---

[226] Juenger *op. cit.* n 192

[227] Symeonides *op. cit.* n 17 at 331

[228] The significant contacts approach

[229] Symeonides *op. cit.* n 17

The second caveat is directed towards the State of California and the version of "interest analysis" employed in that jurisdiction for the past thirty years since the decision in *Offshore Rental Co. v. Continental Oil Co.*[230] which has been described in the following terms:

> Although the opinion by Justice Tobriner does not cite Leflar, it breathes his spirit and follows his teachings: for once the better sister-state law was applied with the result that a non-resident foreign defendant prevailed against a local plaintiff.[231]

Again asserted, recently, in *McCann v. Foster Wheeler LLC.*[232] The variation has become known as the "comparative impairment" theory. In concluding the present section it is appropriate to consider the "comparative impairment" variation in the context of the most recent affirmation.

The facts of *McCann v. Foster Wheeler LLC* were that the plaintiff, while working in an oil refinery in Oklahoma, was exposed to asbestos. The exposure took place in 1957. The plaintiff, at the time, was installing a boiler designed and manufactured by the defendant company in New York. The defendant company is a New York company. At the time of the exposure to the asbestos the plaintiff was domiciled in Oklahoma although later leaving and settling in California in 1975. As with many asbestos actions, significant delay between the initial exposure and discovery of the injury elapsed. It was not until 2005 when the plaintiff was diagnosed with a form of cancer associated with exposure to asbestos. The question for decision concerned a choice of law between Oklahoma and California. Put simply, under Oklahoma law the action would not be permitted whereas under California law the action would be permitted despite the delay.

---

[230] (1978) 583 P.2d 721

[231] Juenger *op. cit.* n 178 at 421 - 422

[232] *McCann v. Foster Wheeler LLC* (2010) 48 Cal 4th 68, (2010) 225 P.3d 516

The California Supreme Court, in an approach radically different from the "interest analysis" type approaches considered, engaged in a thorough consideration of the impairment the competing states might potentially suffer on non-application of their respective provisions. Drawing from *Offshore Rental Co. v. Continental Oil Co*[233] the court reasoned that Oklahoma would suffer the greater impairment from non-application of its provisions, asserting as follows:

> California choice-of-law cases nonetheless continue to recognize that a jurisdiction ordinarily has "the predominant interest" in regulating conduct that occurs within its borders, and in being able to assure individuals and commercial entities operating within its territory that applicable limitations on liability set forth in the jurisdiction's law will be available to those individuals and businesses in the event they are faced with litigation in the future.
>
> In the present case, in the event Foster Wheeler were to be denied the protection afforded by the Oklahoma statute of repose and be subjected to the extended timeliness rule embodied in California law, the subordination of Oklahoma's interest in the application of its law would rest solely upon the circumstance that *after* defendant engaged in the allegedly tortious conduct in Oklahoma, plaintiff happened to move to a jurisdiction whose law provides more favorable treatment to plaintiff than that available under Oklahoma law.
>
> Although here it is clear that plaintiff's move to California was not motivated by a desire to take advantage of the opportunities afforded by California law and cannot reasonably be characterized as an instance of forum shopping, the displacement of Oklahoma law limiting liability for conduct engaged in within Oklahoma, in favor of the law of a jurisdiction to which a plaintiff subsequently moved, would—notwithstanding the innocent motivation of the move—nonetheless significantly impair the interest of Oklahoma served by the statute of repose.[234]

---

[233] *op. cit.* n 230

[234] *op. cit.* n 232 (2010) 48 Cal 4th 68, 98

On the other hand, the court in assessing the impairment to California law the Supreme Court asserted that:

> By contrast, a failure to apply California law on the facts of the present case will effect a far less significant impairment of California's interest. Certainly, if the law of this state is not applied here, California will not be able to extend its liberal statute of limitations for asbestos-related injuries or illnesses to some potential plaintiffs whose exposure to asbestos occurred wholly outside of California. Nonetheless, our past choice-of-law decisions teach that California's interest in applying its laws providing a remedy to, or facilitating recovery by, a potential plaintiff in a case in which the defendant's allegedly tortious conduct occurred in another state is less than its interest when the defendant's conduct occurred in California. As we shall see, in a number of choice-of-law settings, California decisions have adopted a restrained view of the scope or reach of California law with regard to the imposition of liability for conduct that occurs in another jurisdiction and that would not subject the defendant to liability under the law of the other jurisdiction. Our view is that a similar restrained view of California's interest in facilitating recovery by a current California resident is warranted in evaluating the relative impairment of California's interest that would result from the failure to apply California law in the present setting.

What is significant about the decision is that the "comparative impairment" theory is indeed an "interest analysis" approach, albeit in the negative sense of weighing the harms each of the competing jurisdictions might suffer. What is also significant, in the approach adopted by the California Supreme Court, is the remarkable restraint exercised in arriving at the decision not to apply the *lex fori* which would have had the effect of benefiting the California resident, a local plaintiff. It has already been exhibited that a much more transient connection to the forum has been sufficient to justify the application of the *lex fori*.[235]

---

[235] *Milkovich v. Saari op. cit.* n 213

Described as a "wondrous...doctrine,"[236] it is submitted that the Californian version of interest analysis, the "comparative impairment" theory, as elaborated in *Offshore Rental Co v. Continental Co* in 1978 and in *McCann v. Foster Wheeler LLC* in 2010 represent the prospect that:

> ...in the hands of erudite and enlightened judges, interest-analysis/comparative-impairment is capable of shedding the pro-forum and pro-recovery bias that characterized it in Currie's original conception.[237]

2.7.2.2 *Sample Scenarios Considered*

Scenario A – Traffic Accident

Following the consideration of the "proper law" approach advocated by Professor Leflar, above, it is important to highlight that the forum court is the important consideration in determining the manner in which the approach might operate. It has been submitted, above, that the true net effect of the "proper law" approach is the application of the *lex fori* in virtually all instances.

In the instant fact pattern, it is implicit that the likely forum would be State A or State B. State A was Bob's domicile and State B was where the effects of the accident were experienced and where Bob works. Given the likely selection of forum it is clear that both states have some interest in any eventual action. As such, given the above, it is submitted that a court in State A or B, if employing a "proper law" approach, would not apply the law of State C, the *locus delicti,* nor of State D, the place registration and insurance of the vehicle, nor of State E, the place a citizenship of the driver of the vehicle. The applicable law would be the *lex fori* of State A or B.

Scenario B – Publication of Defamatory Material

---

[236] Juenger *op. cit.* n 178 at 421

[237] Syneonides *op. cit.* n 17 at 328

Much like the consideration of Scenario A, above, the crucial factor in the eventual determination of the applicable law is, actually, the selection of the jurisdiction given the unlikelihood of a forum being genuinely disinterested in an action. In the instant fact pattern it is submitted that the applicable law would, again, be the *lex fori.*

Scenario C – Products Liability

In the context of the instant fact pattern, much like the preceding scenarios, it is submitted that the selection of forum is crucial in the determination of the applicable law. In this instance, it is clear that the likely forum is State 1 given the connections to that jurisdiction: domicile of the victim; place of the event; domicile of the domestic supplier company. As such, it is submitted that it is clear that courts of State 1, the forum, are charged with the enforcement and advancement of forum objectives and policy. Given the submissions, above, it is submitted that the likely applicable law is the *lex fori,* the law of State 1, the invariably better law.

2.8 THE SECOND RESTATEMENT

Moving from the collected approaches considered up to this point in this thesis, brings into focus the final significant theoretical pillar in modern private international law in the United States of America today, the Second Restatement of Conflict of Laws.[238] Today twenty-four states in the union implement[239] its methodology for choice of law in torts making the Second Restatement the dominant methodological concept in the United States today.

The American Law Institute and reporter Professor Willis Reese[240] drafted the Second Restatement over the course of almost twenty years from 1952 until its eventual

---

[238] Restatement (Second) of Conflict of Laws (1971)

[239] Symeonides *op. cit.* n 17 at 331

[240] Professor of Law, Columbia University

publication in 1971. The first observation to make about the Second Restatement, as evidenced by the submissions in the preceding pages, is that it was drafted during a period of exceptional change in the landscape of American private international law. This fact was expressly acknowledged by the reporter, Professor Reese, during the drafting of the Second Restatement and afterwards. Professor Reese asserted during the drafting process that:

> Conflict of laws is in a state of flux. This is particularly true of that most difficult area of the subject, which is frequently referred to as choice of law. Many fundamental rules in this area, that once were generally accepted, have been proved wrong by recent experience...More disconcerting is the fact that wide differences presently exist with respect to underlying objectives and values...This surely is a time for soul-searching and reevaluation.[241]

Later, more succinctly and expressively that the Second Restatement:

> ...was written during [a] time of turmoil.[242]

Nevertheless, it is significant that the reporter recognized the challenges posed, and mistakes made, in the preparation of the First Restatement:

> It now seems evident, in light of hindsight, that conflict of laws was not ripe for Restatement in the 1920's and 1930's, at least in the usual way. The subject was then largely unexplored. This, rather than the Reporter's adherence to the vested rights theory, is believed to be the principal reason for what is now recognized to be the dogmatic and over-simplified character of the original Restatement.[243]

---

[241] Reese, Conflict of Laws and the Restatement Second (1963) 29 Law & Contemp Probs 679, 679

[242] Reese, Foreword (1972) 72 Colum L.Rev 219, 219

[243] Reese *op. cit.* n 241 at 680

Further, in mild defence of Professor Beale although ultimately, recognizing the failure of the dogmatic and simplistic rules Professor Beale elaborated:

> ...Professor Beale had a great sense of order and of logic. He had an instinctive liking for simple, dogmatic rules and for theories that would lead to the adoption of such rules...It soon became apparent that many of the rules stated in this Restatement [First] are wrong or at least so over-simplified as to be misleading.[244]

It was this charge against the regime implemented by the First Restatement that rang loudest in the ears of Professor Reese and the American Law Institute during the period of flux in which the Second Restatement was drafted.

> What we do know now with fair certainty is that choice of law is too vast and complicated an area to be governed by a relatively small umber of simple rules of general application. What is needed instead is a large number of relatively narrow rules that will be applicable only in precisely defined circumstances.[245]

As such, Professor Reese adopted, for the Second Restatement, the goal of doing no harm to the aims of certainty and predictability, at least no greater harm than what had been effected by the application of the First Restatement regime.

> In these circumstances, one obvious goal of the Restatement Second must be not to mislead. Care must be taken not to state rules that will prove wrong when applied to new problems, for if this were to be done with any frequency the Restatement would prove to be a hindrance, rather than an aid, in the further development of the subject. Hence, as a general proposition, it is probably better to err on the side of a rule that may be too fluid and uncertain

---

[244] *ibid*

[245] *ibid* at 681

> in application that to take one's chances with a precise and hard-and-fast rule that may be proved wrong in the future.[246]

On the face of it, the general proposition made by Professor Reese comes as a refreshing change after the regime of the First Restatement but, it is submitted that, there exists a fundamental difficulty in advocating and proposing a rule-driven regime that is premised on significant uncertainty. Professor Reese elaborated further:

> Of necessity, many conflicts rules must be fluid in operation and leave much to be worked out by the courts. A Restatement, of course, must provide whatever guidance is possible. Hence the Restatement Second should state precise and definite rules in those few areas where this can be done...Such rules can be helpful, particularly if accompanied by a statement in the comments of the various policies that should guide the courts in applying them.[247]

Professor Weintraub incisively identified the difficulty:

> The tension between these two statements is apparent. How can there be a statement of "precise and definite rules" in a subject that is quickly changing? The attempt to do so makes the unwarranted assumption that the intellectual bases for the changes already observable will not in time require changes in all areas, even those that are as yet unaffected.[248]

It is submitted, at this early stage in the consideration of the Second Restatement, that the difficulties identified by Professor Weintraub in Professor Reese's founding assertions are indeed apt but that they also touch on the inherent difficulty in

---

[246] *ibid*

[247] *ibid*

[248] Weintraub, "At Least To Do No Harm" Does the Second Restatement of Conflicts Meet the Hippocratic Standard? (1997) 56 Md. L.Rev 1284, 1286

undertaking an exercise in Restatement in the manner the American Law Institute did at that juncture. It is further submitted that, when placed in the context of a "time of turmoil," in the natural course of things it would be impossible to take into account all the varying intellectual bases vying for supremacy. Further, that the Second Restatement should properly be considered, and characterized, as a reforming instrument rather than a mere restatement, or consolidation, of the pre-existing positions.

Before proceeding further it is appropriate to reproduce the relevant provisions of the Second Restatement for the purpose of completeness and accuracy. The core of the choice of law position outlined in the Second Restatement is contained in three parts, Sections 6, 145 and 146, reproduced immediately below.

Section 6: **CHOICE OF LAW PRINCIPLES**

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 interests 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.

Section 145: **THE GENERAL PRINCIPLE**

1. The rights and liabilities of the parties with respect to an issue in tort are determines by the local law of the state which, with respect to that

issue, has the most significant relationship to the occurrence and the parties under the principles states in §6.

2. Contacts to be taken into account in applying the principles of §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.

Section 146: **PERSONAL INJURIES**

> 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 state in §6 to the occurrence and the parties, in which event the local law of the other state will be applied.

The first, and most significant, thing to note at this stage is the importance of Section 6 in the context of the overall regime. In drafting the Second Restatement, Professor Reese might have addressed the choice of law principles identified in Section 6 as standalone principles serving as a nebulous overarching framework within which the subsequent sections of the Second Restatement would rest. However, it is clear from the text of the relevant sections, reproduced immediately above, that Professor Reese and the American Law Institute intended the principles to explicitly serve as the warp upon which the fabric of the Second Restatement's provisions were woven and so run through the entirety of the regime.

As such, it is particularly important to consider the implications of the underlying principles of the Second Restatement before considering the specific choice of law provisions proper. Professor Reese saw the policy considerations outlined in Section 6

as fundamental in underpinning the successful establishment and adoption of a cogent and enlightened rule-based regime such as that elaborated in the Second Restatement[249] concerning choice of law generally and torts, particularly, for the purposes of this work. Professor Reese asserted:

> All rules of law, and choice of law rules are no exception, are the product of policies. A rule is constructed initially to further what the law maker conceives to be the basic policies involved.[250]

Further that:

> Only when the rule has become well established can it safely be applied without conscious reference to the policies involved.[251]

The choice of law policies outlined in Section 6 of the Second Restatement begin with a clear, precise, statement mandating the application of forum legislation in choice of law matters where such legislation is in existence. Only in the absence of an expression of legislative intent should a court revert to other principles. In this sense, Section 6, provides for the potential prioritisation of forum interests above those of other states. However, it is also significant that Professor Reese had regard to a constitutional limitation at the very beginning of the elaboration of the relevant guiding policies, the "full faith and credit" provision:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.[252]

---

[249] Sections 145 - 146

[250] Reese *op. cit.* n 241 at 681

[251] *ibid*

[252] Constitution of the United States of America, Article IV Section I

It must be noted, however, that the scope of application of the "full faith and credit" clause of the Constitution of the United States of America in the context of choice of law appears to be somewhat limited. The traditional position was set out by the Supreme Court of the United States of America in *Allstate Ins v. Hague,*[253] where that court asserted:

> In deciding constitutional choice of law questions, whether under the Due Process Clause or the Full Faith and Credit Clause, this Court has traditionally examined the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation. In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.[254]

At this stage, it is significant to note that the approach set out by the court represents the central thrust of the regime elaborated in the Second Restatement, although this will be considered in fuller detail in the subsequent pages.

It is also significant, at this stage, to briefly set out the facts of *Allstate Ins v. Hague.* The action concerned a fatal road traffic accident in the state of Wisconsin in which the deceased, and respondent's husband, was a Minnesotan. The deceased was a passenger on a motorcycle piloted by a Wisconsin native when that motorcycle collided with a passenger vehicle, also driven by a Wisconsin native. The deceased's connection with Minnesota, at that time, was that he was employed in that state and commuted across the state border from his native state, Wisconsin. It happened that neither the driver of the passenger vehicle nor the pilot of the motorcycle was insured although the deceased was insured by the applicant to the extent that his policy provided for recovery in instances of accident with uninsured drivers to the amount of

---

[253] *Allstate Ins v. Hague* (1980) 449 US 302

[254] *ibid at* 308 *per* Justice Brennan

$15,000 for each of the three vehicles owned by him. Subsequent to the accident, the respondent relocated to Minnesota and was appointed the personal representative of her husband, the deceased's, estate under Minnesota law.

The specific issue at hand concerned the amount recoverable under the deceased's insurance policy. The respondent claimed, in the Minnesota court, that Minnesota law should apply in the forum court with the result that the $15,000 would be "stacked" to total $45,000 while the applicant insurer claimed that Wisconsin law should apply on the basis that the policy, the insurer, the drivers and the event were all located in Wisconsin. The result of an application of Wisconsin law would have been to limit recovery to $15,000 only. The Minnesota court, at first instance, and the Minnesota Supreme Court applied Minnesota law to the detriment of the Wisconsin insurer. It must be noted that, as considered earlier in *Milkovich v. Saari*,[255] Minnesota asserted at that time the application of Professor Leflar's better law approach although the facts instant illustrate, again, the extreme bias towards the *lex fori* inherent in that approach.

The Supreme Court of the United Stated considered the role of the "full faith and credit" provision, its importance in the context of a federal union and its application to choice of law matters. Justice Steven, concurring, began by asserting that:

> The Full Faith and Credit Clause is one of several provisions in the Federal Constitution designed to transform the several States from independent sovereignties into a single, unified Nation. The Full Faith and Credit Clause implements this design by directing that a State, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringement upon their sovereignty. The Clause does not, however, rigidly require the forum State to apply foreign law whenever another State has a valid interest in the litigation.[256]

---

[255] *op. cit.* n 213

[256] *op. cit.* n 253 at 321

It is submitted at this stage that, in the context of the European Union private international law regime, the concept of "full faith and credit" is particularly important as it resembles the concept of mutual respect in the administration of justice in community states as embodied in the Brussels I regime concerning jurisdiction and recognition of judgments in civil and commercial matters.[257] However the crucial difference, as alluded to above and subsequently expanded upon by the court, between the "automatic" nature of the regime in Europe and the scope of application of the full faith and credit clause lies in its purported assertion as an automatic principle. Justice Stevens asserted further:

> On the contrary, in view of the fact that the forum State is also a sovereign in its own right, in appropriate cases, it may attach paramount importance to its own legitimate interests. Accordingly, the fact that a choice of law decision may be unsound as a matter of conflicts law does not necessarily implicate the federal concerns embodied in the Full Faith and Credit Clause. Rather, in my opinion, the Clause should not invalidate a state court's choice of forum law unless that choice threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State.[258]

It is submitted that this further assertion of the court does little to achieve the "single, unified nation"[259] set out as an objective of the full faith and credit clause in the constitution of the United States. The assertion refers directly to a choice of law perceived to be inappropriate, when viewed from an objective perspective, and its reconciliation with the full faith and credit clause. It is submitted that there is a curious appreciation of the legitimate interests of another state in the context of the perceived inappropriately applied law. Surely where a sister state in the Union has significant contacts with a fact pattern, to the extent that the non-application of its law is objectively "unsound," then those interests would in be unjustly infringed upon?

---

[257] Regulation (EC) NO. 44/2001 Brussels I

[258] *op. cit.* n 253 at 321

[259] *ibid*

The Supreme Court asserted in the negative:

> I do not believe that any threat to national unity or Wisconsin's sovereignty ensues from allowing the substantive question presented by this case to be determined by the law of another State.[260]

Further that:

> Since the policy provided coverage for accidents that might occur in other States, it was obvious to the parties at the time of contracting that it might give rise to the application of the law of States other than Wisconsin. Therefore, while Wisconsin may have an interest in ensuring that contracts formed in Wisconsin in reliance upon Wisconsin law are interpreted in accordance with that law, that interest is not implicated in this case.[261]

Finally that the:

> Petitioner has filed to establish that Minnesota's refusal to apply Wisconsin law poses any direct or indirect threat to Wisconsin's sovereignty. In the absence of any such threat, I find it unnecessary to evaluate the forum State's interest in the litigation in order to reach the conclusion that the Full Faith and Credit Clause does not require the Minnesota courts to apply Wisconsin law to the question of contract interpretation presented in this case.[262]

In its final analysis, the Supreme Court affirmed the decision of the Minnesota Supreme Court to apply the *lex fori*. It is submitted that, as a result of the decision in *Allstate v. Hague,* the threshold to trigger the application of the full faith and credit

---

[260] *ibid*

[261] *ibid*

[262] *ibid*

clause in the context of choice of law questions in interstate matters in the United State of America is incredibly high. The threshold asserted by the Supreme Court was one requiring a threat to national unity or individual state sovereignty. It is further submitted that in an instance such as the fact pattern presented in *Allstate v. Hague* where application of the *lex fori* is *prima facie* unsound, that national unity, far from being preserved, is challenged and threatened. It is accepted that, had the Supreme Court acted in defence of Wisconsin interests, that it might have been accused of elevating choice of law approaches and doctrine to a federal level given the unpalatability of the Minnesota decision in the eyes of the court. This much was acknowledged by the court in limiting its function:

> It is not this Court's function to establish and impose upon state courts a federal choice of law rule, nor is it our function to ensure that state courts correctly apply whatever choice of law rules they have themselves adopted.[263]

It must be noted that at the time of the decision in *Allstate v. Hague* the Houses of Congress had not exercised their legislative authority to legislate federally on the subject of choice of law. This remains the case today.

It ultimately submitted that *Allstate v. Hughes* represents a lost judicial opportunity to bring clarity and unified harmony to the landscape of American private international law in the discrete field of choice of law. Further that, in the context of the constitutional limitations referred to in Section 6 of the Second Restatement, the only constitutional limitation on a choice of law is that it does not threaten national unity or state sovereignty. As such, given the unlikely occurrence of a threat to national unity or an infringement of state sovereignty in a fact pattern and ruling such as that in *Allstate v. Hughes,* it is submitted that it appears as though there are no constitutional requirements in arriving at a choice of law decision. In effect, individual states have been allowed a *carte blanche* in this regard.

Returning to the consideration of the principles outlined in Section 6 of the Second

---

[263] *ibid* at 332

Restatement particular importance must be placed on the seven stated principles.[264] What is significant to notice, and consider, from the outset is that the seven principles represent, as the underpinning methodological and theoretical principles of the Second Restatement, a significant divergence from the other contemporary choice of law theories examined earlier in this section. Having considered Professor Leflar's "better law" approach, above, it is noticeable that the policy objective asserted[265] as characterizing that approach is absent from the policies underlying the Second Restatement.

Further, when considering the Second Restatement from the perspective of interest analysis as a general concept and the specific approach outlined by Professor Currie, above,[266] it is evident that the stated policy considerations in the Second Restatement do not coincide with those prioritized in Professor Currie's interest analysis. Of the policy considerations outlined in Section 6 of the Second Restatement it is the considerations of "justified expectations" and "certainty, predictability and uniformity of result" that resonate against the ideal advocated by proponents of interest analysis. At this stage it must be noted that, in addition to the two policy factors mentioned specifically above, perhaps more significant is the role given to:

(a) the needs of the interstate and international systems[267]

The importance of the reference to the "interstate and international systems" is significant in the context of the competing choice of law rationales at the time of the drafting and promulgation of the Second Restatement. The first, more obvious, observation to make is that it is significant that its place is at the beginning of the list of underlying policy considerations. This on its own might not, perhaps, be of great significance given that there is no priority ascribed to the policy considerations:

---

[264] *op. cit.* nn 248 - 249

[265] *op. cit.* n 224

[266] *op. cit.* nn 91 - 174

[267] Restatement Second section 6(2)(a)

> ...also, it is not suggested that the factors mentioned are listed in the order of their relative importance. Varying weight will be given to a particular factor, or to a group of factors, in different areas of choice of law.[268]

In this regard, the policy considerations elaborated in the Second Restatement mirror the five choice influencing factors outlined by Professor Leflar. However, it is important to look beyond the bare text of the Section 6 of the Second Restatement toward the comments appended to the section by Professor Reese. In respect of "the needs of the interstate and international systems" Professor Reese elaborated:

> Probably the most important function of choice of law rules is to make the interstate and international systems work well. Choice of law rules, among other things should seek to further harmonious relations between states and to facilitate commercial intercourse between them.[269]

Further that:

> Rules of choice of law formulated with regard for such needs and policies are likely to commend themselves to other states and to be adopted by these states. Adoption of the same choice of law rules by many states will further the needs of the interstate and international system and likewise the values of certainty, predictability and uniformity of result.[270]

It is submitted that the effect and consequence of the elaborating comments is significant and reinforced the shift in ideology the Second Restatement represented in choice of law thinking at the time in the United States. The nature of that shift, however, was from nationalistic bias in favour of the *lex fori* in virtually all instances

---

[268] Restatement Second section 6 cmt. c

[269] Restatement Second section 6 cmt. d

[270] *ibid*

towards a more internationalist perspective. As such, it is submitted that the Second Restatement marked the completion of the circle of approaches in private international law in the United States of America. As considered earlier in this chapter, the early comity-based approach elaborated by Judge Story and the First Restatement elaborated by Professor Beale represented manifestations of versions of internationalist thinking. Again, as considered in the pages above, the competing contemporary approaches to the Second Restatement represent overt and deliberate manifestations of nationalist thinking as exhibited by their almost unwavering focus of the *lex fori* as the *only* choice available. Ultimately, it is submitted that the Second Restatement represented, and continues to represent, a more open and measured approach towards choice of law.

In placing the "needs of the interstate and international systems" above all other functional objectives of choice of law it is submitted that Professor Reese, and the American Law Institute, lengthened the focus of contemporary private international law in the United States. As such, it is submitted that not only do the "needs of the interstate and international systems" serve to promote and prioritise an internationalist perspective towards choices of law in cross border matters but the importance afforded to the "needs" shifts the focus of the renewed internationalistic prioritisation from the individual to the collective. In the federal context manifest in the United States of America the effect was, and is, to prioritise the net impact and effect on the Union as opposed to individual states concerned in an action.

It is also significant to consider the potential effectiveness of the prioritisation of the "needs of the interstate and international systems" as distinct from the "full faith and credit" clause of the Constitution of the United States considered earlier[271] in the context of the promotion and protection of federal union in the United States. It has already been submitted, above, that the "full faith and credit" clause of the Constitution of the United States has been virtually neutered by the Supreme Court of the United State since the decision in *Allstate Ins v. Hague.*[272] Irrespective of its

[271] *op. cit.* nn 252 - 263

[272] (1980) 449 US 302

effectiveness, or lack thereof, the lack of legislative direction from Congress serves to nullify any potential impact the "full faith and credit clause" might have. As such, it is submitted that it is the prioritisation of the "needs of the interstate and international systems" that serves to protect the interests of the Union from a destructive national regime prioritising forum interests in the manner in which the contemporary competing approaches might.

Returning to the seven principles outlined in Section 6(2), above,[273] it has already been identified that the section, and so the underlying policies and principles contained therein, is referenced directly in the provisions concerning choice of law in torts.[274] It has also been identified that there is no explicit order of priority amongst the seven underlying policies as stated in the Second Restatement by Professor Reese.[275] It has been argued that the first policy set out by Professor Reese, the "needs of the interstate and international systems" might occupy a place of particular importance in the minds of presiding courts and judges in the twenty four states claiming to implement and apply the Second Restatement today,[276] but it must be recognised that this might not be the case.

In a leading contemporary decision, *Tooker v. Lopez,*[277] the Court of Appeals of New York the court touched on this issue. For illustrative purposes is it important to outline the facts of the action in *Tooker v. Lopez.* The deceased applicant, a young woman, was killed when the sports car in which she was a passenger overturned after the driver lost control while attempting to overtake another vehicle. In addition to the deceased applicant, the driver and another passenger were also killed. The estate of the deceased driver was the respondent in the action. The accident took place in

---

[273] *op. cit.* nn 248 - 249

[274] Restatement Second section section 145, 146

[275] *op. cit.* n 268

[276] Symeonides *op. cit.* n 17 at 331

[277] *Tooker v. Lopez* (1969) 24 NY 2d 569

Michigan while the parties to the action were New York domiciliaries. The vehicle was also registered and insured in New York. The action concerned the application of Michigan law over New York law by the lower Appellate Division. Before going further it is important to note that the action in *Tooker v. Lopez* arose following the landmark decision of *Babcock v. Jackson*[278] which will be considered in the in the following pages.

Considering, specifically, the priority ascribed to the various underlying principles in the Second Restatement in Section 6(2) Judge Breitel, in dissent, noted that:

> For that matter any monistic attempt to find some one great principle or doctrine to cover all conflicts problems in all fields of law has not been and is not likely to be successful. Certain it is that contacts theory or governmental interests theory, and their several variations all help to explain the several influences effective in reaching results, but no one of them is entitled to recognition as a universal touchstone, yesterday, today, or tomorrow (see, e.g., Leflar, Comments on *Babcock v. Jackson*, 63 Col. L. Rev. 1212, 1247, 1248-1249).[279]

Further that:

> The efforts of analysts like Currie, Cavers, Reese, Ehrenzweig, and the Restatement itself, as much as those of the now-disavowed Beale, seek or sought to articulate why the selection between significant and adventitious facts divides them as it does, and to create or discover a viable rationale. The problem has been exacerbated, of course, by the scholar's, and sometimes the Judge's understandable penchant to discover a single embracive principle to cover all cases.[280]

---

[278] *Babcock v. Jackson* (1963) 12 NY 2d 473

[279] *Tooker v. Lopez op. cit.* n 277 at 596

[280] *ibid*

Put simply, it is clear that each of the underpinning principles outlined in Section 6(2) of the Second Restatement is individually valid as a justification for a choice of law, whatever that choice might be. Further, that each of the underpinning principles might lead to a different conclusion in an action than the next underpinning principle. In this regard it is important to consider the nature of the individual underpinning policy principles: however, it is proposed to do so on a very narrow and limited basis. For present purposes it is proposed simply to assert whether the underpinning principles are individually or collectively focused in the manner considered in respect of the first underpinning principle, the "needs of the interstate and international systems:"

b) The relevant policies of the forum – *individual focus*
c) The relevant policies of other interested states and the relative interests of those state in the determination of the particular issue – *collective focus*
d) The protection of justified expectations – *individual focus*
e) The basic policies underlying the particular field of law – *individual focus*
f) Certainty, predictability and uniformity of result – *collective focus*
g) Ease in the determination and application of the law to be applied – *individual focus*

It is significant that that when taken with the first underpinning principle, considered above, there exists a 4:3 split in the competing approaches between those states focused on the individual interests of states as opposed to those states focused on the collective interests of federal union, interstate harmony and international harmony. It is submitted that it is evident that, at this early stage in the consideration of the regime introduced by the Second Restatement, from a policy perspective the Second Restatement represents an amalgamation of various competing ideologies rather than an assertion of a new ideology. The regime of the Second Restatement cannot be characterised as one casting aside the old approaches advocated by Professor Beale in the First Restatement, considered earlier.

Further still, in the absence of any prioritisation amongst the underpinning principles

inherent judicial tendencies to elaborate a definitive approach might manifest themselves. This was illustrated by Judge Breitel[281] in *Tooker v. Lopez* in asserting the "penchant to discover a single embracive principle to cover all cases."

Ultimately, however, it is submitted that there is no "*one rule to rule them all.*"

Another aspect to the lack of "*one rule to rule them all*" is the fragmentation engendered as a result the apparent disharmony in underpinning policy. The fragmentation in competing underpinning choice of law principles is compounded by the Second Restatement's nature as a rule selecting regime as opposed to a jurisdiction selecting one. As similarly advocated by Professor Cavers[282] and Professor Leflar,[283] and considered earlier in this chapter, it is clear that the regime in the Second Restatement has as its objective the selection of applicable rules rather than the selection of jurisdictions whose law would then apply in an action. Section 6 provides:

> ...the factors relevant to the choice of the applicable rule of law...

However, the fragmentation issue inherent in the Second Restatement is not restricted to individual rules that have been selected in light of varied and potentially divergent underpinning principles. The second aggravating factor contributing to potential fragmentation of approach within the regime of the Second Restatement is the scope of application of the chosen rule. Section 145 provides:

> 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 under the

---

[281] *op. cit.* n 279

[282] *op. cit.* n 75

[283] *op. cit.* n 219

principles stated in s 6.[284]

2.8.1 *Characterisation within the Second Restatement*

What is significant is that the Second Restatement appears to embrace the possibility of discrete, individual, choices of law being made for individual issues in an action as opposed to a singular choice for the entire action. Put in other language, the Second Restatement specifically provides for *depeçage* in tort actions. Professor Reese elaborated that:

> The courts have long recognised that they are not bound to decide all issues under the local law of a single state. Thus in a simple motor accident case that occurred outside the state of the forum, a court under traditional and prevailing practice applies its own state's rules to issues involving process, pleading, joinder of parties, and the administration of the trial while deciding other issues such as whether the defendant's operation of the vehicle was negligent by reference to the law selected by application of the rules stated in this Chapter.[285]

Further that:

> Each issue is to receive separate consideration if it is one which would be resolved differently under the local law rule of two or more of the potentially interested states. Experience and analysis have shown that certain issues that recur in tort cases are most significantly related to states with which they have particular connections or contacts.[286]

Given the assertions made by Professor Reese in the comments accompanying the

---

[284] Restatement Second section 145(1)

[285] Restatement Second section 145 cmt. d

[286] *ibid*

Second Restatement, it is clear that there is significant scope within the regime elaborated for a degree of judicial discretion and finesse regarding the delineation and characterisation of particular issues and the choices of law flowing from those characterisations. However, it is submitted that the characterisation of issues as distinct from one another for the purposes of alternative choices of law does not end with a mere factual or legal distinction between them. While the text of the Second Restatement is unclear on this point it is submitted that the accompanying commentary properly illuminates the intentions of Professor Reese and the American Law Institute.

As such, it is clear that "issues" may be distinguished following a two stage process under the regime of the Second Restatement. The first stage in the identification process is to determine whether a matter is procedural or substantive in the eyes of the forum court. The distinction between matters of substance and matters of procedure is exceptionally important in the context of modern private international law regime as the answering of the question serves as the gateway to considering the matter in the context of private international law proper. As such it is submitted that the characterisation of a matter as substantive or procedural is a significant preliminary question that that ultimately did not escape the reach of the Second Restatement despite indications to the contrary in the text of the Second Restatement itself. Section 122 specifically provides that:

> A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.[287]

The importance of the preliminary delineation of issues between matters substance and matters procedure lies in the fact that the traditional, common law, position is that matters of procedure are automatically excluded from the ordinary private international law process and subject to the automatic application of the *lex fori*. Professor Reese elaborated further, specifically, on the distinction between matters of

[287] Restatement Second section 122

substance and matters of procedure:

> The courts have traditionally approached issues falling within the scope of the rule of this Section by determining whether the particular issue was "procedural" and *therefore* to be decided in accordance with the forum's local law rule, or "substantive" and *therefore* to be decided by reference to the otherwise applicable law. These characterizations, while harmless in themselves, have led some courts into unthinking adherence to precedents that have classified a given issue as "procedural" or "substantive," regardless of what purposes were involved in the earlier classifications.[288]

As such, the common law mechanism of characterisation represents a valuable arrow in the armoury of a court to dispense with answering intricate private international law questions in a given issue. It is submitted that, given the unyielding nature of private international law as a discipline in the minds of lawyer and judge alike, its availability presents the temptation to resort to it where reasonably possible in a given fact pattern.

A particularly important example of characterisation in action is the traditional common law assertion that the assessment and quantification of damages is wholly procedural in nature. This concept has been described by Professor Weintraub in the following terms:

> What about damages? Heads of damages, the items that a court or jury may include in computing the amount awarded to the plaintiff, are universally regarded as substantive. If the forum's choice-of-law rule for torts points to a Mexican state, that Mexican state's law determines the heads of damages. Quantification of damages under these heads, however, is regarded as "procedural" and forum standards apply.[289]

---

[288] *ibid* cmt. b

[289] Weintraub, Choice of Law for Quantification of Damages: A Judgment of the House of Lords Makes a Bad Rule Worse (2007) 42 Tex Int LJ 311, 312

Further that:

> Quantification is the bottom line – what all the huffing and puffing at trial is about.[290]

Considering "the bottom line," in the context of the Second Restatement, it is provided in Section 171 that:

> The law selected by application of the rule of section 145 determines the measure of damages.[291]

A cursory reading of this, apparently unambiguous, provision of the Second Restatement might lead to the conclusion that there is no question that the quantification, or "measure," of damages would be governed by the applicable law as designated by the substantive provisions elsewhere in the Second Restatement. However, as evident from considerations above, the commentary accompanying the Second Restatement is vital in fully grasping the effect of the regime. Professor Reese elaborated:

> The law selected by application of the rule of section 145 determines what items of loss can be included in the damages and what limitations, if any, are imposed upon the amount of recovery. The right to recover damages for a tort is to be distinguished from the right of access to the courts, the method of assessing damages, for instance, whether by court or jury, and the evidence admissible. These are all matters of judicial administration that are determined by the local law of the forum (see Chapter 6).[292]

---

[290] *ibid*

[291] Restatement Second section 171

[292] *ibid* cmt. a

Further that:

> The forum will follow its own local practices in determining whether the damages awarded by a jury are excessive.[293]

It is important, however, to draw the distinction between the two connected issues in damages – the "heads" of damages and the quantification proper. The commentary to the Second Restatement clearly provides for the application of the governing law as determined by Section 145 to the identification of the "heads" of damage. This approach is not new to the Second Restatement and represents a manifestation of established principle in the United States. The United States Supreme Court in *Slater v. Mexican National Railroad*[294] elaborated:

> But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitation on his liability that law would impose...we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught.[295]

Against the characterisation of the "heads" of damage as substantive the quantification proper has been characterised in the commentary by Professor Reese as procedural in nature and this approach too finds its basis in existing practise and principle. Dicey sets out:

---

[293] *ibid* cmt. f

[294] *Slater v. Mexican National Railroad Co* (1903) 194 US 120

[295] *ibid* at 126

> A distinction must be drawn between remoteness and heads of damage, which are questions of substance governed by the *lex causae*, and measure or quantification of damages, which is a question of procedure governed by the *lex fori.*[296]

As such, and as a combination of, the two comments elaborated by Professor Reese serve to muddy the unambiguously clear measure in Section 171 of the Second Restatement. It is not proposed to delve into the substance of the rationale underpinning the common law grip on the quantification of damages being recognized as procedural rather than procedural at this stage in this thesis, it is proposed to consider this issue in light of the significantly different approach manifest in the European private international law regime under the Rome II Regulation[297] later in this thesis. However, it is submitted that given that the quantification of damages is "the bottom line," such a characterization by a forum court represents another important arrow in the armoury of a forum court, albeit one not designed to avoid the intricacies of private international law questions. Fundamentally, in the common law context, such a characterisation represents a mechanism by which a willing forum could exercise a measure of control in actions otherwise manifestly connected with other jurisdictions.

Before proceeding further, it must be mentioned that the common law experience in the United States of America in characterising the quantification of damages as procedural does not represent the *status quo* of the common law globally.

It is worth mentioning that the experience in the Australia has recently been at odds with the American jurisprudence. The High Court of Australia in *John Pfeiffer Pty v. Rogerson*[298] has been to regard the quantification of damages as an inherently

---

[296] Dicey & Morris, *The Conflict of Laws* (12th ed.) 183

[297] Regulation EC No. 864/2007 on the law applicable to non-contractual obligations (Rome II) Article 15(c)

[298] *John Pfeiffer Pty v. Rogerson* (2000) 172 ALR 625

substantive matter and so governed by the applicable law. The High Court of Australia asserted that:

> Two guiding principles should be seen as lying behind the need to distinguish between substantive and procedural issues. First, litigants who resort to a court to obtain relief must take the court as they find it. A plaintiff cannot ask that a tribunal which does not exist in the forum (but does in the place where a wrong was committed) should be established to deal, in the forum, with the claim that the plaintiff makes. Similarly, the plaintiff cannot ask that the courts of the forum adopt procedures or give remedies of a kind which their constituting statutes do not contemplate any more than the plaintiff can ask that the court apply any adjectival law other than the laws of the forum. Secondly, matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure.[299]

Further reasserting the position:

> Secondly, all questions about the kinds of damage, or amount of damages that may be recovered, would likewise be treated as substantive issues governed by the *lex loci delicti*.[300]

Contrary to the Australian position the House of Lords has more recently asserted, in *Harding v. Wealands,*[301] that the characterization of the quantification of damages remains a procedural matter in the United Kingdom and so mirroring the asserted position in the United States of America under the Second Restatement and the common law. Lord Hoffman turned to the Private International Law (Miscellaneous Provisions) Act 1995 which provides that:

---

[299] *ibid* at para 104

[300] *ibid* at para 105

[301] *Harding v. Wealands* [2006] UKHL 32

> [nothing in this Part] (d) authorises any court of the forum to award damages other than in accordance with the law of the forum.[302]

In elaborating the statutory position Lord Hoffman reverted to clarification from the Lord Chancellor in explanation of the statutory position created by the 1995 Act:

> With regard to damages, issues relating to the quantum or measure of damages are at present and will continue under Part III to be governed by the law of the forum; in other words, by the law of one of the three jurisdictions in the United Kingdom. Issues of this kind are regarded as procedural and, as such, are covered by clause 14(3)(b). It follows from this that the kind of awards to which the noble Lord referred of damages made in certain states, in particular in parts of the United States, will not become a feature of our legal system by virtue of Part III. Our courts will continue to apply our own rules on quantum of damages even in the context of a tort case where the court decides that the "applicable law" should be some foreign system of law so far as concerns the merits of the claim. Some aspects of the law of damages are not regarded as procedural and, in accordance with the views of the Law Commissions in their report on the subject, Part III does not alter this. These aspects concern so-called "heads of damages"—the basic matter which is being compensated for—such as special damage relating to direct financial loss. Whether a particular legal system permits such a head of damage is not regarded as procedural but substantive and therefore not automatically subject to the law of the forum. This seems right given the intimate connection between such a concept and the particular nature of the case in issue.[303]

As such, it is submitted that on the matter of damages there is discord and disharmony in the common law world. Professor Weintraub, almost exasperated, asserts a glimmer of hope:

---

[302] Private International Law (Miscellaneous Provisions) Act 1995 Article 14(3)

[303] *Harding v. Wealands op. cit.* n 298 at para 37.

> One bit of sanity that survives in this choice-of-law madness is that courts regard statutory limits on recovery as "substantive."[304]

But ultimately he concludes that, despite his reasoned and explained conviction otherwise, the "madness" is likely to persist:

> I have opposed this silliness, but the windmills show little sign of weakening.[305]

Further that the:

> ...established rule is monstrous.[306]

2.8.2 *The Rule in the Second Restatement*

Leaving the substantive consideration of the policy underpinnings of the Second Restatement behind, it is appropriate to move to consider the rule connected with those underpinning policies. Section 145, the general approach, provides:

> The General Principle
>
> 1. The rights and liabilities of the parties with respect to an issue in tort are determines by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles states in §6.
> 2. Contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:

---

[304] Weintraub *op. cit.* n 289 at 313

[305] *ibid*

[306] Weintraub *op. cit.* n 248 at 1304

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.

The first observation to make about the measures in Section 145 is that the underpinning principles elaborated in Section 6, considered above, are woven directly into the fabric of the main rule. The second, most important, observation is the approach itself, the "most significant relationship" test and its primacy. However it must also be observed that the concept of a "most significant relationship" is inherently vague given the diversity in the underpinning principles in Section 6 and the contacts set out in Section 145(2).

Looking more closely at the territorial contacts set out in Section 145(2), above, it is significant to note the nature of the contacts contemplated. It is clear that the contacts listed above are territorial in nature but that they do not attempt to deliberately eschew concepts prevalent in preceding regimes. The example in the territorial contacts listed above is that the first contact, "the place where the injury occurred," represents the core of the position set out by Professor Beale in the First Restatement, a position not abandoned but rather absorbed into a looser understanding of territorial connection. However, the scope of potential connecting factors ranges from the *lex loci delicti* to the *lex loci damni*, the personal law of the parties involved and the locus of the parties relationship. Nevertheless it must be remembered that the list set out in Section 145(2) is not exhaustive.

In the commentary to the Section Professor Reese elaborated:

> In applying the principles of s6 to determine the state of most significant relationship, the forum should give consideration to the relevant policies of all

> potentially interested states and the relevant interests of those states in the decision of the particular issue.[307]

Further that:

> When the injury occurred in a single, clearly ascertainable state and when the conduct which caused the injury also occurred there, that state will usually be the state of the applicable law with respect to most issues involving the tort.[308]

It is submitted that this is a particular exception to an otherwise broad discretion present in the Second Restatement, and commented on by Professor Reese, enabling a court to determine the relevant connecting factors for application and the relative importance of those factors, rather than a prescribed and automatically applicable provision. In addition to this, it creates the automatic assumption in favour the state of conduct and event. In the ordinary course of events it is acknowledged that such an assumption might be wholly appropriate but, taken in hand with the potentially determinative connecting factors collectively, it represents a distinct bias towards mere territorialism rather than a proper consideration of the underpinning principles outlined in Section 6 of the Second Restatement. It is those principles that are integral to the application of an approach seeking to determine the "most significant relationship" and so the appropriate choice of law. The temptation to simply count the connecting factors looms ever-present in the shadow cast by the Second Restatement. The Supreme Court of Tennessee in *Hataway v. McKinley* asserted that:

> The primary advantage of the Restatement (Second) approach is that it utilizes a flexible mixture of the current thinking on choice of law. Some, however, have criticized the Restatement (Second) approach because of its complexity. The approach primarily advocates a governmental interest analysis, but many courts have merely counted contacts rather than engaging in an analysis of the

---

[307] Restatement Second section 145 cmt. e

[308] *ibid*

interests and policies listed in the Restatement.[309]

In its assertion, the Tennessee Supreme Court recognised the reality of the experience of application of the Second Restatement, that courts had essentially resorted to "sticking pins in maps."[310] Although more fundamentally:

> Courts that purport to follow the Second Restatement generally engage in a contact-counting exercise, with the Second Restatement relegated to the status of a guide for determining which particular contacts are generally relevant to the choice of law inquiry. In short, sections 145 and 188 are being used as ends in themselves, rather than as starting points for the choice of law decision, which ultimately should be governed by the principles identified in section 6.[311]

A further, third, initial observation is that, much like with respect to Section 6, fragmentation appears to manifest itself in the context of the possible application of multiple laws in a given action, the *depeçage* issue. As the scheme of the Second Restatement provides for varying choices in law it would seem natural and proper that each choice made would carry with it corresponding considerations of the varying connecting factors and the corresponding underpinning principles. However, what is also clear is that the scheme of the Second Restatement provides for the possibility of alternate appreciations of the connecting factors in different issues. The distinct possibility is that the weighting or priority of a particular connecting factor might change between issues.

2.8.3 *Criticisms of the Second Restatement*

---

[309] *Hataway v. McKinley* (1992) 830 SW 2d 53, 58

[310] Weintraub *op. cit.* n 248 at 1290

[311] Smith, Choice of Law in the United States (1987) 38 Hastings LJ 1041, 1046

Moving from these general observations to criticism of the Second Restatement on its promulgation by the American Law institute, it is significant to note that it did not meet with universal applause. The Second Restatement was praised by some such as JHC Morris:

> ...the most impressive, comprehensive and valuable work on the conflict of laws that has ever been produced in any country, in any language, at any time.[312]

The Second Restatement was, however, simultaneously and equally scorned for consisting of "non-rules" and for merely elaborating what was in essence an amalgamation of rules into a single "approach" lacking in precision and details. Professor Reese acknowledged the importance of the distinction and the fervour at that time for certainty:

> The principal question in choice of law today is whether we should have rules or an approach. By "rule" is meant a phenomenon will lead the court to a conclusion.[313]

The issue further considered by the reporter, Professor Reese, in the context of his thoughts on *Babcock v. Jackson*[314] questioned whether:

> ...one should seek to develop rules of choice of law or rather give the courts no guidance other than that they should consider a number of factors in

---

[312] Morris, Law and Reason Triumphant or: How Not to Review a Restatement (1973) 21 Am J Comp L 322, 330

[313] Reese, Choice of Law: Rules or Approach (1972) 57 Cornell L.Rev 315

[314] *op. cit.* n 93

> arriving at their decisions. This basic question remains unanswered in the United States today.[315]

The answering of the question posed by the reporter himself is particularly important, given that the courts face:

> ...a judicial task of some magnitude to define the place of the most significant relationship in light of §6 and of the multiple connecting factors, or to weigh factors for their "relative" significance.[316]

The dilemma faced by Professor Reese and the American Law Institute in considering the challenge of a generation of tumultuous jurisprudence and academic critique is particularly relevant in the context of the European private international regime. The difference in method ultimately adopted and, in particular, the impact on the two common law regimes within the European Union, Ireland and the United Kingdom, is significant. Professor Briggs identified a perceived impact as:

> Private international law and lawyers are now having done to them what was done almost 40 years ago to the system of weights and measures. We are finally being made to go metric. We are all in Rome now.[317]

As such, it is particularly relevant to consider the rationale of the Reporter, Professor Reese in this regard. It has already been identified[318] that the principal contemporary question in American choice of law was the desirability of a return to a rule based approach or the elaboration of a broader, more accommodating, "approach". It is submitted that it is already clear that the regime of the Second Restatement is

---

[315] Scholes, Hay, Symeonides, Borchers, *Conflict of Laws* (3rd ed. 2000) section 2.14 n 44

[316] *ibid* at 65

[317] Briggs *op. cit.* n 88

[318] *op. cit.* n 313

characteristic of an "approach." Professor Reese asserted the characteristics and the inherent problem of such a regime as:

> By "approach" is meant a system which does no more than state what factor or factors should be considered in arriving at a conclusion. An example of an approach is section 6 of the Restatement *(Second) of Conflict of Laws* which lists "factors relevant to the choice of the applicable rule of law," but neither states how a particular choice of law question should be decided in light of these factors nor what relative weight should be accorded them.[319]

While considering the comparative merits of a rule-based approach, Professor Reese asserted:

> Rules are employed in most areas of the law. Indeed, throughout the ages the development of rules has been one of the primary objectives of the common law judge. This has been so because of the advantages that rules bring. Perhaps the most obvious of these benefits are certainty and predictability, important factors not only for those planning future transactions but also for those confronting either lawsuits or problems of how much to offer or accept by way of settlement.[320]

In the context of the "...judicial task of some magnitude..."[321] Professor Reese elaborated the particular attractions and benefits of a rule based regime against the initial struggles of a common law judge in ascertaining the appropriate application of an "approach":

---

[319] *ibid*

[320] *ibid* at 316

[321] *op. cit.* n 316

> All that a judge need do when deciding a question covered by a rule is to select the proper rule and then, after gaining an understanding of its provisions, to apply it. By this process he will be led to a conclusion.[322]

Further that:

> Far more difficult is the task of a judge when an approach is involved. Here he is told simply to consider one or more enumerated factors in arriving at his conclusion and usually is given little, if any, guidance as to the relative weight he should give these factors. As a result, each decision will be essentially *ad hoc* and the judge will rarely be able to rely upon, or even to obtain much guidance from, earlier opinions.[323]

2.8.4 *Babcock v. Jackson*

It is appropriate, at this stage, to finally consider in detail the leading contemporary decision in American private international law, *Babcock v. Jackson.*[324] Representing a departure from the traditional approach by the New York court, it will be considered in the context of the broader New York approach to choice of law questions later in this chapter but for the present purposes it is appropriate to consider it in the context of Professor Reese's deliberations on the desirability of rules or approaches.

The facts of *Babcock v. Jackson*, a guest passenger statute case, are similar in nature to cases considered earlier in this chapter[325] and are, again, particularly compelling in justifying a departure from the traditional approach espoused by the New York court until then. All the parties to the action were from Rochester, New York and together

---

[322] *op. cit.* n 313 at 317

[323] *ibid*

[324] *Babcock v. Jackson* (1963) 12 NY 2d 473

[325] *Tooker v. Lopez* (1969) 24 NY 2d 569; *Milkovich v Saari* (1973) 203 NW 2d 408 *et al*

with friends were in Ontario, Canada, for a weekend trip when the respondent, Jackson, lost control of his vehicle and collided, in Ontario, with a stone wall adjacent to the highway on which they were travelling. The plaintiff in the action, Babcock, was a guest passenger in the vehicle at the time and was seriously injured in the accident. Subsequently, after returning to New York, the plaintiff filed suit against the respondent claiming ordinary negligence against the respondent. Much like the vehicular accident cases considered earlier in this chapter the facts involved a difference in the legislative provisions in the competing states. In this instance Ontario had promulgated a guest passenger statute having the effect of preventing recovery by a guest passenger against a host driver. The driver, a New Yorker, was immune from suit under the prevailing provisions of Ontario law:

> The owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable, for any loss or damage resulting from bodily injury to, or the death of any person being carried in the motor vehicle.[326]

The primary question for the court was formulated by Judge Fuld:

> The question presented is simply drawn. Shall the law of the place of the tort *invariably* govern the availability of relief for the tort or shall the applicable choice of law rule also reflect a consideration of other factors which are relevant to the purposes served by the enforcement or denial of the remedy?[327]

In setting out a radical departure from the traditional position Judge Fuld was not kind in his treatment of the doctrinal approach contained in the First Restatement. Drawing on Professor Yntema, Judge Fuld asserted:

---

[326] Highway Traffic Act of Province of Ontario section 105 (2)

[327] *op. cit.* n 324

> "The vice of the vested rights theory," it has been aptly stated, "is that it affects to decide concrete cases upon generalities which do not state the practical considerations involved"[328]

Further that:

> The vested rights doctrine has long since been discredited because it fails to take account of underlying policy considerations in evaluating the significance to be ascribed to the circumstance that an act had a foreign *situs* in determining the rights and liabilities which arise out of that act.[329]

Judge Fuld did, however, acknowledge the particular benefit of the approach contained in the First Restatement but again reiterated the growing dissatisfaction with it:

> ...the theory ignores the interest which jurisdictions other than that where the tort occurred may have in the solution of particular issues. It is for this very reason that, despite the advantages of certainty, ease of application and predictability which it affords, there has in recent years been increasing criticism of the traditional rule by commentators and judicial trend towards its abandonment or modification.[330]

Further that the:

> Realization of the unjust and anomalous results which may ensue from application of the traditional rule in tort cases has also prompted judicial search for a more satisfactory alternative in that area.[331]

---

[328] *ibid* at 478

[329] *ibid*

[330] *ibid*

[331] *ibid*

In search of a more satisfactory alternative Judge Fuld relied on two earlier cases, *Auten v. Auten*[332] and *Kilberg v. Northeast Airlines Inc.,*[333] upon which to base the departure from the traditional approach elaborated by Professor Beale in the First Restatement. The first significant observation to make about the authorities relied upon by the court in *Babcock v. Jackson* is that neither of the two authorities shared a fact pattern similar to the facts at hand. *Auten v. Auten* was an action in contract while *Kilberg v. Northeast Airlines*, considered earlier in this chapter, disguised the core choice of law question with questions of damages and their limitation. Judge Fuld paid particular attention to the reasoning of the court in *Kilberg* as it highlighted the particular injustice possible under a scheme such as the First Restatement:

> Modern conditions make it unjust and anomalous to subject the traveling citizen of this State to the varying laws of other States through and over which they move *** An air traveller from New York may in a flight of a few hours' duration pass through *** commonwealths. His plane may meet with disaster in a State he never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an airplane's catastrophic descent may begin in one State and end in another. The place of injury becomes entirely fortuitous. Our courts should if possible provide protection for our own State's people against unfair and anachronistic treatment of the lawsuits which result from these disasters.[334]

It is submitted that it is clear from the passage cited by Judge Fuld that his preoccupation, in this instance, concerned the simplistic, unrefined, nature of mechanical rules such as those elaborated in the First Restatement and the potential

---

[332] *Auten v. Auten* (1954) 208 NY 155

[333] *Kilberg v. Northeast Airlines* (1961) 9 NY 2d 34, *op. cit.* n 166

[334] *Babcock v. Jackson op. cit.* n 324 at 480; *Kilberg v. Northeast Airlines op. cit.* n 333 at 39 per Chief Judge Desmond

for aberrations in the resultant applicable law. Fortune, rather than reason, was the eventual determinative factor in the eyes of Judge Fuld:

> The emphasis in *Kilberg* was plainly that the merely fortuitous circumstance that the wrong and injury occurred in Massachusetts did not give that State a controlling concern or interest in the amount of the tort recovery as against the competing interest of New York in providing its residents or users of transportation facilities there originating with full compensation for wrongful death.[335]

It is submitted that rather than mere fortune, it was, and is, the combination of fortune and rigidly applied rules, overly generalised and lacking in refinement, that present the risk of injustice such as that which preoccupied Judge Fuld in this instance.

In seeking freedom from the shackles of mechanistic rigidity the court turned to *Auten v. Auten,* a contract law case, in which the New York court first elaborated an alternative to the regime elaborated in the First Restatement. Judge Fuld asserted that in *Auten v. Auten*:

> ...this court abandoned such rules and applied what has been termed the "center of gravity " or "grouping of contacts" theory of the conflict of laws.[336]

Further, and highlighting core elements of New York's revolutionary "center of gravity" approach:

> ...the courts instead of regarding as conclusive the parties' intention or the place of making or performance, lay emphasis rather upon the law of the place "which has the most significant contacts with the matter in dispute"[337]

---

[335] *Babcock v. Jackson op. cit.* n 324 at 480

[336] *ibid*

[337] *ibid*

Judge Fuld, convinced of the desirability of the departure set out in *Auten v. Auten* and *Kilberg v. Northeastern Airlines Inc.* sought to extend the reach of the court's departure from mechanistic rigidity in matters of contract only to include matters of tort:

> The "center of gravity" or "grouping of contact" doctrine adopted by this courts in conflicts cases involving contracts impresses us as likewise affording the appropriate approach for accommodating the competing interests in tort cases with multi-State contacts.[338]

Further that:

> Justice, fairness and "the best practical result" may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.[339]

Further again that:

> The merit of such a rule is that "it gives to the place having the most interest in the problem paramount control over the legal issues arising out of a particular factual context" and thereby allows the forum to apply "the policy of the jurisdiction most intimately concerned with the outcome of the particular litigation (*Auten v. Auten* 308 NY 155, 161).[340]

Applying the "revolutionary" approach to the facts instant, Judge Fuld significantly asserted:

---

[338] *ibid* at 482

[339] *ibid*

[340] *ibid*

> Comparison of the relative "contacts" and "interests" of New York and Ontario in this litigation, *vis-à-vis* the issue here presented, makes it clear that the concern of New York is unquestionable the greater and more direct and that the interest of Ontario is at best minimal. The present action involves injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile, garaged, licensed and undoubtedly insured in New York, in the court of a weekend journey which began and was to end there. In sharp contrast, Ontario's sole relationship with the occurrence is the purely adventitious circumstance that the accident occurred there.[341]

Further, that:

> ...it is New York, the place where the parties reside, where their guest-host relationship arose and where the trip began and was to end, rather than Ontario, the place of the fortuitous occurrence of the accident, which has the dominant contacts and the superior claim for application of its law. Although the rightness or wrongness of defendant's conduct may depend upon the law of the particular jurisdiction through which the automobile passes, the rights and liabilities of the parties which stem from their guest-host relationship should remain constant and not vary and shift as the automobile proceeds from place to place.[342]

Judge Fuld interestingly concluded that:

> ...there is no reason why all issues arising out of a tort claim must be resolved by reference to the law of the same jurisdiction. Where the issue involved standards of conduct, it is more than likely that it is the law of the place of the tort which will be controlling but the disposition of other issues must turn, as

---

[341] *ibid*

[342] *ibid* at 483

> does the issue of the standard of conduct itself, on the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented.[343]

At this point, it is important to consider the effect of the decision of the New York Court in *Babcock v. Jackson.* In advocating the adoption of a "center of gravity" approach the Court asserted that New York was more intimately connected with the facts and so applied New York law, the *lex fori*, to conduct occurring in Ontario. The real significance of the decision in *Babcock v. Jackson* is, however, to be observed more in what the court did not elaborate rather than what it did. It is clear from the preceding pages that the court was "impressed"[344] with the "center of gravity" approach elaborated in *Auten v. Auten* and *Kilberg v. Northeastern Airlines Inc.* to the extent that it should further discredit the traditional approach of the First Restatement in New York. What the Judge Fuld did not do, in the course of the majority decision, was to clearly identify what exactly "center of gravity" should signify in the context of the competing contemporary choice of law methodologies in American private international law.

From the preceding pages it is submitted that the majority decision of the court, delivered by Judge Fuld, in fact offers multiple possible interpretations and meanings for "center of gravity" in the revolutionary regime it subsequently ushered in. Otherwise referred to as the "most significant contacts with the matter in dispute,"[345] it is not clear whether the determination of significance should be quantitative or qualitative and neither is a guide to the qualitative indicia provided by the Judge Fuld.

What is clear, however, is that the "the jurisdiction which...has the greatest concern with the specific issue"[346] might be determined by a consideration and "...comparison

---

[343] *ibid* at 484

[344] *op. cit.* n 338

[345] *op. cit.* n 337

[346] *op. cit.* n 339

of the relative "contacts" and "interests" of..."[347] the competing states in an action but again little is said in elaboration of "contacts" and "interests". As such, the possibility of a comparative analysis of competing governmental interests is, at the very least, implicit in this assertion and, similarly, suffers the same malady as a pure governmental interest analysis approach might suffer – insufficient clarity and reason concerning the relative weighting of interests, considered earlier in this chapter.

It is submitted that any comparative analysis might also focus purely on the numerical majority of "contacts" or "interests." In the context of *Babcock v. Jackson* the court clearly viewed New York as having greater numerical contacts with the action[348] while correspondingly viewing the "contact" or "interest" of the *locus delictus* as "minimal"[349] in nature. It is submitted that this might amount to an exercise in "sticking pins in maps."[350]

It is further submitted that the latitude evident in Judge Fuld's assertion concerning the means of obtaining the "best practical result,"[351] and the justice and fairness intended to be done, equally yield uncertainty and imprecision. It is not clear from whose eyes the "best practical result" should be viewed and in the absence of further guidance, from the relatively brief decision, it is submitted that no conclusions can be drawn as to the intended direction the court intended to steer itself aside from distancing itself from the regime elaborated by Professor Beale in the First Restatement. However, as against this, it must be observed that Judge Fuld likened the position consequent to his assertion to that of the Second Restatement:

---

[347] *op. cit.* n 341

[348] *op. cit.* n 342

[349] *ibid*

[350] *op. cit.* n 310

[351] *op. cit.* n 339

> Such, indeed, is the approach adopted in the most recent revision of the Conflict of Laws Restatement in the field of torts. According to the principles there set out, "The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort"...and the relative importance of the relationships or contacts of the respective jurisdictions is to be evaluated in light of "the issues, the character of the tort and the relevant purposes of the tort rules involved."[352]

Given the likening of the regime to that elaborated by Professor Reese in the Second Restatement there are a number of corollary observations to be made in this regard. The first observation is that the position following the decision in *Babcock v. Jackson* much like the Second Restatement, observed earlier, is equally vulnerable to the accusation that it requires no more than an exercise in simple arithmetic to determine the state with the most numerous contacts and so determining that state to be the state of most significant relationship. However the distinction between the regime of the Second Restatement and that in *Babcock v. Jackson* is that, while both seek to determine the state of greatest connection to the issue at hand, the Second Restatement, at least, gives guidance as to the contacts significant in reaching a conclusion:

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.[353]

As such:

---

[352] *Babcock v. Jackson op. cit.* n 324 at 482

[353] Restatement Second section 145 (2)

> ...the *Babcock* decision failed to give definitive shape to the "grouping of contacts" doctrine and may be read as contemplating either a qualitative interest analysis, a quantitative massing of contacts, or some combination of the two. It is this diversity of credible interpretations which has produced such varied applications of the *Babcock* approach in subsequent decisions.[354]

The second observation to be made in the context of a comparison between the position in *Babcock v. Jackson* and the regime under the Second Restatement is that, again, unlike the scheme of the Second Restatement the decision of the New York court fails to elaborate choice influencing considerations in the same manner as the Second Restatement.[355] Professor Leflar commented that:

> That state's early approval of the "dominant contacts" approach, in *Auten v. Auten* and *Babcock v. Jackson*, gave initial impetus to the choice of law revolution that followed, but the inexactness of that initial approach and the room it left for difference of opinion as to what contacts were dominant (most significant) produced inevitable confusion in the later cases.[356]

Professor Leflar commented further that:

> A major difficulty was judicial unwillingness to identify and admit the existence of dominant contacts alone, yet which exerted influence on the actual conclusions reached by the judges.[357]

Professor Reese, the reporter in the drafting of the Second Restatement, commented on the effect of *Babcock v. Jackson* and asserted that:

---

[354] T.J.B, The Impact of *Babcock v. Jackson* (1966) 52 Virginia L.Rev 302, 307

[355] Restatement Second section 6

[356] Leflar, Choice of Law: A Well-Watered Plateau (1977) 41 Law & Contemp. Prob. 10, 19

[357] *ibid*

> Since the time of *Babcock*, because of the uncertainty and unpredictability it engendered, the court has been deluged by appeals and wracked by dissent.[358]

In this regard it is important to mention the dissenting judgment in *Babcock v. Jackson.* Judge Van Voorhis was unconvinced as to the legitimacy of the majority's action and pointedly compared the actions of the majority to the worst, chauvinistic, imperial tendencies of generations past:

> Attempts to make the law or public policy of New York State prevail over the laws and policies of other States where citizens of New York State are concerned are simply a form of extraterritoriality which can be turned against us wherever actions are brought in the courts of New York which involve citizens of other States. This is no substitute for uniform State laws or for obtaining uniformity by covering the subject by Federal law. Undoubtedly ease of travel and communication, and the increase in interstate business have rendered more awkward discrepancies between the laws of the States in many respects.[359]

Further that:

> ...this is not a condition to be cured by introducing or extending principles of extraterritoriality, as though we were living in the days of the Roman or British Empire, when the concepts were formed that the rights of a Roman or an Englishman were so significant that they must be enforced throughout the world even where they were otherwise unlikely to be honored by "lesser breeds without the law."[360]

---

[358] Reese *op. cit.* n 313 at 318

[359] *Babcock v. Jackson op. cit.* n 324 at 486

[360] *ibid*

If, as asserted earlier in this section, the Second Restatement elaborates no definitive theoretical nor methodological preference it is submitted that the position adopted by Judge Fuld for the majority in *Babcock v. Jackson* elaborates an even less definitive preference. As such:

> ...*Babcock*, like the Second Restatement, could not provide more than well reasoned guidance for future cases. Unfortunately, its inability to do more resulted in a line of cases marked more by confusion than consistency.[361]

Considering the net effect of the Second Restatement and *Babcock v. Jackson* over the course of the preceding pages, it is submitted that it is clear that they functioned as a "tag-team" against the prevalence of the traditional regime of the First Restatement but that they did not, and do not, offer a clear alternative choice of law methodology in place of that elaborated in the First Restatement. Confusion and ambiguity, it is submitted, were the hallmarks of choice of law in the American private international law regime as a result.

2.8.5 *Continuing Impact of the Second Restatement and Babcock v. Jackson*

It is important, at this stage, to consider the further nature of the shift triggered by the Second Restatement and *Babcock v. Jackson.* The specific provisions of both the Second Restatement and *Babcock v. Jackson* have already been considered in detail in the preceding pages, however when taken together, and viewed from a more macro perspective, the wider impact and significance of the positions emerges. Additionally, it is important to remember that, while *Babcock v. Jackson* was not the first decision rejecting the territorial and mechanistic rule-driven approach elaborated in the First Restatement,[362] it has been attributed with sparking the revolution resulting in the

---

[361] Scholes, Hay, Symeonides, Borchers, *Conflict of Laws* (3rd ed. 2000) section 17.29

[362] *Grant v. McAuliffe* (1953) 41 Cal 2d 859, *op. cit.* n 155; *Auten v. Auten* (1954) 208 NY 155, *op. cit.* n 332; *Kilberg v. Northeast Airlines* (1961) 9 NY 2d 34, *op. cit.* nn 166, 333

"reject[ion] [of the] hoary rule of *lex loci delicti.*"[363] To date, forty states have cast off the shackles of the First Restatement in favour of an alternative of some sort, mostly in favour of the Second Restatement. In order of adoption, the wave of revolution swept across the United States as indicated below with those states today specifically implementing the scheme of the Second Restatement totalling twenty-four in number, emphasised, and twenty-nine citing *Babcock v. Jackson* in the course of casting off the First Restatement, starred:[364]

1. New York[365]
2. Oregon*[366]
3. Pennsylvania*[367]
4. ***Iowa****[368]
5. Wisconsin*[369]
6. ***Illinois****[370]
7. New Hampshire*[371]

---

[363] Solimine, The Impact of *Babcock v. Jackson*: An Empirical Note (1993) 56 Albany L.Rev 773, 774

[364] *ibid* at 777, 790; Symeonides, Twenty-Fourth Annual Choice of Law Survey (2011) 58 Am J Comp L 303, 331; Scholes, Hay, Symeonides, Borchers, *Conflict of Laws* (3rd ed. 2000) section 17.26 n 1

[365] *Babcock v. Jackson* (1963) 12 NY 2d 473, *op. cit.* n 324

[366] *Lilienthal v. Kaufman* (1964) 395 P.2d 543 (Or. 1964); *Casey v. Manson Construction* (1967) 428 P.2d 898

[367] *Griffith v. United Air Lines* (1964) 203 A.2d 796

[368] *Fabricius v. Horgen* (1965) 132 N.W.2d 410

[369] *Wilcox v.Wilcox* (1965) 133 N.W.2d 408

[370] *Wartell v. Formusa* (1966) 213 N.E.2d 544; *Allstate Ins. Co. v. Elkins* (1979) 396 N.E.2d 528; *Ingersoll v. Klein* (1970) 262 N.E.2d 593

[371] *Clark v. Clark* (1966) 222 A.2d 205, *op. cit.* n 200

8. ***Florida****[372]
9. ***Washington***[373]
10. ***New Jersey****[374]
11. Kentucky*[375]
12. ***Nevada***[376]
13. California*[377]
14. ***Alaska****[378]
15. ***Mississippi****[379]
16. Rhode Island*[380]
17. ***Arizona****[381]
18. ***Missouri****[382]
19. ***Maine****[383]

---

[372] *Hopkins v. Lockheed Aircraft Corp.* (1967) 201 So.2d 743; *Bishop v. Florida Specialty Paint Co.* (1980) 389 So. 2d 999

[373] *Baffin Land Corp. v. Monticello Motor Inn, Inc.* (1967) 425 P.2d 623; *Werner v. Werner* (1974) 526 P.2d 370

[374] *Mellk v. Sarahson* (1967) 229 A.2d 625

[375] *Wessling v. Paris* (1967) 417 S.W.2d 259

[376] *Tab Constr. Co. v. Eighth Judicial Dist. Ct.* (1967) 432 P.2d 90

[377] *Reich v. Purcell* (1967) 432 P.2d 727, *op. cit.* n 105

[378] *Armstrong v. Armstrong* (1968) 441 P.2d 699; *Ehredt v. DeHavilland Aircraft Co.* (1985) 705 P.2d 446

[379] *Mitchell v. Craft* (1968) 211 So. 2d 509

[380] *Woodward v. Stewart* (1968) 243 A.2d 917

[381] *Schwartz v. Schwartz* (1968) 447 P.2d 254

[382] *Kennedy v. Dixon* (1969) 439 S.W.2d 173

[383] *Beaulieu v. Beaulieu* (1970) 265 A.2d 610

20. ***Ohio****[384]

21. North Dakota*[385]

22. ***Vermont****[386]

23. Minnesota*[387]

24. Louisiana[388]

25. ***Colorado****[389]

26. ***Oklahoma***[390]

27. Massachusetts*[391]

28. ***Nebraska***[392]

29. Arkansas*[393]

30. ***Delaware***[394]

31. ***Texas****[395]

32. Hawaii*[396]

33. Michigan*[397]

---

[384] *Fox v. Morrison Motor Freight Inc.* (1971) 267 N.E.2d 405

[385] *Issendorf v. Olson* (1972) 194 N.W.2d 750

[386] *LeBlanc v. Stuart* (1972) 342 F. Supp. 773

[387] *Milkovich v. Saari* (1973) 203 N.W.2d 408, *op. cit.* n 213

[388] *Jagers v. Royal Indem. Co.* (1973) 276 So. 2d 309

[389] *First National Bank v. Rostek* (1973) 514 P.2d 314

[390] *Brickner v. Gooden* (1974) 525 P.2d 632

[391] *Pevoski v. Pevoski* (1976) 358 N.E.2d 416

[392] *Crossley v. Pacific Employers Ins. Co.* (1977) 251 N.W.2d 383

[393] *Wallis v. Mrs. Smith's Pie Co.* (1977) 550 S.W.2d 453

[394] *Oliver B. Cannon & Son Inc. v. Dorr-Oliver Inc.* (1978) 394 A.2d 1160

[395] *Gutierrez v. Collins* (1979) 583 S.W.2d 312

[396] *Peters v. Peters* (1981) 634 P.2d 586

34. ***Montana***[398]

35. ***Idaho***[399]

36. ***Connecticut****[400]

37. Indiana[401]

38. ***Utah***[402]

39. ***Tennessee****[403]

40. ***South Dakota****[404]

It is clear that the *Babcock v. Jackson* has had a profound impact on the landscape of modern American private international law. It is also submitted that, together with the Second Restatement, the real impact has been to cause a shift from a rigid and mechanistic, rule-driven, regime to a regime best characterized as an "approach." Further, given the diversity of the alternative regimes considered earlier in this section, it is submitted that a further effect of the combination of the Second Restatement and *Babcock v. Jackson* has been to render uncertain what certain.

In considering the more fundamental question of the desirability of one or the other, a rule driven regime or an "approach", the thoughts of the reporter for the Second Restatement, Professor Reese, are particularly relevant. It is submitted that the relevance is not simply in the context of the private international law regimes in the United States of America or the rest of the common law world, to be considered in the

---

[397] *Sexton v. Ryder Truck Rental Inc.* (1982) 320 N.W.2d 843

[398] *In re Estate of Murnion* (1984) 686 P.2d 893

[399] *Johnson v. Pischke* (1985) 700 P.2d 19

[400] *O'Connor v. O'Connor* (1986) 519 A.2d 13

[401] *Hubbard Mfg. Co. v. Greeson* (1987) 515 N.E.2d 1071

[402] *Forsman v. Forsman* (1989) 779 P.2d 218

[403] *Hataway v. McKinley* (1992) 830 S.W.2d 53, *op. cit.* n 309

[404] *Chambers v. Dakotah Charter Inc* (1992) 488 N.W.2d 63

following sections, but also in the context of the European private international law project culminating in the Rome II Regulation[405] governing choice of law for the purposes of non-contractual obligations.

Professor Reese asserted that the fundamental question concerned the ascertainment and weighing of competing state policy:

> The task of defining the policy's scope of application or of providing proper accommodation for conflicting policies bears close analogy to the choice of law problem of determining how best to accommodate multistate and local law policies, including the question of which state has the greatest concern in the decision of the particular decision.[406]

Professor Reese went further in analogising private international law with ordinary, domestic, law for the purposes of illuminating what he perceived to be central to the common law tradition and the doctrine of precedential value of reasoned jurisprudence:

> In at least most areas of the law the constant aim of the courts has been to translate policies into rules as quickly as possible for the reason, among others, that rules are more precise and hence provide greater certainty and predictability than do policies and also are far easier for the courts to apply.[407]

In the context of the private international law, the question asked and answered by Professor Reese was:

---

[405] Regulation EC No. 864/2007 on the law applicable to non-contractual obligations (Rome II)

[406] Reese, Choice of Law: Rules or Approach (1972) 57 Cornell Law Review 315, *op. cit.* n 313 at 318

[407] *ibid* at 319

> Should the aim of the courts not be the same in choice of law? It is the opinion of the writer that this question should be answered in the affirmative and that the development of rules should be as much an objective in choice of law as it is on other areas.[408]

It is also the submission of the writer of this thesis that the aim of the courts should be the same in choice of law. The need for a definitive and precise body of rule becomes particularly acute in the context of a multi-jurisdictional arrangement such as the United States of America and the European Union. It is submitted that the needs of certainty, predictability of outcome, the proper maintenance of an international system, predictable justice, party expectation and inherent fairness demand more than a fragmented and ambiguous regime comprised of an incoherent and virtually incomprehensible myriad of approaches, variations on approaches and embracing, rigid, rules.

Commenting on the nature of the previously existent rule as elaborated in the First Restatement, as considered earlier, Professor Reese asserted:

> The current unpopularity of rules in choice of law is believed to be primarily an overreaction to the failure of previous attempts at rule making in tort and contract. These rules were few in number and all embracing in character. Essentially there was but one rule in tort, namely, that a person's rights and liabilities should be determined by the law of the state where defendant's allegedly tortious act first caused injury to plaintiff.[409]

Further asserting that the rejection of the regime of the First Restatement might not be fatal to the cause of a rule-driven regime in some form in the United States:

> This is not meant to suggest that all-embracing choice of law rules can never be successful...there may also be instances where application of a simple, all

---

[408] *ibid*

[409] *ibid*

> embracing rule of choice of law is supported by an overriding need for uniformity of result.[410]

But that:

> Bad rules may well be worse than no rules at all.[411]

It is submitted that, perhaps, this thought, although unenunciated throughout the course of the judicial rejection of the First Restatement, might have manifested itself in the minds of the forty courts to reject the First Restatement. It is conceded that this submission is highly speculative and without real basis.

Professor Reese accurately highlights the inherent problem with the regime in the First Restatement – that the nature and scope of the rules therein was so broadly phased and all-embracing in nature that there was no scope for flexibility nor refinement of the rule or its application:

> Rules are bad if they do not properly give effect to the policies involved, or if they are phrased so broadly as to be applicable to situations involving policies different from those the rules were designed to implement. The choice of law rules for tort and contract were bad primarily for the first reason.[412]

In the context of the First Restatement Professor Reese observed that:

> To be sure, application of the law of the place of the last event is easy for the court and provides predictability and uniformity of result. But these advantages are bought at the sacrifice of other policies, a price the courts have

---

[410] *ibid* at 320

[411] *ibid*

[412] *ibid*

been unwilling to pay.[413]

In response to the bleak outlook for the proponents of a rule-driven approach, such as Professor Reese himself, and the European project in codification and harmonization across the twenty-seven members that was to follow a generation later, Professor Reese observed astutely and encouraged strongly that:

> ...the risk of failure should not deter an attempt at rule making in choice of law – just as it does not do so in other areas of the common law – whenever there is a good basis for the belief that a proposed rule would lead to good results under most circumstances. And a rule which has proved its worth in practice should not be refused application in a case that falls within its proper scope merely because it would lead in that case to a result that might be thought unfortunate...perfection is not for this world. The advantages which good rules bring are worth the price of an occasional doubtful result.[414]

It is submitted that there is significant truth in Professor Reese's observation and assertion when viewed from the perspective of a proponent of rule-driven regimes. The contrary position, and that of the common law in practice, is that justice and fairness must also be done in the individual instance as much as systemically. In the context of the European private international law project, to be considered later in this thesis, this particular issue is of critical importance given the unique position of the United Kingdom and Ireland as the sole common law states in a Union primarily civil law in nature.

In charting a way forward for proponents of rule based regimes, Professor Reese almost prophetically asserted the shape a successful regime might take. Again, from a European perspective the assertion is particularly relevant:

> To be successful, such rules must satisfactorily implement the multistate and

---

[413] *ibid* at 321

[414] *ibid* at 322

> local law policies involved. It is unlikely that rules of wide application can attain this objective in torts and contracts and in many other areas of choice of law...more hope for success should be afforded by a relatively large number of narrow rules, each of which would be concerned with a particular issue or a group of closely related contacts.[415]

Professor Leflar, likewise, acknowledged difficulties with the First Restatement and the approaches offered under the Second Restatement and *Babcock v. Jackson:*

> No court can in a single case follow all the theories that are currently proposed, but it can agree with their general effect, which is that there are better ways of deciding choice of law issues than under the old mechanical rules prescribed by Professor Beale and the first conflicts Restatement.[416]

Although Professor Leflar subsequently asserted that for the most challenging choice of law matters there might be a better, more radical, solution:

> A different and better answer to some of the most difficult of all conflicts cases lies completely outside of conflicts law...It is federal substantive law, not conflicts law that is needed.[417]

Further that:

> New federal common law to govern a number of other essentially national matters, eliminating state choice of law litigation accordingly is both desirable and inevitable. That, however, is not part of conflicts law, but rather an escape

---

[415] *ibid*

[416] Leflar, Choice of Law: A Well-Watered Plateau (1977) 41 Law & Contemp. Prob. 10, *op. cit.* n 356 at 26

[417] *ibid* at 24 - 25

from conflicts law.[418]

At this stage it must be asserted that in the context of contemporary private international law thinking, the alternatives offered by Professor Reese and Professor Leflar locate themselves at opposite ends of the spectrum of potential approaches. However in the context of the decision in *Babcock v. Jackson* it has equally been observed that both might be credible possibilities:

> Indeed the majority opinion contains items of comfort for almost every critic of the traditional system.[419]

2.8.6 *New York and Neumeier v. Keuhner*[420]

At this stage it might seem odd to return to New York but the case of *Neumeier v. Kuehner* is significant as it purports to bring some clarity to the ambiguity of the position following *Babcock v. Jackson* and the Second Restatement in that state. There is little need to recount the precise facts of the action as they virtually mirror those of *Babcock v. Jackson* with the exception that the guest passenger in that instance was a native of Ontario traveling in a New York automobile rather than a New Yorker traveling as the guest.

Again, Chief Judge Fuld was to the fore in pronouncing the decision of the court. In this instance, however, the decision is significant in that it recognized particular maladies typically evidence in "approach" based regimes and that it proposed reform:

> When, in *Babcock v. Jackson,* we rejected the mechanical place of injury rule in personal injury cases because it failed to take account of underlying policy considerations, we were willing to sacrifice the certainty provided by the old

---

[418] *ibid* at 25 - 26

[419] Currie, Comments on *Babcock v. Jackson* (1963) 63 Colum L.Rev 1212, 1234

[420] *Neumeier v. Kuehner* (1972) 31 NY 2d 121

> rule for the more just, fair, and practical result that may best be achieved by giving controlling effect to the law of the jurisdiction which has the greatest concern with, or interest in, the specific issue raised in the litigation.[421]

Further that:

> In consequence of the change effected – and this was to be anticipated – our decisions in multi-state highway accident cases, particularly in those involving guest-host controversies, have, it must be acknowledged, lacked consistency.[422]

Judge Fuld then turned his attention to rules and their place in New York's "center of gravity" approach:

> The single all-encompassing rule which called, inexorably, for selection of the law of the place of injury was discarded, and wisely, because it was too broad to prove satisfactory in application. There is, however, no reason which choice of law rules, more narrow than those previously devised, should not be successfully developed, in order to assure a greater degree of predictability and uniformity, on the basis of our present knowledge and experience.[423]

It is submitted that Judge Fuld's assertion bears striking similarity to Professor Reese's similar assertion above, although Judge Fuld was keen to frame any rules against the backdrop of *Babcock v. Jackson:*

> *Babcock* and its progeny enable us to formulate a set of basic principles that may be profitably utilized, for they have helped us uncover the underlying

---

[421] *ibid* at 127

[422] *ibid*

[423] *ibid*

values and policies which are operative in this area of the law.[424]

Judge Fuld drew from his earlier decision in *Tooker v. Lopez*[425] in elaborating three narrowly framed rules:

1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.

2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not — in the absence of special circumstances — be permitted to interpose the law of his state as a defense.

3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.

In the facts at hand Rule 3 applied to the action and the court could not find a "substantive purpose" to displace the *lex loci delicti* under the provisions of the Rule:

---

[424] *ibid*

[425] *Tooker v. Lopez* (1969) 24 NY 2d 569, *op. cit.* n 277

> Certainly, ignoring Ontario's policy requiring proof of gross negligence in a case which involves an Ontario-domiciled guest at the expense of a New Yorker does not further the substantive law purposes of New York. In point of fact, application of New York law would result in the exposure of this State's domiciliaries to a greater liability than that imposed upon resident users of Ontario's highways. Conversely, the failure to apply Ontario's law would "impair" — to cull from the rule set out above — "the smooth working of the multi-state system [and] produce great uncertainty for litigants" by sanctioning forum shopping and thereby allowing a party to select a forum which could give him a larger recovery than the court of his own domicile. In short, the plaintiff has failed to show that this State's connection with the controversy was sufficient to justify displacing the rule of *lex loci delictus.*[426]

What is significant about the decision in *Neumeier v. Kuehner* is that precise, complex and rational rules were drawn up and implemented. A further observation is that the *lex loci delicti* gained new significance as a result of the operation of Rule 3.

Before leaving New York it is important to mention one final authority in connection with *Neumeier v. Kuehner* and *Babcock v. Jackson. Schultz v. Boy Scouts of America Inc.*[427] is significant in that it extended the applicability of the rules elaborated by Judge Fuld in *Neumeier v. Kuehner* beyond the realm of guest statue cases and into other types of loss-distributing actions.

2.8.7 *Sample Scenarios Considered*

Scenario A – Traffic Accident

Following the consideration of the schemes of the connected regimes of the Second Restatement and *Babcock v.* Jackson, it is important to highlight that the forum court is no longer the most important consideration in determining the manner in which the

---

[426] *Neumeier v. Kuehner op. cit.* n 424 at 129

[427] *Schultz v. Boy Scouts of America Inc.* (1985) 65 NY 2d 189

regimes operate and the eventual choice of law. It has been submitted, above, that the two regimes operate as variations of a common theme, the identification of the place most closely connected with the fact pattern at hand.

In the instant fact pattern, it is implicit that the likely forum would be State A or State B. State A was Bob's domicile and State B was where the effects of the accident were initially experienced and where Bob works. It has been submitted Restatement-type regimes operate to determine the most appropriate law given all the circumstances and connecting factors in a fact patter. As such, there are a number of jurisdiction options for a forum court to consider, should it employ a Restatement-type regime, in selecting the appropriately applicable law. In the instant facts, State A is the likely forum and also the domicile and residence of the victim, Bob. State B is the place in which the physical effects of the accident manifested themselves. State C is the *locus delicti*. State D is the place of vehicle registration and State E is place of citizenship of the driven vehicle. In addition to the geographical contacts mentioned it is important to consider the relative interests of the competing states, the comparative impairment to the respective states, the underlying policy objectives in the competing states, the reasonable party expectation, amongst the guiding principles identified above.

As submitted above it is not clear, from the schemes of the Restatement-type regimes, the manner in which the connecting factors and prevailing interests are to be weighted and distinguished. It must be noted that, in the context of personal injury actions, Section 146 of the Restatement is significant. It provides that the law of the place where the injury occurs is to apply unless there is a more closely connected state. In the instant case, it must be observed that this reference to the *lex loci delicti* would lead to the application of a law which only has a connection to the action by virtue of the parties' temporary presence in State C. It is submitted that there is a more closely connected state to the action capable of displacing the application of the *lex loci delicti* under Section 146 of the Restatement.

Further, it is, again, submitted that where there was once certainty there now exists ambiguity and uncertainty in choice of law theory. Without further, real information it is difficult to indicate what might be the applicable law other than to discount the potential application of the law of States C and E.

Scenario B – Publication of Defamatory Material

Without repeating the observations made in the context of Scenario A, above, it is clear that the range of potentially applicable jurisdictions is available to a forum court employing a Restatement-type regime. However, in the context of aggregate defamation actions, Section 150 the Restatement provides that:

> 1) The rights and liabilities that arise from defamatory matter in any one edition of a book or newspaper, or any one broadcast over radio or television, exhibition of a motion picture, or similar aggregate communication are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> 2) When a natural person claims that he has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the person was domiciled at the time, if the matter complained of was published in that state.

As such, it is submitted that with respect to the newspaper publication, Frank's domicile cannot be designated the applicable law on that basis but it may yet apply if it can be designated the law most closely connected. However, it is submitted that the guiding factors in the Restatement, considered above, do little to bring clarity to the asserted ambiguity as each guiding factor leads to the application of one or other of the laws of States X and Y.

Scenario C – Products Liability

In the context of the instant fact pattern, it is submitted that there is a clearly connected jurisdiction to the action for the purposes of determining the applicable law, State 1. In addition, Section 146, considered above, serves to indicate the application of the law of State 1, the *lex loci delicti*, to the action. As such, it is submitted that in the instant fact patter there is no uncertainty. Were a forum court to

employ a Restatement-type regime, it is submitted that it would be the law of State 1 that would apply.

2.9 CONCLUSION

With the rejection of the First Restatement, and the elaboration of alternatives to it, it appears as though the impetus for reform and the advancement of private international law in the United States has been largely lost, save limited measures in New York as mentioned above. As a proving ground for testing a multitude of choice of law theories and methodologies it has proven invaluable, but it is submitted that the European private international law project has since superseded that in the United States and adopted, at its core, ideologies bearing striking similarity to those elaborated by Professor Reese, above, [428] advocating a renewed attempt at implementing a rule-driven regime.

Professor Symeonides commented on the broader experience in the United States of America:

> If the American experience has something to offer, it is a reminder that a system that is too rigid – as the traditional American system was – ultimately fails to deliver the promised predictability because in a democratic society no system can "mechanize judgment" and, to the extent it attempts to do so judges will ignore it.[429]

Indeed, in the context of modern choice of law thinking in the United States of America it is evident that neither a wholesale return to a rule driven regime in the manner advocated by Professor Reese, nor a shift towards the harmonization of substantive law at the interstate level in the manner advocated by Professor Leflar has occurred. Rather, the *status quo* has remained in the United States of America

---

[428] *op. cit.* nn 404 - 413

[429] Symeonides, Rome II and Tort Conflicts: A Missed Opportunity (2008) 56 Am J Comp L 173, 180

following the rejection of the regime elaborated by Professor Beale in the First Restatement.

As a modern private international law regime, the United States' position exists as an unacceptably fragmented and ambiguous regime comprised of an incoherent and virtually incomprehensible myriad of approaches, variations on approaches and embracing, rigid, rules. It is submitted that the time is, fundamentally, right for a return to the drawing board in the United States of America in order to bring unity and clarity to the present prevailing trend of chaos.

OTHER COMMON LAW JURISDICTIONS

Despite the primary focus of this thesis being the choice of law regimes in the United States of America and Europe it is, nevertheless important to place those considerations in the context of the wider common law experience of choice of law questions for torts. To that end this chapter will consider four distinct regimes: The United Kingdom, Canada, Australia and Ireland. It is not proposed to engage in an extensive consideration of these regimes in the same manner as the regimes in the United State of America, considered above, or across Europe, considered in the next chapter. It is, however, proposed to outline the dominant approaches in the additional common law jurisdictions with a view to identifying and considering their salient and distinctive features.

Much like the consideration of the choice of law regime in the United States of America, this chapter aims identify whether there has emerged any prevailing trends amongst the jurisdictions being considered: The United Kingdom; Australia; Canada; Ireland. It is important that the preceding examination of the, unacceptably, fragmented regime in the United States is borne in mind as context for the present chapter.

3.1 THE UNITED KINGDOM

In the United Kingdom the Private International Law (Miscellaneous Provision) Act 1995 put choice of law questions on a statutory footing save instances of defamation and where the tort took place before May 1996. This section will consider both positions with the common law principles being of particular importance as they serve as the fundamental basis of the statutory regime given the close similarities between the legislation and the immediately preceding common law position. Additionally, from a wider, international, standpoint it is important to consider the development of the common law principles in England as they were of great influence to many common law jurisdictions in formulating their approaches. Given the consideration of

choice of law in the United States of America, in the preceding chapter this is of particular relevance in contrast.

3.1.1 *Substantive Matters*

The first significant decision on the conflicts of law at common law was the decision in *The Halley*[1] setting out the general position that where there is an international element to the tort, unless that same act would give rise to an actionable tort in England, then the facts could not be used to sue in English law. Briefly, the main facts of that case were that action was brought against a ship owner for damage caused by a collision due to the negligent navigation of a pilot he was compelled to employ by Belgian law. An application of the *lex loci delicti* would have resulted in liability whereas in England there was no principle of vicarious liability on the employer for the act of the employee. As such, the court refused to hear the matter as the claimed tort was unknown to it.

Phillips v. Eyre[2] saw a scenario where the Governor of Jamaica by arresting the plaintiff committed a battery and false imprisonment. That act was originally actionable against the Governor in the Jamaican court until their legislature passed legislation retrospectively legitimising the Governor's action. The court made a significant modification to the position in *The Halley* by holding that the act must be actionable in England had the act taken place there, and that the act must not be justifiable in the country of commission.

As a result of the combination of *The Halley* and *Phillips v. Eyre* a general rule gained traction with the effect that 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.

---

[1] *The Halley* (1868) LR 2 PC 193

[2] *Phillips v. Eyre* (1870) LR 6 QB 1

Secondly, the act must not have been justifiable by the law of the place where it was done.[3]

The practical effect of the double-actionability rule was summarised by the Lord Chancellor in 1995 in advance of the adoption of the 1995 Act:

> The law is to the advantage of the defendant because, as a general rule, the plaintiff cannot succeed in any claim unless both the law of the forum and the law of the place where the wrong occurred make provision for it, whereas the defendant can escape liability by taking advantage of any defence available under either law. This appears unfair to plaintiffs because it ensures that they cannot generally succeed to a greater extent than is provided by the less generous of the two systems of law concerned.[4]

Subsequently, in the decision of *Machado v. Fontes,*[5] the court relaxed the rule to a certain extent by holding that it was sufficient if the act was wrongful in the country where it was committed, even though any damage would not have been actionable in civil proceedings there.

In *Chaplin v. Boys*[6] the House of Lords overruled *Machado v. Fontes* and declared that, in general, the damage or head of damage had indeed to be actionable under the *lex loci delicti* as well as under English law for action to proceed in England. That hurdle, once passed, provided for the application of the *lex fori* in place of an otherwise applicable foreign law. In the wake of that decision it was asserted that there might exist a risk that, otherwise just, claims might be excluded. In contemplation of this Lord Wilberforce set out an exception to the strict application of the double-actionability rule having the effect of admitting cases in instances where

---

[3] *ibid* at 28-29 *per* Willes J

[4] HL Paper 36, March 1995, at 3

[5] *Machado v. Fontes* [1897] 2 QB 231

[6] *Chaplin v. Boys* [1971] AC 356

recovery was not ordinarily possible under the *lex loci delicti*. As such, Lord Wilberforce identified the purpose of the exception in the following terms:

> ...it is necessary to identify the policy of the rule, to inquire to what situations, with what contacts, it was intended to apply; whether not to apply it, in the circumstances of the instant case, would serve any interest which the rule was devised to meet.[7]

However, Lord Wilberforce reiterated the exceptional nature of the new position:

> the general rule must apply unless clear and satisfying grounds are shown why it should be departed from.[8]

In *Red Sea Insurance Co Ltd v Bouygues SA,*[9] marked an acceptance and affirmation of the exception carved out by the House of Lords in *Boys v. Chaplin.* The Privy Council held that, where justice required in particular circumstances, an action could proceed in the courts of the forum on the basis of the *lex loci delicti*, even though the damage or head of damage would not be actionable under the *lex fori*, the reverse position of that observed in *Boys v. Chaplin.* On the face of it, the adoption of the reverse position in *Red Sea Insurance* would seem appropriate in the interests of justice and prudence and consistency of approach.

On closer consideration it is submitted that the newly modified approach adopted, by the Privy Council, serves to elegantly achieve forum pre-eminence on an entirely discretionary basis. Recalling the consideration of the "proper law of tort" approach advocated by Professor Leflar in the United States of America, and favoured in *Clark v. Clark*[10] in that jurisdiction, it is submitted that the effective result of the operation

---

[7] *ibid* at 392

[8] *ibid* at 391

[9] *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190

[10] *Clark v. Clark* (1966) 106 NH 351

of the decisions in *Boys v. Chaplin* and *Red Sea Insurance* is to effectively provide for the seamless, automatic, application of the *lex fori* in the eyes of the English Court.

3.1.2 *Procedural Matters*

Recalling the consideration of the choice of law regimes in the United States of America it is important to recall that there exists a traditional distinction at common law between substantive and procedural matters. Setting out the distinction, Lord Hodson, in *Chaplin v. Boys,* asserted that:

> the law relating to damages is partly procedural and partly substantive, the actual quantification under the relevant heads being procedural only.[11]

The importance of the distinction between substantive matters and procedural matters is that substantive matters are, at common law, determined in accordance with the "double-actionability" rule whereas procedural matters being determined by the *lex fori.* Lord Wilberforce asserted that:

> But I suspect that in the ultimate and difficult choice which has to be made between regarding damages for pain and suffering as a separate cause of action and so governed by the lex delicti, or treating them as merely part of general damages to calculate which is the prerogative of the lex fori, two alternatives which are surely closely balanced in this case, a not insubstantial makeweight, perhaps unconscious in its use, is to be found in a policy preference for the adopted solution.[12]

Lord McDonald approved this thinking in *Mitchell v. McCulloch,*[13] highlighting the argument that "procedural matters, including the measure of damages, are determined

---

[11] *op. cit.* n 6 at 379D

[12] *ibid* at 392F-393C

[13] *Mitchell v. McCulloch* 1973 SC 1, 7

solely by the *lex fori*." The Australian High Court in *Stevens v. Head*[14] summarized the current thinking:

> The law relating to damages is partly procedural and partly substantive. According to the traditional application of the substance-procedure distinction, the question whether legislative provisions dealing with awards of damages are substantive or procedural has been approached by asking whether the provisions affect the character of the wrong actionable or go only to the measure of compensation. This approach is consistent with the equation traditionally drawn between matters of procedure and matters relating to remedies.[15]

Approved by the Australian Court of Appeal in *Roerig v. Valiant Trawlers Ltd.*[16] The Scottish Law Commission (*Private International Law: Choice of Law in Tort and Delict)*[17] acknowledged the standing common law position of the quantum of damages being assessed under the *lex fori* as a matter of procedure, recommended the position remain as such. Though in a significant about-turn the Australian High Court, in *John Pfeiffer Pty Ltd v. Rogerson,*[18] knowingly altered the common law position applicable there, to the effect that questions of the assessment of damages were to be answered by the governing law and not the *lex fori*.

3.1.3 *Statutory Reform*

With a growing dissatisfaction with the primacy of the double-actionability rule in *Phillips v. Eyre* and the inherent bias towards the application of the *lex fori* the Law

---

[14] *Stevens v. Head* (1993) 176 CLR 433

[15] *ibid* at 447 per Mason CJ

[16] *Roerig v. Valiant Trawlers Ltd.* [2002] 1 WLR 2304

[17] Law Com No 193, Scot Law Com No 129

[18] *John Pfeiffer v. Rogerson* (2000) 172 ALR 625

Commission reviewed the common law position during the 1980's.[19] This process eventually led to the enactment of the Private International Law (Miscellaneous Provisions) Act 1995 so placing a significant portion of private international law in the United Kingdom on a statutory footing. The act, section 11 in particular, sets out the new general position that the *lex loci delicti* alone should govern the matter, specifically the country in which the events(or most significant events) occurred. There is also an exception to the general rule along the lines of the "proper law of tort" exception in the existing common law position. Section 12 allows for the *lex loci delicti* to be supplanted by the law of another country if it would be substantially more appropriate to apply the law of that country.

Section 9(1) of the act sets out that the measures it contains are to be applied in "matters relating to tort," with section 9(2) asserting that it is the *lex fori* that determines the scope of this. Clearly it relates to matters that were traditionally tortious for the purposes of the old English common law position, together with those matters that are "tort-like," not having a traditional basis and are neither contractual nor based on unjust enrichment.

3.1.4 *English Torts*

Section 9(6) provides that the act wholly applies to acts committed in England. The act is somewhat convoluted in the position regarding domestic torts. The above provision is subject to the section 14 qualification that nothing in the act affects any rule of law not abolished by section 10 of the act. Section 10 of the act abolishes the double-actionability rule and the common law exception to the rule as discussed above. The courts have, however, asserted that the statutory scheme applies to torts committed in England as well as those committed in other jurisdictions.[20]

Sections 9(3) and 13 make provision for the exclusion of defamation issues from the ambit of the legislation. The effect of this is to preserve the relative impunity with

---

[19] Law Com No 193, *Choice of Law in Tort and Delict* (1990)

[20] *Roerig v. Valiant Trawlers Ltd* [2002] 1 All ER 961

which the press operate in England as under the double-actionability where there is no remedy in the other jurisdiction, or where there is a good defence in England the claim is likely to fail. Section 9(5) specifically rules out the use of the doctrine *Renvoi* in relation to any claim. *Renvoi*, considered in extensive detail in the context of the Australian revival of it, is essentially concerned with the applicability of the internal choice of law rules of an otherwise applicable foreign law.

3.1.5 *The General Rule*

The general rule[21] differentiates between torts occurring in a single state and torts occurring in multiple states, although the effect of the act is that most torts are governed by the *lex loci delicti.* From section 11(2) we see that the act advocates different approaches based on the type of tort involved. Where the action is for a personal injury or a death the applicable law is that of the country where the injury was sustained.[22] Where property has been damaged then the law of the country where the property was located when damaged, applies.[23] It is the third part of the section, outlining the place of most significant elements of the events, that has the potential to create a divergence with the stated general position. It is wholly plausible that a situation could arise in which the most significant elements of the tort point to a state in which the tort was not committed. Considerations of this nature are not new to the courts and it is likely that they will consider the older common law cases[24] when considering section 11(2)(c).

3.1.6 *Exceptions*

---

[21] S 11

[22] S 11(2)(a)

[23] S 11(2)(b)

[24] *Metall und Rohstoff AG v. Donaldson Lufkin & Fenrette Inc* [1990] 1 QB 391; *Armagas Ltd v. Mundogas SA* [1986] AC 717

In an effort retain some consistency with the preceding common law position, parliament enacted an exception to the general rule. Section 12, in essence, provides that the general rule may be displaced in favour of some other law where the significance of the connecting factors to the tort point to the application of another law. The potential consequences of the section are quite far reaching, not least for the fact that it provides for the severance of issues within a particular action and each of those issues may be determined independently. The result is that there is the potential for each of the issues resulting in a difference choice of law. For the most part the choice of law is to be the *lex fori* or the *lex loci delicti*, although there is clearly the distinct possibility that there may be a third or fourth choice open to the court depending on the domiciles of the parties to the action.

When considering the connecting factors to the tort in a situation where one of the parties is resident in the state where the tort was committed it is safe to regard that state as having the predominant connection to the tort. As a general rule, only where neither party is resident in the *loci delcti* will that law be displaced in favour of another. *Edmunds v. Simmonds*[25] saw such a situation, where both parties to the action were English and the act took place in Spain. The court held that the involvement of the Spanish lorry was irrelevant as both parties were English. As such, the court applied the section 12 exception to the general rule and applied the *lex fori*. It is important to remember that the section does not provide for the displacement of the *lex loci delcti* simply on the basis of a closer connection, it must be "substantially more appropriate" to displace the *lex loci delicti*.

The act mirrors the common law position, yet again, in providing that matters of "evidence, pleading or practice…or questions of procedure" are to be determined in accordance with the *lex fori*.[26] The act has not specified the distinctions between matters of substance and matters of procedure, as such they must be determined in accordance with the common law principles discussed above. The Australian High

---

[25] *Edmunds v. Simmonds* [2001] 1 WLR 1003

[26] S 14(3)(b)

Court held, in *John Pfeiffer Pty Ltd v. Rogerson*[27] that matters limiting the quantum of damages were to be treated as substantive in nature and so be determined in accordance with the governing law, rather than as purely procedural in nature as it had previously held.[28] Contrast this with actual damage assessment being treated as a procedural matter and as such governed by the law of the forum.[29] The House of Lords considered this issue in *Harding v. Wealands.*[30] Lord Hoffman considered Arden LJ's reasoning, in the Court of Appeal, that the approach in *Pfeiffer* brought with it more logic and was a correct statement of the law in England. He asserted that "the question is not what the law should be but what Parliament though it was in 1995."[31] He indicates his preference for that approach, although concedes that this would be clearly against the intentions of what Parliament intended in the 1995 Act. Lord Hoffman made the assertion that:

> "there can however be no doubt about the general rule, ... , issues relating to the quantum or measure of damages are governed by the *lex fori*"[32]

Lord Rodger concurred with this assessment[33] although, clearly, the learned Lords based this on an assessment of Parliamentary debate as to the intended construction of "procedure" in the context of the act. They determined that Parliament intended "procedure" to bear a special meaning beyond the strict interpretation that Arden LJ imparted to it in the Court of Appeal.

---

[27] *John Pfeiffer Pty Ltd v. Rogerson* (2000) 172 ALR 625

[28] *Stevens v. Head* (1993) 176 CLR 433

[29] *Pepper v. Hart* [1993] AC 593, affirmed by *Harding v. Wealands* [2006] UKHL 32, [2005] 1 All ER 415

[30] *Harding v. Wealands ibid*

[31] *ibid* at para 51

[32] *ibid*

[33] *ibid* at para 67

3.1.7 *Public Policy Exception*

Section 14(3)(a)(ii), in somewhat convoluted language, sets out the public policy exception to the application of the general rule. Despite the presence of the prohibitions in the subsection it would be wholly inappropriate for the judiciary to exercise the exception based simply on the existence of such provisions externally. It would be far more appropriate confine the application of the exceptions to instances where the foreign law is wholly repugnant to the principles of English law. Allowing greater flexibility in its application would allow a *de facto* assertion of the *lex fori*, clearly contrary to the intentions of the legislature.

3.1.8 *Sample Scenarios Considered*

Scenario A – Traffic Accident

Assuming that State A is the forum in the instant facts, it is significant to note that the applicable, English, provision is the Private International Law (Miscellaneous Provisions) Act as opposed to the traditional common law position. As such, the Act requires the application of the *lex loci delicti*, the law of State C, unless the connecting factors indicate that it would be substantially more appropriate to apply the law of some other state. Given the above, it is submitted that given the tenuous link to the *locus delicti*, that there might be adequate justification to displace the *lex loci delicti* rule in favour of the *lex fori*, traditional, rule.

Scenario B – Publication of Defamatory Material

In the context of Defamation, the statutory position in the United Kingdom is inapplicable. Section 13 of the 1995 Act provides for a specific exception preserving the applicability of the double-actionability threshold test for the application if the *lex fori* to the action. As such, provided that the publication of the incriminating photographs cannot be justified in the states of publication and the forum, the *lex fori* will be the applicable law.

Scenario C – Products Liability

In the context of the instant fact pattern, it is submitted that the provisions of the 1995 Act, considered above, are directly applicable. As such, the applicable law is the *lex loci delicti*, the law of State 1. Further, it is submitted that it is not substantially more appropriate to apply the law of State 2. As such, the law of State 1 would not be displaced.

3.2 AUSTRALIA – A MARKED DEPARTURE

Up until 2000 the Australian approach was consistent with the traditional common law approach as outlined in *Phillips v. Eyre* and *Boys v. Chaplin* above. The High Court knowingly, and purposefully, embarked on a fundamental shift in thinking in *John Pfeiffer Pty Ltd. v. Rogerson*[34] and *Regie National des Usines Renault SA v. Zhang.*[35] These decisions were subsequently approved and applied by the High Court and State Supreme Courts in *Neilson v. Overseas Projects Corporation of Victoria Ltd*[36] and *Amaca PTY Ltd. v. Bernard George Frost*[37].

3.2.1 *John Pfeiffer Pty Ltd. v. Rogerson*

John Pfeiffer concerned an intra-national, inter-state, action in which there was a distinct difference in the level of damages available between the two concerned jurisdictions. The court was concerned with issues of the appropriate governing law relating to the substantive matter and the assessment of damages, an issue that had perviously been deemed a procedural matter for assessment by the *lex fori.*

Using the federal nature of Australia as a central strand in its argument, the High Court made the assertion that it would be "odd or unusual" for "the existence, extent and enforceability of the rights and obligations of the parties [to be] affected significantly by where the court [exercising federal jurisdiction] sits."[38] In its deliberations, the court examined s118 of the Australian Constitution where it is stated that:

---

[34] *John Pfeiffer Pty Ltd v. Rogerson* [2000] HCA 36, (2000) 172 ALR 625, (2000) 203 CLR 503

[35] *Regie National des Usines Renault SA v. Zhang* [2002] HCA 10

[36] *Neilson v. Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54, (2005) 221 ALR 213

[37] *Amaca PTY Ltd. v. Bernard George Frost* [2006] NSWCA 173

[38] *John Pfeiffer Pty Ltd v. Rogerson op. cit.* n 34 at 642

> "Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State."

This section was interpreted, in *Breavington v. Godleman,*[39] as giving the federal court the ability to displace the law of the forum to ensure "that one set of facts did not give rise to one legal consequence by operation of one State law and another legal consequence by operation of another State law."[40] Despite the uncertainty over the extent of the effect of the constitutional provision the court decided not to examine it.

Instead, the court looked towards five considerations that it, cumulatively, felt favoured the adoption of a single choice of law rule for all Australian courts, federal and non-federal:

a) the existence and scope of federal jurisdiction;
b) the position of the High Court as ultimate court of appeal;
c) the impact of ss 117 and 118 of the Constitution in regard to a public policy exception to choice of law in tort;
d) the predominant territorial concern of State and Territory statutes;
e) the nature of the federal compact.

In the end, however, the court stops short of finding a constitutional mandate for the modification of the common law, as such a finding would inevitably limit future legislative modification of the position on the choice of law.

Ultimately, the court arrived at the conclusion that the *lex loci delicti* was to be applied in all courts, federal and non-federal, in respect of intra-national tort matters. In arriving at this conclusion the court justified its decision on a number of main grounds, considered below.

---

[39] *Breavington v. Godleman* (1988) 169 CLR 41, 97–9

[40] *ibid* at 98

3.2.2 *Reasonable Expectation*

The court believed that the assertion of the *lex loci delicti* gave effect to the reasonable expectation of the parties to the act, that liability for any damage or injury would arise due to the law of the state in which it was committed, and not of any other state. This is a manifestation of the expectation that the laws of the place where people are exposed to risk should also protect them.

3.2.3 *Legal Certainty*

The majority proposed that the new rule was mandated by the requirements of certainty and predictability.[41] Great reference is made to the rather confused experience in the United States, particularly the extent of the variations in approaches and the "very great uncertainty"[42] evident from the consideration of that jurisdiction earlier in this thesis. Is certainty achieved by imposing a mandatory choice of *lex loci delicti*? This may be answered both in the affirmative and in the negative. Where the governing law is that of the place of the commission of the tort it must still be decided where was the place of the commission of the tort. It must be considered "where in substance did this cause of action arise."[43] In this respect, a blanket rule of the *lex loci delicti* does not yield a wholly certain result and is flexible to some degree.

The second significant development in *John Pfeiffer* is that the court re-classified the assessment of damages as matters of substance to be governed by the applicable law, rather than the traditional approach that they be deemed matters of procedure and so governed by the *lex fori*:

> "*all* questions about the kinds of damage, or amount of damages that may be recovered, would ... be treated as substantive issues governed by the *lex loci*

---

[41] *John Pfeiffer Pty Ltd v. Rogerson op. cit.* n 34 at 647

[42] *ibid* at 646

[43] *Distillers Co. (Biochemicals) Ltd. v. Thompson* [1971] AC 458, 468

delicti"[44]

Because of the shift towards a blanket *lex loci delicti,* procedural rules were held to be relegated to "rules which are directed to governing or regulating the mode or conduct of court proceedings." By contrast, substantive rules were deemed to be concerned with "matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action." With this approach, Australian law on the drawing of the line between the substantive and the procedural has effectively shifted from a terminological orientation to a functional, consequentialist, one.

The High Court proceeded to hold, that limitation laws and laws imposing restrictions on damages are now to be regarded as substantive laws. The former will always affect whether a plaintiff recovers and, therefore, are directed to and have an effect upon the enforceability of rights and obligations. The latter, by affecting how much a plaintiff recovers, alter the rights of the plaintiff and the obligations of the defendant.[45] The net result of the court's decision is that, what was once a somewhat convoluted distinction is now clear, distinct and certain.

3.2.4 *Regie National des Usines Renault SA v Zhang*

Following from the above decision the Australian High Court had the opportunity reconsider its approach to choice of law in respect of wholly international cases. The facts of the case were such that Zhang travelled to New Caledonia in order to comply with an Australian government requirement that applications for permanent residency be lodged from outside Australia. While there, Zhang sustained injuries while driving a vehicle manufactured by the appellant.

The court, by a majority, held that the, long-standing, double-actionability test outlined in *Phillips v. Eyre* had no place whatsoever in Australian law. In doing so the court held that New South Wales indeed had jurisdiction to hear the matter while

---

[44] *John Pfeiffer Pty Ltd v. Rogerson op. cit.* n 34 at para 100

[45] *ibid* at para 131 - 134

applying French law. The decision of the court, in again applying a blanket *lex loci delicti* approach to the choice of law, brought Australian law on international torts in line with the decision in *John Pfeiffer* relating to intra-national torts. Kirby J, quite eloquently, was of the opinion that the double-actionability rule:

> ... now appears as a breath from a "bygone age." It is left over from an earlier phase of private international law, that never gained acceptance beyond the United Kingdom and its dominions and colonies. It is a rule inappropriate to a time of global and regional dealings, technological advances that increase international conflictual situations and attitudinal changes that reject, or at least reduce, xenophobic opinions about the worth and applicability of the law of other jurisdictions.[46]

The court also considered the justifications for such a determination, in particular it gave consideration to the desire for certainty in decision, concurring with the reasoning in *John Pfeiffer*:

> The selection of the *lex loci delicti* as the source of substantive law meets one of the objectives of any choice of law rule, the promotion of certainty in the law. Uncertainty as to the choice of the *lex causae* engenders doubt as to liability and impedes settlement.[47]

Kirby J asserted, in his judgment, that "the predominant international principle for the choice of law in respect of wrongs (torts or delicts) has long been that the applicable law is that of the place where the wrong was committed (*lex loci delicti*)."[48] This position being, in the opinion of the learned Judge, the established position in Europe and the initial position outlined in the United States, where the double-actionability rule in *Phillips v. Eyre* never gained broad acceptance.

---

[46] *Regie National des Usines Renault SA v. Zhang op. cit.* n 35 at para 132

[47] *ibid* at para 66

[48] *ibid* at para 127

Of significance is that the majority was of the opinion that the application of the *lex loci delicti should* operate without a flexible exception, but the majority indeed conceded that the public policy justification for the non-application of the *lex loci delicti* should remain intact.[49] Despite the fact that the majority recognized that the flexible exceptions amounted to a consideration of "governmental interests,"[50] and as such rejected, it was accepted that such an analysis was necessary due to "the modern tendency [is] to frame [public policy reservations] with closer attention to the respective governmental interests."[51]

The application of the *lex loci delicti* in respect of international torts stopped short of a complete replication of the position relating to intra-national torts by the inclusion of a number of caveats. Differing from *John Pfeiffer*, the court, first, left open questions of limitation periods and all issues of kinds and amounts of damages. Secondly, the court in examining the substantive / procedural distinction in the same fashion as in the earlier case, stopped short of duplicating its" finding. The court asserted that it:

> ...would reserve for further consideration, as the occasion arises, whether that latter [referring to the amount of damages that may be recovered] proposition should be applied in cases of foreign tort.[52]

3.2.5 *Neilson v Overseas Projects Corporation of Victoria Ltd*

This more recent decision of the High Court affirmed the basic principles in both *John Pfeiffer* and *Zhang* abolishing the double-actionability test and instead applying a blanket *lex loci delicti* principle to intra and international matters. At first instance,

---

[49] *ibid* at para 53

[50] *ibid* at para 63

[51] *ibid* at para 53

[52] *ibid* at para 76

McKechnie J considered the applicable law question and followed the broad principle set out in *Zhang*, by applying the *lex loci delicti* to the facts. Chinese law, in this instance, was deemed to apply. He then considered the substance of Chinese law set out in Article 146 of the General Principles of Civil Law of China, which stated:

> With regard to compensation for damages resulting from an infringement of rights, the law of the place in which the infringement occurred shall be applied. If both parties are nationals of the same country or domiciled in the same country, the law of their own country or of their place of domicile may also be applied.

From this McKechnie J, without difficulty, applied Australian law to the matter, as both parties to the action were Australian. He seemed to consider the second sentence in the Chinese provision as complimenting the mandatory choice outlined in the first sentence of the article, rather than an exception to it. This being of significance as while both parties were Australian, there were not domiciled in the same place (Western Australia and Victoria), as such the laws governing liability was not identical.

The Full Court considered the matter on appeal and paid particular attention to the net effect of McKechnie J's judgment that the doctrine of *renvoi* should apply in consideration of the choice of law in torts. The court rejected the notion of *renvoi* by asserting that "it would be inconsistent with the reasoning and result in *Zhang* to superimpose a renvoi doctrine the purpose and effect of which is to soften or avoid the rigidity of choice of law rules."[53] The Full Court applied Chinese law and overturning the original judgment on the basis that the action would be time-barred in China.

On appeal to the High Court, however, the decision of the Full Court was overturned by a majority (Gleeson C.J., Gummow, Hayne, Callinan and Heydon JJ.; McHugh

---

[53] *Neilson v. Overseas Projects Corporation of Victoria Ltd* [2004] WASCA 60 at para 48

and Kirby JJ. dissenting). Considering the *renvoi* question only McHugh J. decided the case on a no *renvoi* basis by applying the parts of the General Principles dealing specifically with limitation, to the exclusion of Art.146 of the Chinese General Principles of Civil Law.[54] The majority of the court considered the reference to Chinese law to include Article 146, despite the fact that it was a rule of applicable law. Four of the majority judges favoured the "whole of the *lex loci delicti*" approach, applying the foreign law in its entirety, including any choice of law considerations. The judges asserted this on the ground that the primary objective of the Australian rules was to ensure that the Australian court would decide the case in an identical fashion as the court in the *lex loci delicti* would decide the matter.[55] Without expressing their decision as such, the majority advocated and applied the "total" theory of *renvoi*. The majority seemed to give the possibility of infinite regression in situations where the law of the *lex loci delicti* referred to another jurisdiction and its applicable law considerations very little contemplation. In dealing with the issue of infinite regression under *renvoi* and the interpretation of foreign legal principles, the solution generally adopted by the Australian courts is to require the judge to complete the missing pieces of the legal framework, if necessary, by having regard to the forum's own legal principles. In this connection, it is often said that, in the absence of evidence, foreign law is "presumed" to be the same as Australian law. McHugh J, in his dissent, rejected the notion of *renvoi* for that very reason. He was of the view that infinite regression was a wholly practical problem to be faced as the Australian court would have to presume that the foreign law is the same as Australian law for the purposes of construction and interpretation.[56]

When "applying" foreign law in cross-border situations, the truth is that any court is adopting rules of foreign law as part of the forum's own legal framework in order to

---

[54] *Neilson v. Overseas Projects Corporation of Victoria Ltd op. cit.* n 36 at para 59

[55] Gleeson C.J. (at para 13), Gummow and Hayne JJ. (at paras 89, 111), Heydon J. (at para 271)

[56] *Neilson v. Overseas Projects Corporation of Victoria Ltd op. cit.* n 36 at paras 40 - 46

decide the matters before it. In this, the rules of applicable law serve two distinct purposes. First, to limit the operation of the *lex fori* which would otherwise apply to the determination of an issue. Secondly, to identify foreign rules deemed suitable for adoption by the forum to determine the issue. It is submitted that it is logical that the rules actually applied by the forum should reflect those that would be applied by the court of the *lex loci delicti*. Gummow and Hayne JJ.[57] asserted that to take no account of what a foreign court would do when faced with the facts of a case does not assist the pursuit of certainty and simplicity, as it requires the law of the forum to divide the rules of the *lex loci delicti* between those to be applied (i.e. rules of "domestic law") and those to be ignored (i.e. rules of "private international law"). With this the court built on one of the justifications outlined in *Zhang,*[58] "the selection of the *lex loci delicti* as the source of substantive law meets one of the objectives of any choice of law rule, the promotion of certainty in the law." This requirement was emphatically affirmed by the court where Gummow and Hayne JJ asserted that:

> ...Certainty and simplicity are important consequences of adopting a rule that the *lex loci delicti* governs questions of substance in tort and rejecting exceptions or qualifications, flexible or otherwise.[59]

The court also went further than in the previous cases by asserting a "no advantage" principle as part of Australian private international law. Gummow and Hayne JJ set out the courts thinking quite succinctly:

> [T]he rules adopted should, as far as possible, avoid parties being able to obtain advantages by litigating in an Australian forum which could not be obtained if the issue were to be litigated in the courts of the jurisdiction whose law is chosen as the governing law.[60]

---

[57] *ibid* at paras 94, 95

[58] *Regie National des Usines Renault SA v. Zhang op. cit.* n 35 para 66

[59] *Neilson v. Overseas Projects Corporation of Victoria Ltd op. cit.* n 36 at para 93

[60] *ibid* at para 89

The justices continued their reasoning stating that "adopting a rule that seeks to provide identical outcomes is neither more nor less than an inevitable consequence of adopting a choice of law rule to which there is no exception."[61] Kirby J boiled the issue in *Zhang* down to a single question – "How would the court of the place of the wrong decide the proceedings brought there in respect of that wrong?"[62] It was felt that the Australian court must take that question into consideration when deliberating the matter at bar.

It is clear from the above-considered cases in the United States and United Kingdom that the Australian Court is truly striking a new path in the apparent adoption of *renvoi* in the corpus of Australian private international law. The present case is the first Australian case to apply the doctrine, one more traditionally favoured in civil-law countries in Europe and inherently obscure in the common law world. It is submitted that the court used the doctrine to secure the application of its own law, although in the given circumstances and the context in which Art.146 was read, the outcome was a justified one.

Despite this, there is the inherent problem that the Australian court, in endeavouring the replicate a decision that the Chinese court was likely to make, was fundamentally misguided in its interpretation and application of Chinese law. The Court "presumed" that Australian law was the same as Chinese law for interpretative purposes and on that premise filled the gaps with Australian principles of interpretation rather than Chinese principles. Were the court truly seeking to ensure concurrence with a likely Chinese decision, it is submitted that it would have been more appropriate to apply the doctrine of *forum non conveniens* to the matter and let the Chinese court decide the issue rather than attempt to approximate Chinese law as interpreted in line with Australian principles.

3.2.6 *Amaca PTY Ltd. v. Bernard George Frost*

[61] *ibid* at para 91

[62] *ibid* at para 176

In this more recent Australian authority on the issue, the New South Wales Court of Appeal affirmed and applied the reasoning in all the above cases - *Pfeiffer, Zhang* and *Neilson.* The court undertook an exhaustive examination of the current Australian Position on the choice of law in tort after having considered the place of the commission of the tort and identifying the appropriate and authoritative tests:[63]

> Expressed, as they necessarily must be expressed, at a high level of generality, the authoritative tests for determining the place of a tort are to identity the place:
>
> - Which gives the plaintiff cause for complaint (*Jackson v Spittall*).
> - Where in substance the cause of action arose (*Distillers*).
> - Where the act or omission assumes significance (*Voth*).
>
> Each of these tests will lead to the same result. The common theme is a concern with substance not form.

The court applied the dicta in the discussed cases, emphasizing the importance of the "no advantage" notion first expounded in *Pfeiffer.*[64] The court re-affirmed the connection made between the doctrine and the desire for certainty and simplicity in decision.

The Court[65] made the connection with the doctrine of *renvoi* set out in *Neilson* by reference to application of the choice of law rules of that other forum and asking "what the foreign jurisdiction would do?" This implicit recognition of *renvoi* confirms the shift by the High Court in *Neilson* and further puts Australian at the vanguard of the common law world in terms of its" choice of law rules.

3.2.7 *Sample Scenarios Considered*

---

[63] *Amaca PTY Ltd. v. Bernard George Frost op. cit.* n 37 at para 38

[64] *ibid* at paras 82 - 96

[65] *ibid* at paras 98 - 100

Scenario A – Traffic Accident

The likely treatment of the instant fact pattern in an Australian court bears striking similarity to the position in the United Kingdom following the adoption of the Private International Law (Miscellaneous Provisions Act) in 1995 and the position in the United States of America following the widespread adoption of the First Restatement. Evident from the corresponding sections above, the 1995 Act and the First Restatement mandate the application of the *lex loci delicti.* From the consideration of the Australian position, above, it is clear that the Australian common law jurisprudence has moved away from the application of the double-actionability test towards a default application of the *lex loci delicti* as a matter of common law.

As such, the Australian position requires the strict application of the *lex loci delicti*, the law of State C. However, unlike the position in the United Kingdom, allowing for a displacement of the *lex loci delicti* where there is a country more substantially connected with the action, the Australian position appears without exception and more closely mirroring the position in the United States of America following the First Restatement. As such, the law of State C would likely apply without possibility of displacement.

Scenario B – Publication of Defamatory Material

In the context of interstate defamation, the application of the *lex loci delicti* rule remains the preferred methodology of the Australian court following the decision in *Dow Jones & Company Inc v.* Gutnick, considered below. As such, it becomes necessary to understand where that location is for the purposes of interstate defamation. *Gutnick,* para 3.4.2 below, is instructive in mirroring the traditional common law position and that elaborated under Section 377 of the First Restatement in the United States of America. *Gutnick* provides that the *locus delicti* is:

> …located at the place where the damage to reputation occurs.

As such, the *locus delicti* is defined as the place where the communication takes place, where it becomes available in comprehensible form. In the facts at hand it is clear that there are two forms of publication, print and electronic, each with distinct results. With respect to the print publication it is submitted that it is the law of State Y that would apply. With respect to the electronic communications, it is submitted that the position is similar that in the United State of America, considered above. As such, the potential options open to the court in the determination of the *lex loci delicti* are again relevant:

e. The place where from content was uploaded to a server;
f. The location of the server;
g. The place where damage was suffered;
h. The place where the content was accessed and downloaded.

Despite the options available to the court, it is submitted, that it is the place where the communication was received that prevails. In the context of an internet publication, it is submitted that the *locus delicti* would be where the content was accessed and downloaded, irrespective of Frank's domicile in State X and RedTop's domicile in State Y.

Scenario C – Products Liability

In the context of a products liability fact pattern, such as that instant, and the application of the *lex loci delicti* rule, the Australian position is, again, strikingly similar to those in the United Kingdom and under the First Restatement in the United States of America. As evident immediately above, the Australian *lex loci delicti* approach more closely resembles that in the First Restatement given its stricter application.

As such, given that the harmful force took effect in State 1, the *locus delicti* is State 1 thus requiring the application of the law of State 1.

3.3 CANADA

The historical position in Canada, along with the rest of the common law world, is that the *lex fori* was the default position subject to the double-actionability rule – the act had to have been wrong in the forum along with the locus of the act. The *lex loci delicti* was not available as an affirmative choice of law option, solely as a defence to an action, under the double-actionability rule.

As evident from the progression of the positions in the UK and Australia, the strict default application of the *lex fori* came to be seen as somewhat insular and introverted. It began to be thought that the application of the *lex fori,* in instances where the significant connections in the matter lay in another jurisdiction, bore little connection to the just resolution of tort claims. The apparent shift away from the *lex fori* is rooted in the change in approach towards tort law in general. Tort law was originally seen as being inherently punitive, in parallel to criminal law in its operation. As with most public law, criminal law did not allow for any choice of law considerations. As such the former position on the choice of law in tort did not allow for any consideration as to the choice of law. Tort law was seen to perform a public function and so it was in the public interest to apply the local law. This position has since changed and tort law is now seen as a wholly "private" branch of law, permitting the possibility of considering the application of an alternative law.

The starting point for the consideration of Choice of law issues in Canada is the 1945 Supreme Court of Canada decision in *McLean v. Pettigrew.*[66] The facts of the case are identical to the stereotypical scenario presented in choice of law questions, the automobile accident involving multiple states. The plaintiff was a guest passenger in the defendant's vehicle, both residents of Quebec, where they were involved in an automobile accident in Ontario. At the time, Quebec law would have allowed recovery whereas Ontario law, the *lex loci delicti*, would have prevented recovery. The Supreme Court applied the British position in *Phillips v. Eyre* as modified by *Machado v. Fontes*, that the harmful act was wrongful in Quebec, the forum, and not

[66] *McLean v. Pettigrew* [1945] S.C.R 62

justified in Ontario, and allowed recovery. What is evident from the application of the doctrines is that the possible scope of its application is very broad. There would appear to be little limiting the application of the *lex fori*, as the second tier, added by *Machado*, conceivably encompasses broader heads of liability than just the tortuous nature of the act, it could very well extend to the criminality of the act as a barometer for justification.

While the correct result was reached in that instance, the inherent danger with the illustrated approach arises where one of the parties to the accident resides in the *lex loci delicti*. In such an instance it is evident that there would be a strong preference for the *lex fori* to the distinct detriment of that party resident in the place of the harm.

3.3.1 *Grimes v. Cloutier*[67]

This case is a good illustration of the possible application of *McLean* in an instance where one of the parties resides in the state of the act and the other party does not. The facts here were that an accident occurred in Quebec involving a plaintiff from Ontario and defendants from Quebec. The plaintiff recovered limited damages from a suit in Quebec and sought to increase her compensation by pursuing the defendant in an Ontario court. There the court rejected the plaintiff's action on the basis that the second tier of *Phillips* had not been discharged.

Despite the rejection of the action, the court proceeded to adopt a modified version of the rule in *Boys v. Chaplin*, as expounded by Dicey,[68] essentially the two-tier approach previously favoured with the provision that the "law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties," may apply.

3.3.2 *Lucas v. Gagnon*[69]

---

[67] *Grimes v. Cloutier* (1990) 69 O.R. (2d) 641

[68] Dicey & Morris, *The Conflicts of Laws* (11th ed 1987), at pp 1365-166, Rule 205

[69] *Lucas v. Gagnon* [1993] 11 O.R. (3d) 422

At Court of Appeal level this decision pre-dates the important decision in *Tolofson*, though it remains instructive to consider the approach taken by the court. The facts were that the plaintiff and one defendant resided in the forum, while the defendant and the act itself were associated with another jurisdiction. The court declined to draw parallels with McLean to the exclusion of all other principles, it instead distinguished between the two defendants and the plaintiff's relationship with them. The court applied *McLean* and *Grimes* separately to each defendant. While one could argue that the decision produced a fair and just result based on the facts, it could also be argued that the decision introduced further uncertainty into the Canadian position by endorsing both approaches.

A particularly interesting aspect of this decision in *Lucas v. Gagnon* is the manner in which the court treated the defendants. Common law courts are no strangers to distinct judgments towards distinct defendants, although the court went further in this instance. The court saw fit to apply two distinct systems of law to the case by separating the defendants and deciding the appropriate law based on the individual circumstances. That decision by the court raises the notion of *depeçage* and its utilization in choice of law cases. The House of Lords, in *Boys v. Chaplin,* acknowledged the potential role of the doctrine, although jurisprudence has been relatively weak since then with only allusions made to it by practice, such as in *Lucas*. There has been reluctance to accept, outright, the doctrine in modern choice of law systems due to concerns regarding the introduction of such a flexible methodology. Questions of incompatibility are certainly pertinent when considering the inter-operation of multiple legal systems, this together with the potential for extreme unpredictability of outcome when *depeçage* is taken with the flexible exception as outlined in *Boys*. The Law Reform Commission[70] acknowledged these concerns in considering and ultimately rejecting the doctrine.

---

[70] U.K., The Law Commission and the Scottish Law Commission, *Private International Law: Choice of Law in Tort & Delict* (Law Commission Report No. 193, Scottish Law Commission No. 129) (London: Her Majesty's Stationary Office, 1990) at 27

It is perhaps unfair to reject *depeçage* out of hand, the doctrine has been applied in one form or another by courts in particular where distinctions are made between matters of substance and matters of procedure. It is necessary to consider the most significant argument posited against *depeçage*, the excessive flexibility it is perceived to bring. While it is without doubt that the doctrine brings with it greater choice for judges, where it is used only as part of a flexible exception to a general rule, the potential for unjust usage of the doctrine can be reduced as an alternative system could only be chosen where an exception to any general rule is warranted, rather than considering an alternative from the outset.

3.3.3 *Tolofson v. Jensen*[71]

The Supreme Court, in delivering a concurrent judgement with the appeal in the previously mentioned *Lucas v. Gagnon,*[72] emphatically moved away from the previously entrenched position outlined and applied since *McLean v. Pettigrew.* The facts in *Tolofson* were again based around a multi-state automobile accident. The plaintiff, a British Columbian, sought redress in British Columbia, from a British Columbia and Saskatchewan driver following an accident in Saskatchewan. The Court rejected the *lex fori* as previously applied and instead held that the appropriate law was the *lex loci delicti.*

In arriving at this decision, the court took a number of theoretical steps in justifying the move away from the *lex fori.* First in these steps was the need for certainty and uniformity in the federal state. The court asserted that the *lex loci delicti* would be particularly suited to Canada's federal structure. La Forest J. reasoned that:

> ...unless the courts' power to create law in this area exists independently of provincial power...then the courts would appear to be limited in exercising

[71] *Tolofson v. Jensen* [1994] 3 S.C.R. 1022; *Orzel v. Seward* (2011) ONSC 6767; *Spar Aerospace v. American Mobile Satellite* (2002) 4 SCR 205

[72] *ibid*

> their powers to the same extent as the provincial legislatures...If a court is thus confined, it is obvious that an extensive concept of "proper law of tort" might well give rise to constitutional difficulties. [73]

La Forest J. also opined that whatever rule is utilised should ensure that certainty and uniformity persisted throughout the state:

> The nature of our constitutional arrangements – a single country with different provinces exercising territorial legislative jurisdiction – would seem to me to support a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout the country. This militates strongly in favour of the *lex loci delicti.*[74]

The second of the Court's justifying reasons for applying the *lex loci delicti* is the desirability of order and fairness. The court went so far as to assert that order and fairness are preconditions to justice with order ranking above fairness in priority:

> While, no doubt, as was observed in *Morgaud*, the underlying principles of private international law are order and fairness, order comes first. Order is a precondition to justice.[75]

The third, final, main justification for the application of the *lex loci delicti* in the eyes of the court was the importance to preserve comity, both domestically and internationally, albeit *obiter dictum* in that respect. Advocating a default application of the *lex loci delicti*, and utilising comity as a justification, presents issues where there is a conflict of law between the personal law of the parties and the *lex loci delicti*. Principles of comity and sovereignty are of little primary instructive value in choice of law considerations and, it is submitted that, they are best left to

---

[73] *ibid* at 1065 - 66

[74] *ibid* at 1064

[75] *ibid* at 1058

considerations of jurisdiction. Observing the practical procedures in choice of law cases, decision on the application of another law in a case is dependent on whether the issue is raised in court. Were comity a real consideration of the court, the choice of law issue would be of paramount importance to the court as the state has an inherent interest in seeing certain laws applied in particular instances. The court would make a determination on the matter irrespective of the desires of the parties to the action.[76] In fact parties tend to make a positive decision as to the applicable law, as such it appears that comity is not a real fundamental principle in considerations of choice of law.

Despite the specificity of the judgement, courts have been swift to seize upon the qualification made by the Supreme Court. The main case of concern is *Hanlan*[77] in which the court drew upon the distinction made between national and international factual scenarios to avoid the application of the *lex loci delicti* rule expounded in *Tolofson* and, instead, apply "the flexible exception" seen in English law. The court did so because it deemed the application of the *lex loci delicti* to create an injustice. The qualification in *Tolofson* allowed the application of the *lex fori*, in this instance, as the Supreme Court contemplated that where the tort is an international one that the default *lex loci delicti* rule may be departed from where necessary. Curiously the Supreme Court limited this exception to international cases, rather than making it a general qualification to the *lex loci delicti* rule for national inter-state cases. Given the decisions there appears to be a certain conflict in the position of the Canadian court. In *Hanlan,* the court applied the law of the place most substantially connected to the matter whereas in *Tolofson* the court applied the *lex loci delicti.* It is conceded the matter in the latter was an interprovincial and not international matter. We are presented with the situation that in interprovincial cases the *lex loci delicti* is the rule to follow while in international cases, where in the interests of justice and fairness, the *lex loci delicti* may be departed from in favour of the law of the place most

---

[76] Fentiman, *Foreign Law in English Courts* (Oxford University Press, 1998); *Petkus v. Becker* [1980] 2 S.C.R. 834 per Dickson C.J.C. 31; *Nystrom v. Tarnava* (1996) 44 Alta. L.R. 355 (Q.B.) 32; *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155

[77] *Hanlan v. Sernesky* (1997) O.R. (3d) 603 (Ont. Gen. Div.)

significantly connected. It seems somewhat strange that the acceptance of the exception would not be uniform in it's application, as such the *Tolofson* distinction must be questioned.

Tolofson is distinct in its approach in seeking a definitive answer to the question of choice of law in tort in that the court undertook a minute analysis of the underlying reality in which choice of law rules operate. LaForest J. surmised that the underlying reality is the "territorial limits of law under the international legal order." Clearly these limits replicate those described in public international law principles such as sovereignty and comity of nations. It is a basic principle of sovereignty and comity that the accepted national borders are accepted as limits to jurisdiction and that courts refrain from applying local law to actions in other jurisdictions. LaForest J.'s derivation from established principles is undoubtedly attractive and easy to accept, although the distinct reality is that choice of law operates as a mix of private, public and procedural considerations.

Walker questions whether the test expounded in *Tolofson* would allow the application of any law other than the *lex loci delicti.* As apparent from the judgment it would appear that the Supreme Court, in adhering to it's territorial reasoning, considered that "the underlying principles of private international law are order and fairness, order must come first. Order is a pre-condition to justice,"[78] as such the application of any law other than the *lex loci delicti* would appear to be unlikely.

3.3.4 *Hanlan v. Sernesky*[79]

In *Hanlan*, the court was intent on finding that the facts warranted an application of the *lex fori* rather than the *lex loci delicti,* as outlined in *Tolofson.* The court based its decision on the assertion that the facts warranted an application of the *lex fori* as they fit a certain factual scenario justifying it. The Court of Appeal found two justifications for the application of the other law, the *lex fori*: both parties to the case were resident

---

[78] *Tolofson v. Jensen op. cit.* n 71 at 1058

[79] *Hanlan v. Sernesky* (1997) 35 O.R. (3d) 603 (Ont. Gen. Div.)

in some place other than the *lex loci delicti*; and no connection existed to the *lex loci delicti* other than the fact that the tort occurred there. It must be noted that the courts, in the utilisation of the exception, applied the *lex fori* because it was the law of the parties to the case and not simply because it was the law of the forum. The inevitable consequence of *Hanlan* is that, in Canada, there is no clear guidance for when the exception should apply, or whether it should apply at all.

3.3.5 *The need, and search, for a better rule*

Flowing from the decisions in *Tolofson* and *Hanlan* there is a distinct lack of clarity as to the reasoning behind the distinction between international and inter-provincial cases justifying their differing treatments. It appears that the court was intent on securing a line of pre-determined outcomes rather than concerning itself with just outcomes. In its quest for certainty the court eschewed the possibility of applying some law other than the *lex loci delicti*, especially where the outcome applying the *lex loci delicti* would be unjust, in inter-provincial cases.

Is it possible to discern, in the decisions of courts and academic statements of the law regarding the flexible exception, some regularity or uniformity that could be articulated as a rule?[80] In considering whether the court should apply the personal law of the parties, where there is a coincidence of domicile or residence, the court criticized the application of the personal law in a thoughtless and automatic fashion as it had the potential to produce anomalous results. "Should luck be on your side because you happen to crash into another Ontario resident while driving in Quebec, instead of crashing into a Quebecer?"[81] From the surface it appears that this scenario would be classed of one of "place of most significant relationship," so correctly allowing the application of the personal law of the parties, the place having the most significant relationship to the events. It must be remembered that the coincidence of place may simply be fortuitous, therefore the application of that law is not guaranteed,

---

[80] Walker, "Are We There Yet?" Towards a New Rule For Choice of Law in Tort (2000) 38 Osgoode Hall L.J. 331, 340

[81] *Tolofson v. Jensen op. cit.* n 71 at 1058

particularly where its application would result in an unexpected and unjust windfall for either of the parties. As a general rule, the personal law of the parties is applied where the place of the tort seems be wholly coincidental, it would also seem somewhat incorrect to apply the personal law of the parties where the coincidence is wholly accidental and goes to a determination of the very entitlement to recovery.

The decision in *Tolofson*, in seeking to set out a unifying principle, moved away from traditional considerations of private international law and into the realm of public international law by considering aspects of comity and sovereignty. In looking externally the court overlooked a valuable source of reasoning within its own jurisdiction, national tort law. The logic and principle in national tort law is inescapable, the court decides the case with questions of fairness and justice and deterrence, rather than principles rooted in international law. Choice of law issues are not intended to prohibit recovery or the adjudication itself. This, being the effect of applying principles of public international law to such questions. They are, instead, intended to allow the court, once jurisdiction is seized, to better make determinations given the relevant relationships and circumstances. It would seem only natural that where the relationship between the parties indicates that some other law is applicable to the matter the court should have that cognizance of this but that where it is purely coincidental the personal laws of the parties being the same, the court should be less willing to apply that law. Why not move away from the international law based approach, in *Tolofson*, towards an approach based more on the underlying logic and tenets of tort law itself?[82] Why not apply the foreign law only where the relationship between the parties suggests a reasonable expectation that law is desired and relevant?[83]

3.3.6 *Rule Proposition in Canada*

Having already considered the notion of basing choice of law decisions on Tort

---

[82] Walker *op. cit.* n 80 at 344

[83] *ibid*

principles of reasonableness and reasonable expectation, we are led to Walker's[84] proposition that a new rule should be derived from that line of reasoning. The proposition that the consideration be based in terms of the relationship of the parties to the action rather than geo-political considerations the court might otherwise be concerned with, is to be noted. Looking towards Article 133 of the Swiss Code on Conflicts of Laws,[85] we see that the position is framed in terms of the relationship of the parties. In particular the default Swiss position is somewhat reversed from the traditional Canadian position, where the parties are resident is the same place, that law is to apply otherwise it is the *lex loci delicti* that is to apply. The emphasis on the relationship between the parties being central to the consideration of the court is highlighted by the third part of the rule:

> ...claims based on an unlawful act violating an existing legal relationship between the damaging and the damaged party are governed by the law that applies to the pre-existing legal relationship.

Walker suggests that the obsession with territorialism in choice of law questions should be left by the wayside in favour of the social context and implication of any determination. Further, the default route taken by the court should be the social considerations route with any territorial and geographical considerations confined to instances where there is an absence of relationship between the parties.

Remembering that *Tolofson* distinguished between cases of an international nature and those of inter-provincial nature, it is important to consider the possible future for that distinction. The Court, in *Tolofson*, allowed the exception to the expounded rule, in international cases, because due to the construction of the Canadian Constitution:

> Unless the courts' power to create law in this area exists independently of

---

[84] *op. cit.* n 80 at 342

[85] Karrer & Arnold, *Switzerland's Private International Law Statute of December 18, 1987, The Swiss Code on Conflict of Laws and Related Legislation* (Boston: Kluwer Law and Taxation Publishers, 1989)

> provincial power ... then the courts would appear to be limited in exercising their powers to the same extent as the provincial legislatures. I note that provincial legislative power in this area would appear to rest on s. 92(13) – "Property and Civil Rights in the Province." If a court is thus confined, it is obvious that an extensive concept of "proper law of the tort" might well give rise to constitutional difficulties.[86]

It is apparent that provincial courts are constrained by section 92 to the extent that, despite the fact that the provinces exercise territorial jurisdiction, they must treat the events identically regardless of where they occurred in the country, per LaForest J.:

> The nature of our constitutional arrangements -- a single country with different provinces exercising territorial legislative jurisdiction -- would seem to me to support a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout the country.

Clearly this position is weighted in favour of an ordered and certain result for interprovincial cases irrespective of the competing equities in the action. This position, created primarily by the decision of the court in Morguard,[87] allows for the free selection of forum within the federation.

Junger has proposed[88] an alternative approach for the development of Canadian choice of law founded on the default application of the *lex loci delicti*, qualified by considerations of the most significant elements of the delict. With every rule there is arguably an exception to it and, following this tradition Junger, proposed that where the *lex loci delicti* is not the law with which the parties have substantial connection, and where another law would better achieve the relevant governmental interests in the

---

[86] *Tolfoson v. Jensen op. cit.* n 71 at 1065

[87] *Morgaurd Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077

[88] Junger, Proposed Choice of Law Methodology for Tort in Canada: Comparative Evaluation of British and American Approaches (1994) 26 Ottawa L.Rev. 75 at 118

case at bar. Junger then advocates incorporating *depeçage* into the considerations of the court given an examination of uniformity and certainty questions in the application of some law other than the *lex loci delicti*.

It is submitted that this approach, despite being relatively complex, might represent a sound step forward in choice of law considerations in Canada given the uncertainty following *Tolofson*. It brings together the desirability of a *lex loci delicti* centric approach with the inherent flexibility attached to *depeçage* and considerations of substantial connection to a particular matter. Although it must be noted that the proposal is a construct of many distinct approaches and may prove difficult to reconcile with preceding judicial sentiment in Canada.

3.3.7 *Conclusions*

From the above it is apparent that the net position in Canada favours the application of the *lex loci delicti* with some sort of a flexible exception to its application. *Tolofson* advances a theory centred on the application of the *lex loci delicti*, a judgment questioning the very existence of an exception to that rule. While the objective of the court in advancing a "unifying theory" for the choice of law was laudable, it failed to provide for an exception to the application of the *lex loci delicti*, where the court felt that such an exception was appropriate given the circumstances of the case. Professor Castel has suggested that the Canadian court revisit the formerly favoured theory guided by the underlying principles of tort law. Were such a mindset adopted the court would inevitably find itself guided more by justice and desirability of each particular result, rather than setting down a consistently applicable rule. In essence, it would be the "law most substantially connected" that would apply. The adoption of this position would mean the relegation of the *lex loci delicti* to a default position, where there facts of the case existed in a vacuum of any significant relationship that would indicate a reasonable expectation between the parties that another law be applied.

It would, therefore, appear that the Court has moved towards a blackletter approach, although their implementation of that approach is distinctly lacking in sufficient clarity and precision. Such lack of clarity highlights the inherent benefits of taking a

more principled approach to choice of law questions, and as Professor Castel has suggested, a reconsideration of a more fundamental approach, as evident in many parts of the United States, would yield a more just and equitable result. Equally attractive, although distinct, is Junger's approach suggested above. That approach would likely to yield predictable, yet fair, results on a *lex loci delicti*-centric basis. Without doubt, however, is the need for a considered opinion from the Supreme Court, in the absence of legislation, to finally resolve the present vacuum in which the choice of law in torts remains.

3.3.8 *Sample Scenarios Considered*

Scenario A – Traffic Accident

The likely treatment of the instant fact pattern in Canadian court bears striking similarity to the position in the United Kingdom, Australia and the United States of America following the widespread adoption of the First Restatement. Evident from the corresponding sections above, the 1995 Act, the First Restatement and the judicial shift in Australia mandate the application of the *lex loci delicti* to varying degrees. From the consideration of the Canadian position, above, it is clear that the Canadian common law jurisprudence has also moved away from the application of the double-actionability test towards a default application of the *lex loci delicti* as a matter of common law. However, in contrast to the position in Australia, it also clear that the application of the *lex loci delicti* rule is tempered by a flexible exception. As such, a degree of uncertainty is the net result.

As such, the application of the *lex loci delicti*, the law of State C. However, it might appear that the instant fact pattern fits within the mould of *Hanlan v.* Sernesky, above, to the extent that the only connection with the *locus delciti* was that the two parties happened to, fortuitously, be present there at the time. As such, it might appear as though the *lex loci delicti,* the law of State C, might be displaced in favour of some other law. *Hanlan* must be distinguished at this stage to the extent that, in the former, both parties to the action were connected to the forum while in the instant fact pattern only Bob would be connected to the forum. As such, it is submitted that the likely

selection by a court, applying the Canadian model for choice of law in torts in this instance, would be the *lex fori* rather than the otherwise unconnected *lex loci delicti*.

Scenario B – Publication of Defamatory Material

In the context of interstate defamation, the application of the *lex loci delicti* rule remains the preferred methodology of the Canadian courts following the decision in *University of Calgary v. Colorado School of Mines*, considered below. However, it must be noted that this position is far from resolved in the mind of the Supreme Court of Canada. The recent decision of *Breeden v. Black*[89] casts doubt on the applicability of the, default, *lex loci delicti* rule to internet defamation cases. The court asserted:

> In the companion case of *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, I discuss the implications of choice of law in the context of multistate defamation claims. Without resolving the issue, I note that there is some question as to whether the *lex loci delicti* rule, according to which the applicable law is that of the place where the tort occurred, ought to be abandoned in favour of an approach based on the location of the most harm to reputation.[90]

As such, it is submitted that no clear guidance can be offered, in the Canadian context, on the likely applicable law in the instant fact pattern. Ambiguity and uncertainty prevails.

Scenario C – Products Liability

In the context of a products liability fact pattern, such as that instant, and the application of the *lex loci delicti* rule, the Canadian position is, again, strikingly similar to those in the United Kingdom, Australia and the United States of America under the First Restatement. As evident immediately above, the Canadian *lex loci*

---

[89] *Breeden v. Black* [2012] SCC 19 (18 April 2012)

[90] *ibid* at para 32

delicti approach more closely resembles that in the United Kingdom in that it is subject to a flexible exception in instances where an injustice is done in a given fact pattern.

As such, given that the harmful force took effect in State 1, the *locus delicti* is State 1 thus requiring the application of the law of State 1. It is submitted that it is unlikely that the *lex loci delicti*, State 1, would be displaced should State 1 be the selected forum.

3.4 ESCAPE FROM THE LEX LOCI DELICTI AT COMMON LAW

While it is clear from the above that the United Kingdom, Australia and Canada have indeed effectively abandoned the traditional adherence to the *lex fori* in favour of the *lex loci delicti,* there clearly remains an inherent tendency for judges to attempt to revert to the *lex fori.* As evident above, such attempts can take the form of distinctions between substance and procedure or even the utilisation of a flexible exception to the *lex loci delicti* rule, by the very existence means to revert to the *lex fori* it is suggested that the displacement of that rule in its entirety is not possible.

Following the shift towards the *lex loci delicti* in the UK, Canada and Australia, commentators identified five distinct devices open to the court to adopt in order to allow the application of the *lex fori*:

1. Characterisation of the question as a non-tort claim, so allowing the application of the *lex fori.*[91]
2. Asserting the forum as the *locus delicti* as such allowing the *lex fori* to be applied as the *lex loci delicti.*[92]
3. Characterisation of the matter as procedural rather than substantive, allowing the *lex fori* to apply.[93]
4. The classic utilisation of a flexible exception to the *lex loci delicti* rule in favour of the *lex fori.*[94]
5. Look towards public policy as a justification to apply the *lex fori.*[95]

---

[91] Carter, The Private International Law (Miscellaneous Provisions) Act 1995 (1996) 112 LQR 190, 193

[92] *ibid* at 193 – 194

[93] Morse, Torts in Private International Law: A New Statutory Framework (1996) 45 ICLQ 888, 895

[94] *op. cit.* n 91 at 194

[95] Reed, The Private International Law (Miscellaneous Provisions) Act 1995 and the

There also emerged a sixth, and unpredicted method, by which the courts could revert to the *lex fori: renvoi.* Arguably the cause for the ignorance towards *renvoi* was the express prohibition of its application by the 1995 Act in the United Kingdom.

The following pages will consider each of the methods for escaping the *lex loci delicti* and attempt discern the current relevance of the mentioned methods.

3.4.1 *Characterisation of the Question*

Due to the existence of wrongs of a non-tort nature, there exists the distinct avenue for the court to proceed down, in deeming matters not tortious. This may particularly occur where multiple issues exist in a case, possibly land related or contractual in nature. Of note are cases relating to corporations, where Canadian courts have not treated the choice of law rule in a fashion consistent with the usual rule.[96] *Pearson v. Boliden Ltd*[97] is an excellent example of an instance where the court chose to see the issues as other than tortious. The facts of the case related to securities legislation across multiple provinces in Canada. Although the legislation was largely identical, there were a number of subtle differences relating to limitation periods between New Brunswick and British Columbia and the availability of remedies under statute. The Supreme Court of British Columbia considered, at one level, that the actions under the securities legislation were not tortious[98] although it did consider *Tolofson* in respect of each sub-class. The Court did not feel compelled to apply the *lex loci delicti,* rendering *Tolofson* irrelevant,[99] instead finding direction in statutory consumer

---

Need for Escape Devices (1996) 15 Civil Justice Quarterly 305, 314 - 320

[96] *Voyage Company Industries Inc v. Craster* (1998-08-11) BCSC C976871 at para [12]

[97] *Pearson v. Boliden Ltd* (2002) 222 DLR (4th) 453

[98] *ibid* at 481

[99] *ibid* at 491 - 492

protection actions[100]. In *Pearson* it must be acknowledged that the court did not eschew the *lex loci delicti* for the sole purpose of applying the *lex fori*, the reality of the case was that Ontario law, not British Columbia law, would apply to decide the matter.[101] Evidently courts are willing to apply foreign law in instances where contract, such as an insurance contract above or as in *Guardian of Matt v. Barber*[102] where the Canadian court willingly applied Florida law.

3.4.2 *Characterisation of the Connection to the Forum*

The second logical step, once it has been settled that a tort has taken place, is to determine where it took place.[103] With this question there is scope for the court to find that the tort occurred in the forum and so apply the *lex fori* as the *lex loci delicti* for such a scenario. The obvious caveat to this device is that there is very little scope to use it where actual physical torts have occurred as the place where the act caused injury or damage is usually certain. Following this we see that courts have repeatedly and consistently determined the *locus delicti* to be in certain locations for given types of actions. In automobile actions it has been held that the place of the tort is where the accident occurred.[104] The law of the port governs maritime torts where the ship is in port[105] and similarly actions resulting from aircraft crashes have been held to be

---

[100] *ibid* at 490

[101] *ibid* at 485

[102] *Guardian of Matt v. Barber* (2002) 216 DLR (4th) 453, 485

[103] *Tolfoson v. Jensen op. cit.* n 71 at 1050; *Regie National des Usines Renault SA v. Zhang op. cit.* n 35 at 519 - 539

[104] Australia: *Reid v. AGCO Australia Ltd* [2000] VSC 363; Bellotti v. Stair [2002] QDC 161. *Canada: Ross v. Ford Motor Co.* [1998] NWTR 175; *Drews v. Insurance Corporation of British Columbia* (1998) 55 BCLR (3d) 281. United Kingdom: *Edmunds v. Simmonds* [2001] 1 WLR 1003, 1005; *Harding v. Wealands* [2006] UKHL 32.

[105] *Union Shipping New Zealand Ltd v. Morgan* (2002) 54 NSWLR 690

governed by the law of the place where the aircraft fell to ground.[106] There is also evidence that the *locus delicti* of torts to property would likely be where the property was at the time of the damage occurring.[107]

Moving away from physical torts to ones of a more nebulous nature, such as commercial or economic torts, it becomes easier for courts to ascribe characteristics to a tort connecting it to the forum rather than another location. The greatest difficulties have been posed where there are issues of communication involved. We see that where torts of defamation or negligent misstatement have been alleged, the long standing position is that the tort occurs where the communication is received rather than where damage or damage to reputation has occurred, it appears that the shift towards a *lex loci delicti* methodology has not impacted this assertion.[108] However, there is the more recent decision of *Dow Jones & Company Inc v. Gutnick*[109] where the Victoria court held that regarding defamation, it "is located at the place where the damage to reputation occurs," and particularly that this is where the information becomes available in a comprehensible form. This approach has also been followed in Canada, as evident in *University of Calgary v. Colorado School of Mines.*[110] There presented a question over the applicability of Alberta law to an alleged defamation that took place in Alberta and Colorado. The court asserted that the university's reputation was most significant, naturally, in Alberta and even if a tort had taken place in Colorado that the "more significant wrong" had occurred in Alberta and so it's law should apply.[111] *Direct Energy Marketing Ltd v. Hillson*[112] saw an inadvertent

---

[106] *Bristow Helicopters Ltd v. Sikorsky Aircraft Corporation* [2004] 2 Lloyd's Rep 150, 153, 156

[107] *Shane v. JCB Belgium NV* (2003-11-14) ONSC 02-CV-19871

[108] *Barclay's Bank Plc v. Inc Incorporated* [2000] 6 WWR 511, 523 - 524

[109] *Dow Jones & Company Inc v. Gutnick* (2002) 210 CLR 575

[110] *University of Calgary v. Colorado School of Mines* (1995) 179 AR 81

[111] *ibid* at para 11

[112] *Direct Energy Marketing Ltd v. Hillson* [1999] 12 WWR 408

utilisation of an escape device by the court, following a misinterpretation of the decision in *Calgary*. In *Hillson* the court based it's decision on a quantification of the damage to reputation suffered and the selection of one overriding choice of law, rather than acceptance of the possibility of a multiplicity of applicable laws to discreet issues in a case, although there has been no evidence that this interpretation of *Gutnick* has been adopted by any other Canadian court since.

It is evident that despite the great potential for judicial manipulation of the connecting factors to a particular jurisdiction, the courts have shown remarkable restraint in fixing the forum as the locus of the tort and so apply the *lex fori*. This is particularly evident in instances of maritime torts committed on the high seas, in such instances it has been traditionally held that the locus of the tort is where the ship was registered.[113]

3.4.3 *Distinction between matters of substance and procedure*

Classically where an issue has been classified as procedural, the *lex fori* is applied by the courts as it can only be reasonable that where a court is engaged, even where there are foreign elements to the tort, it would follow its own procedural rules, the *lex fori*, rather than those alien to it. Together with this is the unavoidable reality that the broader procedure is defined as, the greater scope for reversion to the *lex fori*. The distinction between the United Kingdom and Australia has already been considered and in particular the new position enunciated in *Pfeiffer*[114] asserting that all questions relating to damages and their availability are to be answered by the *lex loci delicti* rather than the *lex fori*. The shift in *Pfeiffer*, following from the reasoning in *Tolofson*, is a logical progression of the territorial sovereignty reasoning used to justify the move to the *lex loci delicti* from the outset. In classifying questions of damages as substantive the courts have avoided a crucial incoherence in the former approach of classifying damages issues as procedural.

---

[113] *Roerig v. Valiant Trawlers Ltd.* [2002] 1 All ER 961

[114] *John Pfeiffer Pty Ltd v. Rogerson op. cit.* n 34

Of great significance is the apparently distinct approach adopted by the courts in the assessment of damages. As discussed above, the Australian decision in *Pfeiffer* altered the position there so that issues relating to the quantification of damages are to be treated as substantive in nature.[115] Despite this about-turn in Australia there is little evidence that either Canadian or United Kingdom courts have adopted this line of thought. English and Irish decisions have shown a certain desire on the part of the court to revert to the *lex fori* for the purpose of the assessment of damages,[116] as a corollary of this awards have tended to be greater than what they would have amounted to under the *lex loci delicti.*[117] Canadian courts, by contrast, have tended to award damages lower than those likely to be awarded by another jurisdiction, typically the United States given its physical proximity.[118] Crucially, these cases were decided after the decision in *Pfeiffer* and are indicative of the court's express desire to retain the power to assess damages in accordance with the law with which it is most familiar, the *lex fori*. In *Hulse v. Chambers* Holland J went further and posited that a particular reason for the retention of the *lex fori* in the assessment of damages is that despite the fact that it is a judge who answers the question of damages, it remains technically a jury question and so inherently a matter for the forum alone.

So it seemed that it was settled law in the United Kingdom that the assessment of damages was a matter of procedure and not a matter of substance. In 2002, however, the court appeared to undertake a partial *volte-face* on the issue. In *Harding v. Wealands*[119] the Court of Appeal felt prepared to hold that restrictions on the recovery of damages were matters of substance rather than procedure, and so governed by the *lex loci delicti.*[120] The court was expressly persuaded by the Australian authority of

---

[115] *Routley v. Bridgestone Australian Limited* [2004] NSWDDT 4 paras 20 - 21

[116] *Hulse v. Chambers* [2002] 1 All ER 812; *Kelly v. Groupama* [2012] IEHC 277

[117] *ibid*

[118] *Somers v. Fournier* (2002) 214 [DLR] (4th) 611

[119] *Harding v. Wealands op. cit.* n 29

[120] *ibid* at 435 - 436, 447

Pfeiffer,[121] in particular that the NSW Act imposed restrictions on the very right to recovery and so was substantive. On appeal, the House of Lords reversed the decision of the Court of Appeal, reverting to the former assertion that the distinction between substance and procedure in the assessment of damages was alive.[122] Canadian courts have followed a similar path to the UK courts by allowing the quantum of damages to be limited by Canadian national law despite that the governing law of the case may be an external law.[123] In *Somers v. Fournier* the court expounded a position that allowing the *lex fori* to limit damages was based on "policy considerations" and as such they were procedural in nature.

It would seem apparent that Australia stands alone in the common law world in bundling questions of the assessment and limitation of damages together with questions of availability of damages as matters of substance governed by the chosen applicable law. It is submitted that the approach of the United Kingdom and Canadian courts, despite the apparent enticement to encourage forum shopping, is preferable over the Australian approach. Were the court to follow the Australian approach it is submitted that it might be more appropriate for the court to decline jurisdiction to hear the case from the very beginning using *forum non conveniens.* Where a court has no power of control in the core issues in a case it becomes nothing more than an extension of the foreign court, why not simply return the case to the more appropriate jurisdiction? Accordingly, it is submitted that retention of the distinction between substance and procedure in the assessment of damages represents an important power of a seized national court to make awards consistent with domestic public policy, this being a significant consideration given the election to choose the seized court as the forum.

3.4.4 *A Flexible Exception*

---

[121] *ibid* 433-4

[122] *Harding v. Wealands op. cit.* n 29 at paras 36 - 41

[123] *Somers v. Fournier op. cit.* n 116

Since *Pfeiffer* the Australian position has been not to recognise the notion of a flexible exception to the general rule of applying the *lex loci delicti*, this position has been widely criticised by commentators since that decision[124] as being overly restrictive and lacking clarity in justifying reasoning. As seen in the *Zhang* decision the courts recognised that the traditional exception, expounded by Lord Wilberforce in *Boys v. Chaplin*, was rooted in a comparative interest analysis between the competing states, as common in the United States.[125] Although we have seen that since *Zhang* the court has cited the perceived uncertainty that allowing a flexible exception would bring as ample justification for denying it.[126]

As discussed earlier, the English position since *Boys v. Chaplin*, following the decision in *Phillips v. Eyre*, was that there existed a flexible exception to the application simultaneous application of the *lex loci delicti* and the *lex fori* in favour of either solely. Section 12 of the 1995 Act, as discussed earlier, put the exception to the application of the *lex loci delicti* on a statutory footing so that and "issue" may be determined in accordance with some law other than the *lex loci delicti* where "substantially more appropriate" so to do. Despite the Act raising the threshold required to pass before the exception can be applied, the courts remain inclined to apply the exception in circumstances that would satisfy the traditional test. The flexible exception has also been applied to matters relating to damages.[127] In *Edmunds,* the court was presented a scenario that despite the tort occurring in Spain, both the damage and the parties were connected to England. The court had little hesitation in applying the exception and so allowing the application of English law. Again in *Hulse v. Chambers*[128] the court indicated that, had the parties not already

---

[124] Gray, Flexibility in Conflict of Laws Multistate Tort Cases: The Way Forward in Australia (2004) 23 University of Queensland LJ 435, 462-3

[125] *Regie National des Usines Renault SA v. Zhang op. cit.* n 35 at 519

[126] *Neilson v. Overseas Projects Corporation of Victoria op. cit.* n 36 ALR at 236

[127] *Edmunds v. Simmonds* [2001] 1 WLR 1003

[128] *Hulse v. Chambers op. cit.* n 116

agreed that the foreign law would apply, it would be prepared to apply English law to a situation where the tort was committed abroad but all parties were English. Despite the concession that was made by the parties, regarding the choice of law governing liability, the court nevertheless applied English law, the *lex fori*, in assessing the quantum of damages. The thread connecting the above two cases is that the court was prepared to apply Section 12 of the 1995 Act in instances where all parties to the action were English. It stands to reason that where at least one of the parties is not English there could be little basis for the application of the statutory exception as indicated by the concession in *Hulse v. Chambers* above. Similarly, where all of the parties to the action are from a single country other than England, then Section 12 could be legitimately claimed to allow for the application of that other law as the governing law, where it is not the *lex loci delicti.*

Harding v. Wealands is a significant decision that touches on the applicability of Section 12 in instances where all the litigants are England based. The court, despite the fact that one of the claimants was in fact an Australian and the incident occurred in Australia in an Australian vehicle, applied Section 12 holding that English law was the appropriate governing law. The Court of Appeal[129] unanimously struck down the trial judgment by choosing to focus on the significance and weight of the connections to the two jurisdictions. The Court held that there were a number of links of substantial importance to New South Wales that could not allow the conclusion that is was more appropriate to apply English law.[130] For this reason *Harding v. Wealands* represents an important limit to the application of Section 12 and the traditional inclination of the courts to move for the *lex fori* where English litigants are involved. It would, therefore, seem that the English application of the flexible exception is squarely centred on an examination of the competing interests in a particular matter and assessing where the centre of gravity lies.

The Canadian position on the availability of a flexible exception is outline in the seminal decision in *Tolofson,* discussed earlier. The court refused to allow a flexible

---

[129] *Harding v. Wealands* [2005] 1 All ER 415

[130] *ibid* at 425-426

exception to the application of the *lex loci delicti* for intra-national inter-provincial cases while the exception did find favour in international tort cases. In allowing the exception in international circumstances La Forest J framed his thinking in terms of public policy on an international level:

> ...because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law.[131]

This reference to an "injustice" likely indicates its position between a public policy based exception and a centre of gravity based exception. Despite the apparently restrictive attitude towards the exception, we have seen a relatively liberal interpretation of it in the Canadian courts where seemingly minor differences between the *lex loci delicti* and the *lex fori* were characterised as injustices allowing the application of the *lex fori.*[132] The seeming over-indulgence in the flexible exception by the Canadian court reached its zenith in *Gill v. Gill,*[133] where a British Columbia court saw fit to apply it's law in an instance where there was no physical connection between the alleged tort and that jurisdiction. The factors linking it to the event were that the injured parties were *en route* to British Columbia and, that they intended to live there in the future. This decision seems to indicate what little it took to convince the court to apply the *lex fori,* so much so that it could almost be taken that the court would attempt to find a route back to the *lex fori* as their default methodology.

The seemingly relentless push toward a renewed assertion of the *lex fori* by default was halted in *Wong v. Lee*[134] where an accident occurred in New York, although all the parties to the accident were Ontario-based. The trial judge applied the exception preferring the *lex fori,* Ontario, to the *lex loci delicti,* finding that the difference in the

---

[131] *Tolofson v. Jensen op. cit.* n 71 at 1054

[132] *Wong v. Wei* (1999) 65 BCLR (3d) 222; *Gill v. Gill* 2000 BCSC 870

[133] *Gill v. Gill ibid*

[134] *Wong v. Lee* (2002) 211 DLR (4th) 69

law, that New York law prevented certain deductibles from any award, was enough to amount to an injustice. In delivering the judgment for the Ontario Court of Appeal, Feldman J overturned the trial decision while expressly warning against the invocation of the exception. He asserted that the preceding decisions, discussed above, failed to advert to the policy reasons for the *lex loci delicti* rule, while also criticising the readiness of the court in previous cases to allow the exception by finding injustice in trivial distinctions of law[135] and reasserted the existing public policy to apply the *lex loci delicti.*[136] This renewed vigour in the application of the *lex loci delicti,* and the restraint in deviating from it, continued in *Somers v. Fournier,*[137] mentioned above, where again an interaction between Ontario and New York was being considered. Ontario residents, injured in a motor accident in New York, seized the Ontario courts and on appeal the differences between New York, the *locus delicti*, and Ontario, the forum, were considered. As a matter of substance, the Court of Appeal held that New York law should apply to the case despite that there was a significant connection to Ontario, the forum.[138] The degree of the court's earnestness is illustrated by its affirmation of *Tolofson*'s assertion that the very limitation of an action by the *lex loci delicti* was not sufficient to amount to an injustice warranting the application of the *lex fori* as an exception to the rule.

The decisions in *Wong v. Lee* and *Somers v. Fournier* see a rejection of an exception purely on a consideration of the centre of gravity of a case, the position presently evident in the United Kingdom, rendering it essentially useless as a tool for avoiding the *lex loci delicti*. What remains is essentially a policy-based exception, most evident in international torts, as illustrated in *Tolofson.*

3.4.5 *Public Policy*

---

[135] *ibid* at 75

[136] *ibid* at 77

[137] *Somers v. Fournier op. cit.* n 118

[138] *ibid* at 624

While the four discussed devices for avoiding the *lex loci delicti* vary in their acceptance throughout the common law world, courts have retained the public policy justification zealously as a method to apply the *lex fori* where it is perceived that the application of the *lex loci delicti* would be contrary to the public policy of the forum. Since *Phillips v. Eyre* there has always been the possibility that the application of the *lex loci delicti* together with the double-actionability test, contained therein, could lead to the denial of a claim where the *lex loci delicti* did not allow recovery for a particular type of damage. In such and instance, where there was an evident social deficiency in the decision, the choice of law rules could effectively be dispensed with to allow for the application of the *lex fori*. Alternatively, the public policy exception could be used to avoid an unfavourable outcome without having to declare the external law deficient and unsuitable.

As seen above in *Tolofson* it is apparent that, in Canada, the exception continues to be recognised, although recognised only in the context of international torts. It is clear that the Court was not prepared to accept the existence of the exception for national inter-provincial torts due to the perceived constitutional difficulties and the express desire to ensure uniformity in judicial outcomes throughout the state.[139] La Forest J opined that where an injustice was done by the application of the *lex loci delicti* in an international tort then the option of applying the *lex fori* became available to the court.[140]

The Australian position on the public policy exception, as mentioned above, was formulated in *Pfeiffer* and *Zhang* where, in the former, the court appeared to support the assertion that it was prohibited from denying the application of the law of another national state on the grounds of public policy,[141] effectively confining the application of the public policy exception to international torts. The latter, *Zhang*, saw the court approve that decision from *Pfeiffer* with the net effect that the public policy exception

---

[139] *Tolofson v. Jensen op. cit.* n 71 at 1064-66

[140] *ibid* at 1054

[141] *John Pfeiffer Pty Ltd v. Rogerson op. cit.* n 34 at 533

appears to be available only in international tort situations. Counter to this is the position in the United Kingdom relating to the public policy exception, set out in s14(3)(a)(i) of the 1995 Act,[142] to the effect that the public policy exception is expressly preserved and placed on a statutory footing. The Act allows for the application of the *lex fori*, both intra-nationally and internationally when the *lex loci delicti* would "conflict with principles of public policy."

It is wholly evident that the United Kingdom stands alone in the common law world in allowing the public policy exception without qualification, with other jurisdictions retreating to allowing it only in international situations and even then only where a patent injustice has been done.

3.5 *RENVOI*[143]

As a method for avoiding the application of the *lex loci delicti, renvoi*'s application by the Australian High Court in *Nielson*[144] is seen as a wholly unexpected departure from accepted common law practice, as such it is proposed to undertake a significant examination of *renvoi* given the importance of it's renewed application represents.

We see in the United Kingdom that the application of *renvoi* has largely been excluded by s9(5) of the 1995 Act. That section provides that when considering the applicable law, following the rules set out, the choice of law rules of that other law are not to be considered, irrespective of whether the applicable law is the *lex loci delicti* or the *lex fori*. It would seem that, in the United Kingdom, the utilisation of *renvoi* is limited to those few instances to which the double-actionability rule still applies. The Act seems to have definitively closed the door on *renvoi* going forward in the United Kingdom.

---

[142] Private International Law (Miscellaneous Provisions) Act 1995 (UK)

[143] Ahern, Renvoi's Australian Outing (2007) 15 ISLR 89

[144] *Neilson v. Overseas Projects Corporation of Victoria Ltd op. cit.* n 36

3.5.1 *Neilson v. Overseas Projects Corporation of Victoria Ltd*

As evident from the facts discussed above, the decision in *Neilson* turned on whether the claims brought to trial were time-barred. Bearing the decisions in *Pfeiffer* and *Zhang* in mind, the *locus delicti* was China and under the apparently immovable principle set out therein the applicable law was the *lex loci delicti*. Under Chinese law, the General Principles of Civil Law, Article 8, it was provided that the law of China applied to activities in China and that the limitation period was set at one year [145] unless there were "special circumstances" warranting an extension. [146] Importantly *Pfeiffer* set out that that the limitation laws of the governing law applied.[147]

The argument was raised that under Article 146 of the Chinese GPCL that it would itself apply the law of Western Australia. The article sets out that:

> If both parties are nationals of the same country or domiciled in the same country, the law of their own country or of their place of domicile may also be applied.

As such, the claim was that China would apply the Western Australian period, set at six years, allowing the claim to proceed. Without recounting the facts as discussed above, the High Court of Australia held that indeed there was a *renvoi*, that Western Australian law applied, and that the court must accept the reciprocal *renvoi* from China.

3.5.1.1 *The Whole Law approach*

---

[145] Article 136

[146] Article 137

[147] *John Pfeiffer Pty Ltd v. Rogerson op. cit.* n 34 CLR at 503, 544, 554

Gummow and Hayne JJ rationalised their sudden acceptance of *renvoi* by claiming "the *lex loci delicti* is the whole law of that place."[148] Essentially that under Australian law, when considering the *lex loci delicti*, where it has a choice of law rule that would itself have deferred to some other jurisdiction, the forum must take cognisance of this and give effect to it.

3.5.1.2 *Double Renvoi*

Double *renvoi* calls for the forum court to decide the facts of the case in accordance with the proven principles of the concerned foreign court. In adopting this aspect of the doctrine of *renvoi* Gummow and Hayne JJ in delivering the primary judgment asserted that once it became clear that the application of some external law was required that "the rights and obligations of the parties should be the same whether the dispute is litigated in the courts of that foreign jurisdiction or is determined in the Australian forum."[149] Despite the attempt by McKechnie J, at trial, to reach a decision the Chinese court would have made, his mistake was "to step into the shoes of a foreign judge, exercising that judge's powers as if sitting in the foreign court."[150] This approach was not nearly specific enough to satisfy the demands of the High Court, where Kirby J asserted that the role of the judge "was to ascertain, according to the evidence or other available sources, how the foreign court itself would have resolved the substantive rights of the parties in an hypothetical trial conducted before it."[151] The net result from both approaches is arguably identical, although there is a difference in reasoning. McKechnie J's assertion, at trial, represents an imitation of the assumed decision of a foreign court, whereas the High Court's methodology requires a deeper examination of the foreign law and the reasoning likely adopted in reaching that decision.

---

[148] *Neilson v. Overseas Projects Corporation of Victoria Ltd op. cit.* n 36 CLR at 238

[149] *ibid* at 235

[150] *ibid* at 260

[151] *ibid*

3.5.1.3 *Single Renvoi*

There remains an inherent problem with double *renvoi* in that there is a built-in circularity to the doctrine. This circularity was particularly highlighted by the facts in Neilson where both concerned jurisdictions had choice of law rules applying the rules of the other. In his judgment, Callinan J pointed to what he referred to as the *circulus inextricabilis* evident if Western Australia was required to apply Chinese law that would in turn apply Western Australian law, including the choice of law rule, so moving the question towards Chinese law again. Instead of following the *circulus* endlessly, he chose to settle for a solution that was not "entirely satisfactory intellectually and in logic."[152] The chosen solution was, simply, to accept the *renvoi* from the Chinese court in applying Australian law, as "this is a solution which offers finality, and limits the need to search for and apply foreign law."[153] It is, however, inescapable the evident bias towards the forum and the application of the *lex fori*, where single *renvoi* is adopted, although Callinan J was alone in pursuing the notion of single *renvoi* instead of the double *renvoi* favoured by the majority.

3.5.1.4 *No Renvoi*

Naturally there was always the option open to the court to reject *renvoi* in its entirety, as McHugh J felt appropriate. The court would not have allowed the claim to proceed on the basis of Chinese law, even if the content of Chinese law had been proven in the case. He had already held that the substantive points of Chinese law had not been sufficiently proven, though this assertion is essentially moot given the reluctance to apply the law. Clearly this position, of no *renvoi,* is the most logical following the preceding judgments in *Zhang* and *Pfeiffer* and implies that where reference is made to the *lex loci delicti*, that it is only the domestic side of the *lex loci delicti* that is considered, to the exclusion of any choice of law rules of the *locus delicti.*[154]

---

[152] *ibid* at 277

[153] *ibid* at 278 - 279

[154] *ibid* at 227

3.5.2 *Difficulties Posed by Renvoi's Modern Resurrection*

Mortensen suggests that the conceptual problem underlying *renvoi* is the notion that when the forum is bound by its choice of law rules to apply the law of another jurisdiction, that is must apply the foreign law in it's entirety.[155] Evidently this view was in the minds of the majority of the court in *Neilson* in affirming the application of double *renvoi*. The majority sought to consider the entirety of Chinese law and apply it as such. It has been suggested that choice of law rules are exclusive of internal domestic rules and as such cannot conceptually be taken as part of the whole of the foreign law, a shortcoming of the double *renvoi* and whole law approaches mentioned. The consequent sequence of reasoning is that the forum's choice of law rules, where reference is made to a foreign law, must take cognisance of the foreign law's choice of law rules, where pleaded and proven to the forum court. Where the foreign choice of law rules specify another jurisdiction's laws govern the case the Australian forum must apply that specified law, not the *lex fori* nor *lex loci delicti* by default. Naturally, it is dependant on what is known to the forum court, where no foreign choice of law rules are proven to the court the problem of *renvoi* does not arise, as the forum is assumed to be ignorant of foreign law. In the Western Australian Supreme Court McLure J. observed that the purpose and effect of the combined decisions in *Pfeiffer* and *Zhang* was to identify "the law applicable to the determination of the relevant substantive rights in dispute"[156] rather than the identification of the "jurisdiction or law area which will in turn identify (or facilitate the identification of) the *lex causae.*"[157] It is submitted that the evident result is that *Neilson* effectively reshaped the choice of law rules to create a modified choice of jurisdiction rule.

---

[155] Mortensen, "Troublesome and Obscure": The Renewal of *Renvoi* in Australia (2006) 2 JPIL 1, 12

[156] *Mercantile Mutual Insurance (Australia) Ltd v. Neilson* (2004) 28 WAR 206, 216

[157] *ibid*

From a policy perspectivet, *renvoi* represents a dangerous self-imposed deferral to domestic and choice of law policies of some other jurisdiction. Because of the indiscriminate operation of the doctrine, once applied the net result may be wholly contrary to the public policy of the forum. Naturally, the desire for uniformity of outcome between the foreign court and the forum is in the minds of the forum court, evident in *Pfeiffer* and *Zhang.*[158] Nevertheless, it should not be thought of as a primary justification for the formulation of a choice of law rule, particularly one so deferent to foreign policy. It has been asked why should the forum judge even consider whether uniformity with a possible foreign outcome is desirable?[159] It must be that some other policy reason has created the requirement to refer to the foreign law; traditionally territoriality has been the pre-dominant justification, though satisfaction of party-expectation has become more popular as a justification to refer to a foreign law. Only then should thoughts of uniformity with a likely foreign decision come into the mind of the court. However, where the forum adopts the whole law approach recognising and applying the foreign choice of law regime, it is arguably also ignoring the national policy reasoning that required the application of the *lex loci delicti* by allowing the possibility that another, third law, could be applied.

There is, nevertheless, the possibility that there is no clear policy justification for the course of development of a jurisdiction's choice of law rules. A particular choice of law inclination may exist solely as a construct devoid of policy considerations, its existence dependent on continued judicial application. The adoption of *renvoi* by the Australian High Court appears to have the effect of pre-disposing the forum to ignore the choice of law policies in the forum. We have already seen that in *Pfeiffer* and *Zhang* the High Court had previously discussed, at length, the policy considerations for selecting a choice of law rule. *Pfeiffer* highlighted the importance of territoriality, deterrence of forum shopping, party expectations and certainty of outcome,[160] while

---

[158] *John Pfeiffer Pty Ltd v. Rogerson op. cit.* n 34 CLR at 503, 532, 539; *Regie National des Usines Renault SA v. Zhang op. cit.* n 35 at 533-534

[159] Mortensen *op. cit.* n 155 at 15

[160] *John Pfeiffer Pty Ltd v. Rogerson op. cit.* n 34

in *Zhang* the court's reasoning turned on certainty of result,[161] no doubt influenced by the desire to bring the position for international torts in step with intra-national ones.[162] These justifying thoughts and directions, once applied by the High Court were then rejected by that same court in *Neilson*, on the basis that certainty and simplicity of judgement would be better served by the application of *renvoi* rather than simply ignoring it as an anachronism.[163] In that vain, they avoided making distinctions within the foreign law by applying the whole of the foreign law. Despite these assertions, the argument remains that the application of *renvoi* necessitates the distinction between the foreign regime's own internal rules and it's choice of law rules.[164]

Flowing naturally from this position is the question of which aspect of the foreign law is to be applied, and given priority to, once a distinction is made? Is it not better to select the internal foreign rules rather than preferring foreign choice of law rules, as mandated by double *renvoi*? By their nature, choice of law rules serve to identify an alternate legal system better placed to resolve the issue, in light of this it would seem that the most reasonable position would be the application of the foreign internal rules. Domestic policy, while prepared to eschew its interests in favour of another jurisdiction, should not ignore the consequence of awarding priority to the foreign choice of law rules. Giving primacy to foreign choice of law rules may well result in the application of a third, fourth or fifth legal system. As highlighted earlier, the stated choice of law objective in *Neilson* was ensuring "decisional harmony" with what the foreign law suggested, and harmony with the likely outcome in a foreign court.[165] In attempting to reconcile this policy objective with the preceding objectives in *Zhang*

---

[161] *Regie National des Usines Renault SA v. Zhang op. cit.* n 35 at 517

[162] *ibid* 515 - 516

[163] *Neilson v. Overseas Projects Corporation of Victoria Ltd op. cit.* n 36 at 236 *per* Gummow & Hayne JJ

[164] Mortensen *op. cit.* n 155 at 17

[165] *Neilson v. Overseas Projects Corporation of Victoria Ltd op. cit.* n 36 at 217 - 218

and *Pfeiffer*, it is evident that the only meaningfully concurrent objective is that of deterring forum shopping. Despite the stated importance of territoriality and party expectation, priority was afforded to ensuring uniformity of judgment,[166] to that end foreign choice of law rules were given primacy over its internal counterpart. Notwithstanding that affording priority to the foreign choice of law rules suited the court in this instance, by reverting back to Western Australian law, uniformity of judgment was given a dangerous position above the principles of party expectation, certainty and territoriality despite that uniformity of itself is incapable of amounting to a sufficient policy justification. By following the approach of the High Court, uniformity may not even be assured as the High Court's interpretation of Chinese Law and the likely judicial direction was based on incomplete evidence, and would always be based on incomplete evidence. Arguably, by giving priority to the foreign choice of law rules, the High Court essentially disregarded the established considerations of predictability, party expectation and territoriality as domestic policy justifications for a particular choice of law direction. It is submitted that those objectives, apparently demoted, should be resurrected in place of uniformity, giving renewed importance to the application of foreign internal rules.

It is important to remember that the implementation of double *renvoi* in *Neilson* depends on the foreign state not implementing it itself. Where that foreign state implements double *renvoi* a situation of mutual deference arises, as the foreign court considers how the forum court would decide the case – a wholly unsatisfactory situation as there can be no outcome to that scenario. The direction in *Neilson* is also dependent on the assumption that the foreign court, in the first place, resolves *renvoi* matters brought before it. It is, therefore, with great uncertainty that the court in *Neilson* embarked on resolving how the Chinese court would deal with questions of *renvoi*, should they be brought before the court. Unlike previous authorities[167] the court had no evidence indicating how the Chinese court would deal with the *renvoi* were it posed to it. The established position in *Zhang* for such instances was that the

---

[166] *ibid* at 256

[167] *Estate of Fuld; Hartley v. Fuld (No 3)* [1968] P 675, 701 - 702

court should apply the *lex fori* as normally applicable in domestic cases,[168] though in *Neilson* the court followed the trend established in other aspects of that judgement by assuming that the Chinese court would also have applied the doctrine of double *renvoi*. Notably, this approach results in a stand-off between the two systems with solutions varying from adopting alternative approaches to *renvoi* in each case presented, to alternative approaches to *renvoi* in cases where a stand-off is shown, and further to construct the foreign position in such a manner that it appears as though the foreign court applies double *renvoi*. As it happened, *Neilson* did not necessitate any of these solutions as evidence was presented that the Chinese court would likely have applied the law of Western Australia.

3.5.3 *The Homing Tendency*

Neilson purports to apply the doctrine of *renvoi* for the purpose of realising the goal of international uniformity of outcome in a particular matter. Professor Cowan, earlier, suggested that the true reason for the application of *renvoi* was that:

> the ends of justice will be served just as well, if not better, by the application of the familiar law of the forum rather than the unfamiliar law of a foreign jurisdiction[169]

One has but to follow the steps taken by the High Court to be left with the distinct impression that the court was positively seeking a route by which it could arrive at the door of the *lex fori*, Western Australia. As seen above, the court recognised *renvoi* for the first time (in any guise), allowed evidence to the foreign choice of law rule, ignored established principles it itself laid down in the *Pfeiffer – Zhang* duo of cases.

It is unquestionable that the application of the *lex fori* is preferable to the application of the *lex loci delicti* where it is clearly evident that the centre of gravity of the action

---

[168] *Regie National des Usines Renault SA v. Zhang op. cit.* n 35 at 518

[169] TA Cowan, "*Renvoi* Does Not Involve a Logical Fallacy" (1938) 37 University of Pennsylvania L.Rev 34

lies in the forum and, particularly, where party expectation was such that it was believed that the *lex fori* would govern any tortious action arising from the relationship. Such a desire for the application of the *lex fori* in particular scenarios has been recognised in the exceptions to the default rules in the United Kingdom and Canada, as discussed earlier. As already discussed, minimum criteria for the utilisation of such an exception has been seen to include all parties to the action being forum residents and a particular injustice, since the Canadian decision of *Somers v. Fournier*. It is submitted that such a claim on behalf of Western Australia was particularly weak, so eschewing a traditional escape to the *lex fori* and necessitating the application of *renvoi* to arrive at it. This position of the High Court is perhaps not entirely unexpected given its past tendencies to castigate forum shopping while in the next breath applying the *lex fori* regardless.[170]

3.5.4 *Going Forward*

The decision in *Neilson* has undoubtedly served to resurrect a long forgotten and controversial methodology in choice of law considerations. The decision serves to challenge the scope and remit of the doctrine, challenging the established constraints of *renvoi* to questions of marriage and succession.[171] It is certainly now a part of Australian choice of law rules, though its influence throughout the rest of the common law world may be limited, despite the significance of its implications. As noted earlier, the position in the United Kingdom under the Private International Law (Miscellaneous Provisions) Act 1995[172] expressly prohibits the utilisation of the doctrine in choice of law questions and the new position in Canada, as seen earlier in *Tolofson v. Jensen*, is to allow for a specific exception to the default *lex loci delicti* rule where and "injustice" might otherwise be caused.

---

[170] *Oceanic Sun Line Special Shipping Co Inc v. Fay* (1988) 165 CLR 197, 212; *Stevens v. Head* (1993) 176 CLR 433, 452.

[171] *Macmillan Inc v. Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978, 1008

[172] S 9(5)

Despite the Australian High Court asserting that the adoption of double *renvoi*[173] was not to be taken to intend a change in the position for all cross-border proceedings, there is objectively little in the rationale of the court limiting it solely to tort matters. The decision to choose the "whole" of the *lex causae* together with the stated desire to retain international decisional harmony[174] can easily be applied to all cross-border matters, as such there remains the distinct possibility that the High Court has revived the doctrine to be applied to all areas of the law. Given this, Mortensen suggests[175] that due to the peculiar constraints of Australian choice of law rules, and the particular connection with the parties to the action, the court was particularly motivated to revive the doctrine and that other jurisdictions should be wary of accepting *Neilson* as persuasive authority.

By going to such extraordinary lengths in reviving the doctrine of *renvoi* the High Court took it upon itself to paint a picture of choice of law rules in Australia that differs significantly from the rest of the common law world. With this exceptional approach, there is the price of a lack of escape routes from it, particularly as the application of the doctrine depends of the accuracy of evidence on the state of the foreign choice of law rule being considered. It has been suggested that, as the reason for the application of the doctrine was to revert to the *lex fori*, it would be appropriate to retain an exception to the application of the doctrine in favour of the *lex fori* in situations where the application of double *renvoi* leads to the application of some other system.[176] It would seem from *Zhang,*[177] that a flexible exception is simply not available to the courts with the only exception available is one predicated on public

---

[173] *Neilson v. Overseas Projects Corporation of Victoria Ltd op. cit.* n 36 at 237 - 238

[174] *ibid* at 235

[175] *Mortensen op. cit.* n 155 at 23

[176] Anderson, International Torts in the High Court of Australia (2002) 10 Torts LJ 132, 140 – 141

[177] *Regie National des Usines Renault SA v. Zhang op. cit.* n 35 at 516

policy grounds. *Renvoi* certainly provided the court with an exception to the default application of the *lex loci delicti*, but at the cost of certainty.

There is no doubt that the rigidity of the *Pfeiffer – Zhang* position caused the court to seek out *renvoi* as the alternative escape route from it, and to its credit, it does remedy the inflexibility of the standing position. Despite its attractiveness to the High Court, a flexible exception along Canadian lines would offer significant advantages over a *renvoi*-based approach. As discussed earlier, the Canadian exception is truly an exception rather than a default rule, and activating only where there is a patent injustice.[178] Considering the certainty benefits of this alternative, questions of the application of the *lex fori* are based on considerations of geographical connecting factors, it does not allow for an open-ended reference to a third, fourth, fifth or sixth legal system. More recently, the Supreme Court of Canada tested its flexible exception against the inherently more uncertain doctrine of *renvoi* in *Castillo v. Castillo.*[179] The court, while considering the potential application of Californian law and in particular a limitation period, was not prepared to follow the High Court in supplanting its indigenous flexible exception for the double *renvoi* expounded in *Neilson*. This case serves to highlight the clear demarcation of the threshold for the application of the *lex fori,* in place of the default *lex loci delicti*, evident with the "flexible" exception, in contrast to the uncertainties surrounding double *renvoi.*

The most recent English decision on the availability of *renvoi* to the English courts is *Iran v. Berend.*[180] The case concerned a historical archaeological fragment whose owner had been injuncted from selling having acquired it in 1974. The argument brought to the court by The Islamic Republic of Iran was that the English court should apply the whole of the French law rather than simply its domestic law, such a concession would require the application of an exception to the *lex situs* rule and so apply Iranian law as it was the state of origin of the artefact. The defendant, Denyse

---

[178] *Somers v. Fournier op. cit.* n 118

[179] *Castillo v. Castillo* (2005) 2 SCR 870, 2005 SCC 83

[180] *Iran v. Berend* [2007] EWHC 132 (QB)

Berend, argued that as the item is movable property and she acquired her title while the artefact was in France, the relevant rules that should be applied were French ones. Under Article 2262 of the French Code, were they to be applied, she would have obtained possession either through good faith or prescription, on the basis that she had possessed it for more than 30 years. In considering the doctrine of *renvoi*, Eady J. stated:

> There is no binding authority to the effect that English private international law will apply the *renvoi* doctrine to such questions. Whether or not it should apply in any given circumstances is largely a question of policy. To take examples, it has been applied most frequently in the context of the law of succession; on the other hand, it is not applied in the fields of contractual relations or tort. It seems that the modern approach towards *renvoi* is that there is no over-arching doctrine to be applied, but it will be seen as a useful tool to be applied where appropriate (i.e. to achieving the policy objectives of the particular choice of law rule): see e.g. *Raiffeisen Zentralbank Österreich AG v Five Star Trading* LLC [2001] QB 825, at [26]-[29], *per* Mance LJ; *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54, High Court of Australia.[181]

Eady J. drew from previous decisions on *renvoi* in order to assess its current applicability in English law. Millet J. had, in *Macmillan v. Bishopsgate Investment Trust plc (No. 3),*[182] asserted that:

> In my judgment there is or should be no scope for the doctrine of *renvoi* in determining a question of priority between competing claims to shares, and in the absence of authority which compels me to do so – and there is none – I am not willing to extend it to such a question.[183]

---

[181] *ibid* at para 20

[182] *Macmillan v. Bishopsgate Investment Trust plc (No. 3)* [1995] 1 WLR 978, 1008

[183] *ibid*

Dicey, Morris & Collins[184] appear to have been relied on by Eady J. having considered judgments on similar factual scenarios:

> As a purely practical matter it would seem that a court should not undertake the onerous task of trying to ascertain how a foreign court would decide the question, unless the advantages of doing so clearly outweigh the disadvantages. In most situations, the balance of convenience surely lies in interpreting the reference to foreign law to mean its domestic rules.

Eady J. did however recognize that *renvoi* might have a place in English law:

> I can think of a number of reasons why it *might* be desirable to apply generally, in dealing with national treasures or monuments, the law of the state of origin but that is a matter for governments to determine and implement if they see fit. As Millett J himself observed (also at p. 1008):
>
> > [The doctrine of *renvoi*] owes its origin to a laudable endeavour to ensure that like cases should be decided alike wherever they are decided, but it should now be recognised that this cannot be achieved by judicial mental gymnastics but only by international conventions.[185]

It is this last sentence that perhaps summarises the reality of *renvoi*, while it might be desirable in certain circumstances, the inherent uncertainty, unworkability and unpredictability do not lend *renvoi* to a modern legal order and similar results could be achieved by international instrument. Eady J. concluded that to:

> ...hold that, as a matter of English law, there is no good reason to introduce the doctrine of *renvoi* and that title to the fragment should thus be determined

---

[184] Dicey, Morris & Collins, *Conflict of Laws* (14th ed. 2006)

[185] *Iran v. Berend op. cit.* n 180 at para 30

in accordance with French domestic law.[186]

As a final criticism of *renvoi* it must be questioned whether it is not more appropriate to decline jurisdiction outright, to allow the foreign court to decide the matter rather than to haphazardly attempt to decide the case before the foreign court in a matter the foreign court would while applying foreign laws with which the domestic court has no expertise. The application of *forum non conveniens* may well be the more responsible choice by a national court insistent on applying the whole of a foreign system, by allowing the foreign court to decide the matter, the national court's objective of international uniformity of outcome remains intact. The national court, by simply deferring to the foreign jurisdiction, would ensure consistency in determination and compliance with legitimate party expectation.

[186] *ibid* at para 31

3.6 IRELAND

Owing to our particular history, and ties, with the United Kingdom, the position regarding the choice of law in torts runs in parallel to that in the United Kingdom, although the position has not been settled since the decision in *Grehan v. Medical Incorporated and Valley Pines Association.*[187]

The Irish position until 1986, and in many ways since 1986, was that contained in *Phillips v. Eyre, Chaplin v. Boys* and the more recent Privy Council decision in *Red Sea Insurance Co. Ltd. v. Bouges S.A.* [188] without any significantly different application of the decisions in those cases. At the time, the Irish position was a virtual facsimile of the English Position. The Supreme Court decision in *Grehan* involved the rejection of the *Phillips v. Eyre* in favour of a more flexible approach devoid of set rules, considered on a case-by-case basis. The case was not, however, directly concerned with a choice of law question but with the determination of the *locus delicti* in a question of extra-jurisdictional service of documents. In tentatively outlining a new direction for Irish choice of law rules, the Supreme Court held that service should be allowed out of the jurisdiction where it could be shown that "*any* significant element has occurred within the jurisdiction" but that the court was under "a heavy burden...to examine the circumstances of each case". In advocating this seemingly generous and flexible position the court emphasised the importance of interpreting and applying any rule "in a way designed to ensure that justice and practical common sense prevail."[189]

While the decision was directed at a jurisdiction question, it is not beyond the realms of possibility that the thinking set out in *Grehan* could also be applied post-jurisdiction, to determine choice of law questions. Walsh J. considered, *obiter*, choice of law thinking in Ireland at the time. He made the observation that, at the time, there

---

[187] *Grehan v. Medical Incorporated and Valley Pines Association* [1986] IR 528

[188] *Red Sea Insurance Co. Ltd. v. Bouges S.A.* [1995] 1 AC 190

[189] *Grehan op. cit.* n 187 at 541

was no decision addressing questions of choice of law in tort. Walsh J. admitted that the existing rule in *Phillips v. Eyre* could have 'some superficial attractions,"[190] but was less favourable in his examination of the limbs of that test. In a reasoned assessment of the consequences of the first limb of the standing position, Walsh J. asserted that the limb was:

> not acceptable notwithstanding the support received in the British House of Lords in *Chaplin v. Boys* because it would close the door of the Court to every action in tort not recognised in Irish Law.[191]

In the same breath he alluded to an inherent inflexibility with the system as it stood, particularly where a party was in a vulnerable position. Walsh J asserted that it:

> ...would require the application of Irish law even though the case had no connection at all with Ireland except that the defendant perhaps took refuge thereafter the tort was committed.[192]

Concerning the second part of the rule, that the act must not have been ""justifiable"" by the law of *locus deliciti*, he asserted that in his opinion the use of "not justifiable" was an unsatisfactory situation given the "ambiguity of the term"[193] and recognised that "in other jurisdictions this branch of the rule has given rise to difficulties and to some controversial decisions."[194] Walsh J. continued his scathing criticism of the established approach in the next few sentences of his judgement finding it "has

---

[190] *ibid*

[191] *ibid*

[192] *ibid*

[193] *ibid*

[194] *ibid*

nothing to recommend it"[195] and that it was parochial in nature. He then sketched in broad outline the approach he felt more appropriate in this jurisdiction:

> In my view, the Irish courts should be sufficiently flexible to be capable of responding to the individual issues presented in each case and to the social and economic dimensions of applying any particular choice-of-law rule in the proceedings in question.[196]

What Walsh J. advocated, in essence, was an *à la carte* approach to selecting the applicable choice of law. While clearly advantageous in some circumstances, the approach is inherently flawed in that it is ultimately too skeletal, lacking in direction and consistency.

Since that decision there has been only one real consideration of its applicability and acceptability as a part of modern Irish law. In *An Bord Trachtála v. Waterford foods plc,*[197] Keane J. in the High Court considered the effects of the purported restatement of Irish choice-of-law rule and the interaction with the preceding position in *Phillips v. Eyre.* From the outset Keane J. insisted that that Walsh J.'s comments in *Grehan* were obiter, although clearly entitled to the greatest of respect. Keane J. drew further attention to the nature of the case in *Grehan*, it was a matter concerning jurisdiction rather than considerations of substantive matters. Given the historical difficulties facing judiciaries and the application and/or modification of the rule in *Phillips v. Eyre* Keane J. adverted to the desirability of leaving any reconsideration of the position to the legislature rather than compounding any perceived problems with further judicial activism.

Factually, problems arose in the eyes of Keane J. when the second stage of the *Phillips v. Eyre,* as modified by *Chaplin v. Boys*, was considered. *Chaplin* called for

---

[195] *ibid*

[196] *ibid*

[197] *An Bord Trachtála v. Waterford foods plc* [1994] FSR 316

the application of the *lex fori* together with the *lex loci delicti*, doing so required evidence to the extend of foreign law. Consequently, Keane J. reserved judgement on whether *Phillips v. Eyre* was at all applicable in Ireland, and the extent that any modifications apply to it, while at the same time refusing to follow the Supreme Court's direction in *Grehan*.

The importance of this deviation, by Keane J., cannot be understated as it appears to eschew the Supreme Court's comments, although obiter, with the established two-stage test. Further, it casts outright doubt on the tenability of that previous position in Irish law. In disregarding the obiter comments, Keane J. is nevertheless justified by the imprecision and vagueness of the principle's enunciation in *Grehan*. The Supreme Court also, notably, failed to take cognisance of the potential of *Chaplin v. Boys* to mitigate the "parochial" effects of *Phillips v. Eyre*. Since *Grehan* we have seen the decision in *Red Sea Insurance Co. Ltd. v. Bouges S.A.* also having the net effect of mitigating the harshness of *Phillips v. Eyre* by extending the scope of judicial discretion in the field. All told, given these considerations, together with the looming reality of a new regulation emerging from the EU standardising the approach to choice of law in non-contractual situations, it is submitted that Keane J. was justified rejecting the direction of the Supreme Court in *Grehan*.

The net Irish position at common law is somewhat clouded by conflicting precedent, clearly representing an unsatisfactory status quo for such an important, yet under-considered, area of the law. There is no doubt that clarity in this area is necessary and despite the Rome II Regulation, it nevertheless remains important to arrive at a satisfactory position at common law. It is submitted that the decisions discussed earlier in Canada represent good persuasive authority for a suitable direction for the development of the principle here, although *Red Sea* offers authority, closer to home, of a direction less radical to the discussed Canadian approach. Were the matter subjected to direct scrutiny in the Supreme Court, it is submitted that the court would likely reject *Grehan* in favour of following the *Red Sea* qualifications to *Phillips v. Eyre* rather than preferring the more radical developments seen elsewhere in the common law world.

3.6.1 *Sample Scenarios Considered*

Scenario A – Traffic Accident

As distinct from the other common law jurisdictions considered, it is clear from the preceding pages that the approach in Ireland has not developed in favour of the *lex loci delicti*. Instead, the Irish court, in *Grehan*, has advocated an *a-la-carte* approach favouring flexibility *in extremis*. However, given the comments in *An Bord Trachtála* it is submitted that there is no absolute clarity in Ireland at common law.

Applying the *a-la-carte* approach to the facts at hand it is submitted that the court would likely revert to the *lex fori* given the connection of the plaintiff, Bob, to the forum and the lack of connection of any party to the *locus delicti*.

Scenario B – Publication of Defamatory Material

In the context of interstate defamation and the instant facts, it is submitted that a court applying the prevailing Irish common law position would examine all the relevant issues in determining a final choice of law. In this particular instance issues such as the respective positions on the imposition of liability would weigh in the mind of the court in determining a final choice of law. However, it is suggested that the court, much like a court in the United Kingdom, would likely apply the *lex fori* were it seized.

Scenario C – Products Liability

In the context of the products liability action, at hand, it is submitted that the court would likely apply the *lex fori* given the prevailing priority of balancing the interests of the parties to the action and the overwhelming connection to the jurisdiction.

Thomas, a forum domiciliary was injured as a result of a surgical procedure conducted in the forum. The court, in *Grehan*, asserted that justice and common sense should prevail and it is submitted that justice and common sense would indicate the application of the *lex fori* to the instant facts.

EUROPE

In light of, and building on, the treatment of choice of law in the context of the private international law regimes in the United State of America and other common law jurisdictions considered earlier, the focus will now shift from the new world and return to the old world. Given the stagnation in choice of law jurisprudence and innovative change in the United States of America over the past thirty years, the return to the old world is significant, not just for its size but, for the fact that it is the old world that has yielded new thought in the past generation in the context of private international law. Fundamentally, as a matter of European Union law, where there was chaos there is now unity.

This chapter aims to consider the evolution of choice of law in torts rules in Europe, focusing on its revival as a matter of European concern, in the early twenty-first century, and its progression through the legislative stages. The main focus of this section must, naturally, be the completed European legislative instrument, Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II).

Before moving to consider the Rome II Regulation it is vital to impress, at this stage, the difference in nature between the choice of law regimes considered to this point and the European choice of law regime for torts under the Regulation. The difference is stark, notably because the regimes considered above, owing to their common law heritage, share a propensity for elaborating broad, ambiguous, approaches that defer to the needs of individual justice and fairness. It is, however, acknowledged that the Australian approach elaborated in the High Court of Australia, in particular in *John Pfeiffer v. Rogerson,*[1] marks that jurisdiction apart from the others of common tradition. It will be seen that the European regime presents a solution quite different to those considered above, a comprehensive rule driven regime that is neither too broad with respect to individual rules nor all embracing in the same vein as the First Restatement in the United States of America. Further, the regime under the Regulation cannot, immediately, be characterised as similar to the Second

[1] *John Pfeiffer v. Rogerson* (2000) 172 ALR 625

Restatement in that it merely attempts a loose transcription of common law principle. Professor Reese characterised the failings of rule driven regimes in the United States of America in the following terms:

> The current unpopularity of rules in choice of law is believed to be primarily an overreaction to the failure of previous attempts at rule making in tort and contract. These rules were few in number and all embracing in character. Essentially there was but one rule in tort, namely, that a person's rights and liabilities should be determined by the law of the state where defendant's allegedly tortious act first caused injury to plaintiff.[2]

4.1 EARLY HISTORY

The European experiment in the harmonisation of choice of law rules began in the early years of the communities when the need for such measures was first identified. The scope of the original investigations included contractual and non-contractual relationships, property law and number of general questions such as *renvoi*, *ordre public*. Given the approaches considered to this point, the European private international law project was a hugely ambitious undertaking. Efforts began in the late 1960's following a similar effort by the Benelux states in 1967 in producing a draft proposal for a uniform private international law.[3] Those governments approached the Commission of the Communities, as it was at the time, proposing that efforts to both unify and codify private international law rules in the six member states proceed based on the efforts of the three Benelux states. In seeking to enact a single, common, set of choice of law rules throughout the member states, in their relations with other members and in dealings with external states, a great advantage could be had in the fields of legal and economic certainty. It remains true that the harmonisation of private international law rules throughout member states of the Communities, now the Union, allows for the practical implementation of legitimate choice of jurisdiction

---

[2] Reese, Choice of Law: Rules or Approach (1972) 57 Cornell L.Rev 315, 319

[3] Nadelmann, The Benelux Uniform Law on Private International Law (1970) 18 Am. J. Comp. L. 406

agreements and provide a more realistic and workable alternative to the harmonisation of substantive law throughout the Community. Mr. Vogelaar, Director General for the Internal Market and Approximation of Legislation, in his speech to the Working Group in 1969, highlighted that in his opinion that:

> According to the letter and spirit of the Treaty establishing the EEC, harmonisation is recognised as fulfilling the function of permitting or facilitating the creation in the economic field of legal conditions similar to those governing and internal market.[4]

Further that

> ...there are still legal fields in which the differences between national legal systems and the lack of unified rules of conflict definitely impede the free movement of person, goods, services and capital among the Member States.[5]

So long as substantive law remained unique amongst the members, unification of private international law rules and principles afforded the most efficient method of approximating a unified internal market position allowing the stated aims of the Community, the free movement of goods, services and capital. The members agreed, subject to German reservations, that such an endeavour was in the interest of the market and should proceed.

Following the initial submission by the Working Group of experts on the original areas of interest to the Commission, authorisation was given, on 15 January 1970, to continue work on the unification of private international law in those four original areas. Continuing in earnest, the Working Group of Experts convened to consider the areas put to it by the Commission. The Working Group did not take an isolated approach in considering the respective positions of the six member states only, rather it took a decidedly more expansive approach in considering the merits of many

---

[4] Minutes of the meeting of 26 – 28 Feb. 1969, pp. 3, 4, 9

[5] *ibid*

international approaches. As mentioned above, the Working Group had the Benelux instrument within reach, together with a much earlier French draft of its own private international law,[6] the recently published Second Restatement in the United States and a number of Hague Conference measures in tort.[7] From the outset it was decided that any proposal be "universal" in nature rather than based on a system of mutual reciprocity. This "universal" approach, it is submitted, is inherently necessary for the effective administration of a regime aimed at harmonising internal market situations, particularly as a reciprocity based approach does comparatively little to address fundamental uncertainties and inconsistencies in outcomes throughout the communities. Professor Mario Giuliano, the Italian representative in the Working Group, drafted proposals for both contractual and non-contractual obligations, culminating in 1972 when submitted to the Committee of Permanent Representatives of the Council for deliberation.

Following the 1972 submission, the Preliminary EEC Convention on the Law Applicable to Contractual and Non-Contractual Obligations was ready. Despite the progress made, the Working Group decided to reduce the scope of their considerations and concentrate solely on contractual obligations. Their rationale, in making the decision, was that the majority of member states at the time applied the *lex loci delicti* to tortious situations by default. The product of the Working Group's endeavours was to be the 1980 Rome Convention on the Law Applicable to Contractual Obligations, without a choice of law in tort dimension to it.

It is important to remember that prior to the Maastricht Treaty there was no inherent competence for the Community/Union to legislate in the field of private international law. Article 293 (ex 220) EC had provided that:

> Member States shall, so far as necessary enter into negotiations with each other with a view to securing for the benefit of their nationals ... the

---

[6] (1970) 59 *Revue critique de droit international privé* 832

[7] Convention of 4 May 1971 on the Law Applicable to Traffic Accidents; Convention of 2 October 1973 on the Law Applicable to Products Liability

simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

The Maastricht treaty established a competence in Justice and Home Affairs matters, the third pillar, and following the Amsterdam Treaty's establishment of an area of freedom, security and justice, Article 65 TEC then provided a direct legislative competence in private international law:

> Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include:
>
> a) improving and simplifying:
>
> - the system for cross-border service of judicial and extrajudicial documents,
>
> - cooperation in the taking of evidence,
>
> - the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;
>
> b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
>
> c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

The status quo remained until the Tampere summit of the European Council in 1999 where it was re-affirmed that the principle of mutual recognition was the cornerstone of judicial cooperation in the community following the provision of the Amsterdam

Treaty covering the creation of an area of freedom, security and justice.[8] Following this, the Council and Commission's Vienna Action Plan required the "drawing up a legal instrument on the law applicable to non-contractual obligations"[9] although there was no commitment in the Action Plan to adopt any such instrument upon its drafting.

In order to facilitate this goal, the Commission initiated a consultation period, beginning 3 May 2002, and by 31 October 2002 approximately 80 submissions had been made to the Commission regarding the outline proposals. Looking at the responses as a whole, the level of enthusiasm for such a measure varied wildly from outright rejection and dismissal to enthusiastic approval for such a measure. Interestingly, private business was significantly more sceptical about European influence in the sphere of choice of law in torts than academics and practising legal professionals. Concerns were raised with most aspects of the Commission's outline proposal, from the very need for such a measure, to the breadth and scope of the proposed measure. The Commission noted:

> The reaction ranged from blunt refusal of the draft Regulation as a while to approval with some points of criticism. It is worth noting that business was more critical of the draft than representative of legal professions, academics, and Member States, who in general welcomed the draft.[10]

Despite the wide-ranging criticism of any proposed instrument,[11] the Commission pressed ahead with the completion of the harmonisation of the rules of private international law in civil and commercial matters, essential in the Commission's view to the establishment of an area of freedom, security and justice.

---

[8] [1999] OJ C 19/1

[9] Action Plan, para 40 (b)

[10] http://ec.europa.eu/justice_home/news/consulting_public/rome_ii/news_summary_rome2_en.html

[11] eg. *The Rome II Regulation*, Lords Select Committee on the European Union, 8th Report, Session 2003–04, HL Paper 66

4.2 PARLIAMENT'S LEGISLATIVE ROLE

With the coming into force of the Treaty of Nice,[12] on 1 February 2003, the European Parliament acquired new powers and competences in the European legislative mechanism. As such, all matters falling within the scope of Article 65 TEC, reproduced above, required direct input from Parliament under the co-decision procedure established by Article 251 TEC.

The Commission asserted the general purpose of the entire legislative initiative in choice of law at a European level in the following terms:

> This proposal for a Regulation would allow parties to determine the rule applicable to a given legal relationship in advance, and with reasonable certainty, especially as the proposed uniform rules will receive a uniform interpretation from the Court of Justice. This initiative would accordingly help to boost certainty in the law and promote the proper functioning of the internal market. It is also in the Commission's programme of measures to facilitate the extra-judicial settlement of disputes, since the fact that the parties have a clear vision of their situation make it all the easier to come to an amicable agreement.[13]

It is not proposed to examine the substantive provisions of the original, initial, proposal published by the Commission. However the reception of, and response to, the proposal is of greater importance. It is, nevertheless, important to mention and outline the thrust of the Commission's original proposal.[14] The material scope of the proposal, set out in Article 1, was similar in nature to the existent jurisdiction regime in that it purported to apply to "civil and commercial matters," generally, with

---

[12] OJ C80, 1

[13] COM (2003) 427 FINAL

[14] *ibid*

exclusions against revenue, customs, property and succession matters, amongst others. The general rule of the proposal's regime, set out in Article 3, was that the law applicable was to be the law of the country in which the damage arises or likely to arise, irrespective of the country in which the event giving rise to the damage occurred or of the country or countries in which indirect consequences of that event arise. The proposal refined the general rule with a common habitual residence exception and an escape in favour of some other country manifestly more closely connected with the non-contractual obligation. Put simply, the general rule mandated the application of the *lex loci damni.*

The proposal also purported to govern "violations of privacy and rights relating to personality" through the application of the law of the victim's habitual residence, set out in Article 6.

Moving to consider the response, it is important to first mention the House of Lords in the United Kingdom. In advance of any official response to the Commission's proposal by a European Institution, the House of Lords' European Union Committee considered the proposal from the perspective of the United Kingdom.[15] Without considering specific observations on the original proposal it is significant to note that the considered reaction of the House of Lords was not positive towards the proposal:

> The Regulation raises a serious question of *vires.* The Commission has not shown a convincing case of "necessity" within the meaning of Article 65 TEC. Further, on any construction of Articles 61 and 65 of the EC Treaty there must be the most serious doubts that the proposal can have universal application and can be used to harmonise substantive rules of damages. We urge both the Council and the Parliament to give the most careful consideration to the issue.
>
> There is no evidence of which we are aware that there are such problems in the application of the Member States" conflicts rules in this area as require the

[15] "The Rome II Regulation," 8th Report of Session 2003 – 2004 (HL Paper 66) (HL Report) 7 April 2004

> introduction of a Community measure. The justification provided by the Commission in its Explanatory Memorandum is unconvincing and fails to pay due regard to the views of industry, commerce, the media and legal practitioners. We invite the Council and the Parliament to look critically at the question whether there is a real practical need for the Regulation.[16]

It is highly significant that amongst the chorus of disapproval of the Commission's proposal ranked the leading authorities in English private international law, Sir Peter North[17] and Sir Lawrence Collins.[18] The latter, pointedly, noted:

> The arguments for adoption of a Regulation are wholly unconvincing. The Commission's website on harmonisation makes it clear that its aim is the ultimate harmonisation of rules relating to applicable law. Although the effect of the revised EC Treaty is that the Community has the power to take measures harmonising rules of private international law, it is fanciful to suppose that a regulation to harmonise private international rules for non-contractual obligations is "necessary for the proper functioning of the internal market."[19]

Further that:

> Apart from showing the United Kingdom's commitment to the European

---

[16] *ibid* at paras 184 -185

[17] Co-editor, Cheshire & North, *Private International Law* (13th ed., 1999); Consultant Editor, Cheshire, North & Fawcett, *Private International Law* (14th ed., 2008); Chair, Ministry of Justice Departmental Advisory Committee on Private International Law Matters (North Committee)

[18] Senior editor, Dicey, Morris & Collins, *The Conflict of Laws* (14th ed., 2010); Justice of the Supreme Court of the United Kingdom, Retired

[19] Memorandum, para 1 (HL Report, Evidence)

ideal, I see no advantage to businesses or individuals in participation.[20]

Following from the House of Lords report, but not building upon it, the European Parliament began, in earnest, to consider and assume its legislative competence with respect to the proposal published by the Commission. It is significant that Parliament's rapporteur Diana Wallis MEP,[21] from a common law background in the United Kingdom, practised as a solicitor before election to the European Parliament. As such, it is not insignificant that there emerged particular differences between the position adopted by the Commission, in its original proposal, and that adopted by Parliament at first reading in July 2005.[22] Again, without considering, in detail, the specific provisions of the pre-legislative position, the difference amounted to an ideological difference in approach between the traditionally European approach adopted by the Commission, of specific rules, against a more flexible position adopted by Parliament.[23]

While not rejecting the Commission's proposed general *lex loci damni* rule, Parliament attempted to temper any resultant rigidity in the general rule with a displacement formula applicable in instances where a fact pattern might be manifestly more closely connected with a jurisdiction other than the *lex loci damni*. What is significant is that in elaborating a displacement formula the rapporteur also elaborated a number of connecting factors that appear familiar given the consideration of the position in the United States of America earlier in this text:

> The factors that may be taken into account as manifestly connecting a non-contractual obligation with another country include:

---

[20] *ibid* at para 6

[21] Liberal Democrat, Yorkshire and Humber; Vice President of the European Parliament

[22] OJ C157E, 371 [6 July 2005]

[23] EP Document A6-211/2005 FINAL [27 June 2005]

a) as far as loss-distribution and legal capacity are concerned, the fact that the person(s) claimed to be liable and the person(s) sustaining loss or damage have their habitual residence in the same country or that the relevant laws of the country of habitual residence of the person(s) claimed to be liable and of the country of residence of the person(s) sustaining loss or damage are substantially identical;
b) a pre-existing legal or de facto relationship between the parties, such as, for example, a contract, that is closely connected with the non-contractual obligation in question;
c) the need for certainty, predictability and uniformity of result;
d) protection of legitimate expectations;
e) the policies underlying the foreign law to be applied and the consequences of applying that law.[24]

The most significant observation to make in the context of the preceding consideration of the position in the United States of America is that, in the determination of a manifestly closer connection with another jurisdiction to displace the law otherwise applicable, the rapporteur purported to introduce governmental interest analysis into European private international law as a means of achieving a degree of flexibility. The rapporteur asserted that:

> For the sake of clarity, consistency and an appropriate measure of flexibility, the rapporteur has opted for a flexible general rule which should apply to all torts/delicts in the absence of a choice of law or of special rules set out in the succeeding articles, together with a provision indicating circumstances in which, exceptionally, that rule may be displaced by virtue of the existence of a manifestly closer connection with a country other than that indicated by the general rule. It is considered that this provision can cater for product liability, unfair competition and violations of the environment.[25]

---

[24] *op. cit.* n 22 Article 4(3)

[25] *ibid*

Further, and significantly, that:

> Paradoxically, excessively rigid - ostensibly simple - rules do not necessarily lead to greater legal certainty or to predictability of outcome, which is so important for practitioners. For instance, such rules often result in the Courts using recategorisation of issues as procedural in order to do justice in particular cases.[26]

Taking the modified general rule, proposed by the Parliament, at first reading as a sample for the general trend in the legislative process concerning the embryonic Regulation, it is significant that Parliament was rebuffed by the Commission on publication of its amended proposal early in 2006[27] and by the Council's Common position adopted in September 2006.[28] Taking the displacement of the general rule, again, as an example the Council's version of the rule reverted to the original text proposed by the Commission:[29]

> Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.[30]

The significant observation to make, at this stage, is that attempts by the rapporteur and Parliament to introduce a degree of refined flexibility into the provisions of the

---

[26] *ibid*

[27] COM (2006) 83 FINAL

[28] OJ C289, 68 [28 November 2006]

[29] *op. cit.* n 13

[30] *ibid*

general rule, as a sample, had failed. The further observation to make is that, in the context of the displacement provision of the general rule, attempts to incorporate governmental interest analysis into the scheme of European private international law also failed. However all did not welcome the introduction of this form of interest analysis. Professor Fawcett noted that:

> Yet it would be hard to think of an approach which is less likely to produce uniformity of law than interest analysis. To reach agreement amongst nine member States any rules adopted must be non-controversial which can hardly be said of interest analysis. Neither does interest analysis produce the certainty, predictability and fulfilment of the parties' expectations which are regarded as being such important values in civil law systems, so it is likely to be as unpopular with other member States as it would in England.[31]

It is submitted that the rejection of the additional factors inserted by the rapporteur amount to an implicit rejection of true flexibility and discretion as understood and elaborated under the multiple methodologies manifest in the United States of America today.

Further, Dickinson forebodingly notes, however, that:

> On almost every significant point of dispute, the Commission's approach, if not its preferred wording, would ultimately prevail over that of the Parliament.[32]

On second reading[33] it must be noted that the distance between the Council and

---

[31] Fawcett, Is American Governmental Interests Analysis the Solution to English Tort Choice of Law Problems (1982) 31 ICLQ 150 at 166

[32] Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (2008 OUP)

[33] EP Document A6-0481/2006 FINAL [18 January 2007]

Commission's Common Position and Parliament was less stark than it was at first reading. Again, taking the example of the displacement provision in the general rule, Parliament accepted the text as originally proposed by the Commission and adopted by the Council. However, that is not to say that there was not distance between Parliament and the Council / Commission Common Position. The distance was highlighted by Council's rejection of the position adopted by Parliament at second reading on 19 April 2007.

In the course of Parliamentary debate, in advance of Parliament's second reading position, the rapporteur highlighted the difficulties faced by Parliament in assuming its new legislative competence. This was evidenced by repeated rejection of the most important of its amendments by the Council and Commission. The rapporteur further highlighted the importance of the new competence vested in Parliament:

> We need this, and we, here in Parliament, want to get it done, but it has to be done in the right way. This has to fit the aspirations and needs of those we represent. This is not just some theoretical academic exercise; we are making political choices about balancing the rights and expectations of parties before civil courts.

Further that:

> I am sorry that we have not reached an agreement at this stage I still believe that it could have been possible, with more engagement and assistance. Perhaps it is because both the other institutions are not used to Parliament having codecision in this particular area – I am sorry, but you will have to get used to it![34]

The final observation to make about the legislative process is that, following the rejection of the Parliament's position at second reading, a Conciliation Committee was convened to facilitate the final adoption of a final text. The final text was voted

[34] EP Document CRE 18/01/2007-4

on by Parliament and adopted on 10 July 2007. It is worth noting that the Conciliation Committee convened for the purposes of the Regulation was the first instance in which such a committee had been convened.

Following the adoption of the final measure by the Parliament, the rapporteur expressed mixed feelings:

> I am not entirely sure that we got it right. I find I have been congratulated from many quarters, which makes me a little nervous. Then we are still trying to have the same debates around Rome I and the review of the consumer *acquis*. We have, at some point, to get this relationship correct.[35]

Further that Parliament was responsible for:

> ...bringing private international law into the open to serve the practical needs of our citizens...[36]

It is submitted that the latter sentiment rings true. The zeal with which the rapporteur approached her task, in challenging the established *status quo* in the legislative process in private international law, served to generate lively and engaged discussion. It further served to narrow the effects of any perceived democratic deficit manifest in the legislative process in the European Union. However, as the rapporteur asserted in the former sentiment, the relationship between the European institutions was not correct.

Considering, in the whole, the nature and extent of Parliament's eventual impact on the final Regulation it is submitted that only the faintest traces of influence remain. In the context of the flexibility, individualisation and discretion, the rapporteur sought to incorporate into the Regulation the faint traces of influence are brightest in the recitals to the Regulation:

---

[35] EP Document CRE 09/07/2007-22

[36] *ibid*

> The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice. This Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Therefore, this Regulation provides for a general rule but also for specific rules and, in certain provisions, for an "escape clause" which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules. Equally, it enables the Court seised to treat individual cases in an appropriate manner.[37]

Professor Symeonides accurately describes the Recital as:

> ...what survives from the rapporteur's and Parliament's efforts to inject more flexibility into the text of the general Rule. As noted earlier, the Council and Commission rebuffed these efforts and Recital 14 is the resulting compromise. While much of this Recital is self-congratulatory and merely describes the scheme of Rome II.[38]

4.3 THE REGULATION – ROME II[39]

Characterised as a "kind of conflicts revolution, European style,"[40] it is proposed to

---

[37] Recital 14

[38] Symeonides, Rome II and Tort Conflicts: A Missed Opportunity (2008) 56 Am J Comp L 173, 199

[39] Regulation EC No. 864/2007 on the law applicable to non-contractual obligations (Rome II)

[40] Meeusen, Rome II: A True Piece of Community Law, Ahern & Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New*

turn from considering the progress and evolution of the Regulation and consider the impact and effect of the Regulation itself. It is proposed to consider a number of distinct aspects of the Regulation including: Certainty v. Flexibility; Scope;[41] the general rule[42] and specific rules.[43] It is not proposed to consider every aspect of the Regulation moreso to consider the general scheme of the Regulation and primary provisions. It is important to have regard to the preceding chapters in considering the submissions below.

4.3.1 *Certainty v. Flexibility*

Before turning to consider the Regulation, in substance, there are a number of preliminary issues that must be considered for the purposes of enabling a fuller and more accurate consideration of the Regulation itself. The first preliminary matter that must be considered for the present purposes is the relationship between the Regulation and other European private international law instruments. At the present moment in time the Regulation exists as part of a wider regime at European level with the existence of regulations elaborating common provisions for jurisdiction[44] and choice of law for contractual obligations.[45] As such, the provisions of the Regulation set out that it must not exist in isolation but that it must take account of the instruments concerning jurisdiction and choice of law for contractual obligations, albeit only in the recitals to the Regulation:

International Litigation Regime (2009 Nijhoff) at 8; Michaels, The New European Choice of Law Revolution (2008) 82 Tulane L.Rev 1607

[41] Articles 1 - 3

[42] Article 4

[43] Articles 4 - 13

[44] Regulation EC No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I)

[45] Regulation EC No. 593/2008 on the law applicable to contractual obligations (Rome I)

> The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and the instruments dealing with the law applicable to contractual obligations.[46]

The reference to the other European private international law instruments is significant in that it draws the jurisprudence of the European Court of Justice with respect to the Brussels I Regulation into the realm of the present Regulation. As such, a number of concepts central to the jurisdiction regime, under the provisions of the Brussels I Regulation, carry forward and are equally central to the substantive provisions and operation of the present Regulation.

Given the centrality of the concepts outlined in the Brussels I Regulation to the present Regulation it is important to mention broader, overarching, concepts carried over, at this stage, and deal with specific examples as they arise. The most important general concept that must be considered, particularly given the consideration of parliament's role in the legislative process culminating in the present Regulation, is the balance, or potential lack thereof, between certainty and predictability against the needs of individual justice. Recital 16 goes some way to summing up the difficulties involved:

> Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage…[47]

In addition to this, there is an explicitly expressed "need to do justice in individual cases" in Recital 14, set out above.[48] In the context of the remaining traces of

---

[46] Recital 7

[47] Recital 16

[48] *op. cit.* n 37

Parliament's attempt to introduce flexibility into the provisions of the Regulation. However, against this there is also the explicit need for certainty and predictability:

> The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the Court in which an action is brought.[49]

As such, it is submitted that there is an apparent difficulty in reconciling supposed twin objectives of certainty and individual justice. However the apparent difficulty, it is submitted, might not be so difficult to reconcile upon closer examination of the Recital itself and existing jurisprudence of the European Court of Justice. The first observation to be made in examining Recital 14 is that it is clearly intended to guide and assist in the application and interpretation of the "escape" provision in the general rule[50] and the specific rules.[51] Article 4(3), an example typical of the subsequent iterations of the "escape," provides that:

> Where it is clear from all the circumstances of the case that tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.[52]

It is not proposed to fully consider the operation of the "escape" at this stage; however, it is important to consider it in respect of the balance between certainty and

---

[49] Recital 6

[50] Article 4(3)

[51] Articles 5 - 12

[52] Article 4(3)

fairness in the present Regulation. It is worth noting is that while it is useful to take cognizance of Recital 14 in the interpretation of Article 4(3), it is submitted that the combination of the two provisions do anything but yield certainty. The first observation worth making is that the Recital sets out the objective and purpose of the "escape" as furthering the requirements of legal certainty and the need to do justice in individual cases, rather than identifying instances where there might be a manifestly closer connection.

The second observation to be made is that the language of the Recital and Article 4(3) make clear that, in the determination of a "manifestly closer connection with another country," the only factors that should be considered are the jurisdictional connections with competing states. It is clear, from the language employed in Article 4(3) and Recital 14, that the connecting factors referred to are objective in nature and reject a comparative consideration of the impact of the application of competing laws in the determination of a manifestly closer connection, in light of the objectives of certainty and individual justice. As such, the combination of Article 4(3) and Recital 14 fundamentally reject interest analysis as a central component of the "flexible framework of conflict-of-law rules"[53] elaborated in the present Regulation. It is submitted that the rejection of interest analysis is significant in that highlights the inherent tension in European private international law between true individual justice against the perceived requirement for systemic certainty in furtherance of the "proper functioning of the internal market."

The third observation touches, directly, on that tension between certainty and individual justice in European private international law. It is clear from Recital 14 that in setting out the already mentioned objectives of the "escape" that no priority was explicitly afforded to either the "requirement of legal certainty" or "the need to do justice in individual cases." At first glance, it would appear that the two seemingly conflicting objectives carry equal weight and priority.

At second glance, and on closer examination, it appears that there is, in fact, an order

[53] Recital 14

of priority between the dual objectives of the purportedly "flexible" element of the choice of law regime elaborated by the present Regulation. The source for the prioritization is twofold with the first source being a closer examination of the specific language of the provisions of Recital 14. The first sentence of Recital 14 sets out that:

> The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice.[54]

It is submitted that there is a fundamental qualitative difference between a "requirement" and a "need" in the context of a determination of priority between the two purportedly essential elements the area of justice enabled by the present Regulation. Despite the relatively strong expression of "need" it is submitted that a failure to achieve the needs of a regime would ultimately be more acceptable than a failure to achieve the requirements of that regime. Considered objectively, and in the absence of further guidance, it is submitted that it cannot but be concluded that the "requirement" would likely be considered by the European Court of Justice to be the dominant objective of the "escape" provisions in the Regulation. In the context of the Rome II Regulation, given the absence of jurisprudence from the European Court of Justice, it is further submitted that there exists a fundamental ambiguity of purpose attached to "escape" provisions of the general and special choice of law rules elaborated in the Regulation.[55] It is likely that the European Court of Justice will consider this question.

However, at this stage, it is submitted that there is guidance from the European Court of Justice on the balance between certainty and individual justice, ultimately discretion, in the context of European private international law. Given that the present Regulation must be interpreted in accordance with the Brussels I Regulation under the

---

[54] *op. cit.* n 37

[55] Symeonides, Rome II and Tort Conflicts: A Missed Opportunity (2008) 56 Am J Comp L 173 at 199

provisions of Recital 7,[56] it is essential to examine the position of the European Court of Justice with respect to that instrument.

Given the link to the Brussels I Regulation it is further significant that that Regulation built on, and assumed into its corpus, the jurisprudence of the European Court of Justice with respect to the much older Brussels Convention.[57] As such, it becomes necessary to revert to the Brussels Convention rather than the Brussels Regulation for guidance on the issue of discretion's place in European private international law. Two decisions of the European Court of Justice are significant: *Custom Made Commercial Ltd v. Stawa Metallbau GmbH*[58] and the significant, recent, case of *Owusu v. Jackson.*[59]

The action in *Stawa Metallbau GmbH*[60] concerned an action between German and English parties to a commercial contract. The facts of the action are not wholly relevant for present purposes as they relate to a contractual obligation but the point of interest for present purposes relates to the European Court of Justice's interpretation of Article 5(1) of the Brussels Convention. The issue was neatly asserted by the Court:

> It has been submitted, certainly, that the criterion of the place of performance of the obligation in question which specifically forms the basis of the applicant's action, a criterion expressly laid down in Article 5(1) of the convention, may in certain cases have the effect of conferring jurisdiction on a

---

[56] *op. cit.* n 46

[57] Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304) (Brussels Convention)

[58] C-288/92 *Custom Made Commercial Ltd v. Stawa Metallbau GmbH* Case [1994] ECR I-2913

[59] C-281/02 *Owusu v. Jackson* Case [2005] ECR I-1383

[60] *op. cit.* n 58

> court which has no connection with the dispute, and that, in such a case, the criterion explicitly laid down should be departed from on the found that the result it yields would be contrary to the aim of Article 5(1) of the Convention.[61]

In essence, the argument put to the Court was that, in an instance where the outcome of an action might not be explicitly in furtherance of the aims of the Convention, residual discretion might be exercised against the application of the provisions of the Convention. The argument was rejected. The European Court of Justice asserted that:

> The use of criteria other than that of the place of performance, where that confers jurisdiction on a court which has no connection with the case, might jeopardize the possibility of foreseeing which court will have jurisdiction and for that reason and for that reason be incompatible with the aim of the Convention.[62]

Further that:

> The effect of accepting as the sole criterion of jurisdiction the existence of a connecting factor between the facts at issue in a dispute and a particular court would be to oblige the Court before which the dispute is brought to consider other factors, in particular the pleas relied on by the defendant [*in the particular case*], in order to determine whether such a connection exists and would thus render Article 5(1) nugatory.[63]

Finally that:

> Such an examination would also be contrary to the purposes and spirit of the

---

[61] *ibid* at para 16

[62] *ibid* at para 18

[63] *ibid* at para 19

> Convention, which requires an interpretation of Article 5 enabling the national court to rule on its own jurisdiction without being compelled to consider the substance of the case.[64]

There are two main observations to make about the decision in *Stawa Metallbau GmbH* before moving to consider the *Owusu v. Jackson.* The first, minor, observation its that the European Court, as early as 1994, rejected the notion that it should resort to considering the substance of a case in order to arrive at a determination as to the appropriate jurisdiction, or applicable law for present purposes. In more familiar language, the European Court rejected interest analysis as an appropriate means to ascribe jurisdiction.

The second, major, observation to make is that the Court appeared fixated with the importance of certainty and foreseeability of outcome to the extent that any deviation from the mechanical rigidity of the prescribed regime under Article 5(1) of the Convention "might jeopardize the possibility of foreseeing which court will have jurisdiction."[65] What is striking about the decision of the European Court is that, even in the face of an outcome potentially contrary to the aims of the regime elaborated by the Convention, it asserted the importance of adhering to the provisions of the prescribed regime in the interests of foreseeability of outcome with scant regard for the reality of outcome of the action at hand. It might be asserted that in that particular instance the European Court was presented with a theoretical argument but it is submitted that the position of the European Court in *Stawa Metallbau GmbH* served as a marker for the future.

4.3.2 *Owusu v. Jackson*

Moving to that future and, in particular, the controversial decision in *Owusu v. Jackson*[66] decided on 1 March 2005. The facts of *Owusu* are important for the

---

[64] *ibid* at para 20

[65] *op. cit.* n 62

[66] *op. cit.* n 59

purposes of highlighting the particular difficulties faced in the action. The claimant, Mr. Owusu, suffered a serious accident rendering him a tetraplegic while holidaying in Jamaica. Mr. Owusu was a British national domiciled in the United Kingdom at the time of the accident and subsequently brought an action in the United Kingdom for a breach of contract and in tort against Mr. Jackson, also a British domiciliary. For present purposes it is important to focus on the action in tort and also important to remember that the harmful event, the accident, occurred in Jamaica, a non-convention state.

Mr. Owusu claimed that the British Court was the appropriate jurisdiction for the action under the provisions of Article 2 of the Convention:

> Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the Courts of that State.
> Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.[67]

In response, Mr. Jackson and the other named defendants sought a declaration declining jurisdiction on the basis that "the action had closer links with Jamaica and that the Jamaican courts were a forum with jurisdiction in which the case might be tried more suitable for the interests of all the parties and the ends of justice."[68] In reality, the defendants, and the government of the United Kingdom on reference to the European Court, sought to apply the common law principle of *forum non conveniens* to a fact pattern falling within the scope of the Brussels Convention. It must be remembered that the connected states to the action were the United Kingdom and Jamaica.

Given that only one contracting state to the Convention was involved in the action it is submitted that it would be reasonable to assert that the scheme of that Convention

---

[67] Brussels Convention *op. cit.* n 57 Article 2

[68] *op. cit.* n 59 at para 15

might not have applied as a cross-border matter, for the purposes of that Convention, did not exist. The European Court noted that this argument was indeed advanced:

> Mr. Jackson and the United Kingdom Government also emphasizes, in support of the argument that Article 2 of the Brussels Convention applied only to disputes with connection to a number of Contracting States, the fundamental objective pursued by the Convention which was to ensure the free movement of judgments between Contracting States.[69]

Although this argument was ultimately rejected:

> It follows from the foregoing that Article 2 of the Brussels Convention applies to circumstances such as those in the main proceedings, involving relationships between the Courts of a single Contracting State and those of a non-Contracting State rather than relationships between the Courts of a number of Contracting States.[70]

For present purposes it is the European Court's subsequent consideration of the compatibility of the doctrine of *forum non conveniens* with the scheme of the Convention that is essential is identifying the priority of the European Court. At this stage, and before considering that position, it must be observed that, in an instance where the European Court insisted on the application of the Convention to an action involving only one contracting state, it was unlikely that the European Court would look favourably on the incorporation of an inherently discretionary, potentially subjective, measure into the framework of a mechanistic Community regime.

Given this disposition, the European Court of Justice vehemently opposed the introduction of *forum non conveniens*, specifically, and discretionary residual measures serving to trump the operation of the Convention in appropriate circumstances. The European Court of Justice asserted:

---

[69] *ibid* at para 32

[70] *ibid* at para 35

> Application of the *forum non conveniens* doctrine, which allows the Court seised a wide discretion as regards the question of whether a foreign courts would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently undermine the principle of legal certainty, which is the basis of the Convention.[71]

The European Court went on to acknowledge the particular injustice that would be the result of the adherence to the mechanistic, rule-driven, regime of the Convention but was unmoved:

> The defendants in the main proceedings emphasise the negative consequences which would result in practice from the obligation the English courts would then be under to try this case, inter alia as regards the expense of the proceedings, the possibility of recovering their costs in England if the claimant's action is dismisses, the logistical difficulties resulting from the geographical distance, the need to assess the merits of the case according to Jamaican standards, the enforceability in Jamaica of a default judgment and the impossibility of enforcing cross-claims against other defendants.[72]

Further that:

> In that regard, genuine as those difficulties may be, suffice it to observe that such considerations, which are precisely those which may be taken into account when *forum non conveniens* is considered, are not such as to call into question the mandatory nature of the fundamental rule of jurisdiction contained in Article 2 of the Brussels Convention…[73]

---

[71] *ibid* at para 41

[72] *ibid* at para 44

[73] *ibid* at para 45

As such, it must be observed that despite a compelling fact pattern, where only one contracting state to the Convention was connected to the action and where a genuine and damaging injustice would be effected by adherence to the rigid rule prescribed by the Convention, the European Court rejected all appeals to do justice in the individual case at hand. As such, it is clear the even in the most compelling of circumstances the European Court of Justice has actively prioritised legal certainty and the unwavering operation and integrity of the mechanistic regime elaborated as part of the European private international law regime.[74]

It is submitted, at this early stage, that the European Court's preoccupation with adherence to the letter of the rules elaborated in the legislative instrument should recall the consideration of the regime elaborated by Professor Beale in the First Restatement in the United States of America, considered earlier in this thesis. Further, it is submitted that the failings and criticisms of that regime are particularly relevant and should be borne in mind in judging the present Regulation.

Returning to the present Regulation in the context of the European Court's apparent rejection of flexibility in the interests of individual cases. In considering the present Regulation, Dickinson accurately notes that:

> Not only is the introduction of a subjective, discretionary element in the rule of displacement inconsistent with the language and legislative history of Recital 14, it is inimical to the approach taken by the ECJ in its case law concerning the Brussels Convention, an instrument closely linked to the Rome II Regulation.[75]

---

[74] Fentiman, Choice of Law in Europe: Uniformity and Integration (2008) 82 Tulane L.Rev 2021; Fentiman, Ahern & Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (2009 Nijhoff) at 108

[75] Dickinson *op. cit.* n 32 at para 3.26

It is further submitted that it is important to reflect on Recital 7[76] in the context of the balance between certainty and flexibility. It is submitted, at this stage, that Recital 7 compounds the plight of flexibility as understood at common law in the United States, under the multitude of approaches there, and the majority of other common law states, as considered earlier, and as striven for by the rapporteur and Parliament during the legislative process.

What is significant about Recital 7 is that although, at first glance, it would appear to promote only the harmonious interpretation of the three European private international law instruments, the true effect of the recital is somewhat different. It must be noted that the Rome I Regulation on the choice of law for contractual obligations contains a recital drafted using virtually identical language but the Brussels I Regulation on jurisdiction and recognition and enforcement of judgments contains no such similar provision. It must also be noted that there has been no proposal, to date, in the review process of the Brussels I Regulation to include a similar provision.[77] The true effect of Recital 7, it is submitted, is more sinister in the context of the order of priority between certainty of outcome and flexibility referred to above[78] in that it creates a two-tier private international law regime at European level in which jurisdiction is the primary issue and choice of law questions are relegated to a secondary position.

Taking the two similar provisions in the Rome II[79] and Rome I[80] Regulations, and viewing them from the perspective of those instruments, it is clear that the two choice

---

[76] *op. cit.* n 46

[77] Procedure 2010/0383 (COD)

[78] Recital 14

[79] Regulation EC No. 864/2007 on the law applicable to non-contractual obligations (Rome II) Recital 7

[80] Regulation EC No. 593/2008 on the law applicable to contractual obligations (Rome I) Recital 7

of law instruments must be interpreted and applied with regard to the principles established as a result of respective litigation and the provisions of the Regulations themselves. As such, the two instruments are mutually interdependent. Taking, then, the provisions of the choice of law Regulations against the jurisdiction Regulation, Brussels I, it is striking that, in the absence of a corresponding interpretation provision in the Brussels I Regulation, the interaction of the instruments operates in a manner that elevates Brussels I above the choice of law instruments. Put simply, Rome II and Rome I must be consistent with Brussels I whereas there is no reciprocal interpretive obligation in the application of Brussels I. It is submitted that the net effect of the absence of a corresponding provision in Brussels I is to relegate the choice of law instruments to a subservient position with respect to principles taken from the jurisdiction instrument.

Returning to the tension between certainty and flexibility in the context of the "escape" provisions in the present Regulation, it is submitted that the position within the Regulation, in Recital 14, is that certainty is prioritised by the text of the instrument. Further, with respect to the Brussels I Regulation it is clear that certainty prevails. It is, finally, submitted that given the interpretative obligation in the scheme of the present regulation, discretionary flexibility is inimical to the general scheme of European private international law, as expressed by the European Court of Justice in consideration of the Brussels I Regulation, and internally within the present Regulation. This section has focused on Article 4(3) but it must be noted that similar provisions are evident in Article 5(2), Article 10(4), Article 11(4) and Article 12(2)(c) and, as such, the submissions made apply equally to those provisions in the context of the relationship between certainty and the needs of individual justice.

While there is as yet no jurisprudence from the European Court of Justice on this particular, vital, point with regard to the present Regulation, it may be argued that, given the above, *Owusu v. Jackson* and its mechanistic rigidity could easily translate into the landscape of the present Regulation. Further, that Parliament's impact on this issue is non-existent in real terms. Further, again, the experience gained from the experience in the United States of America did nothing to either bolster the efforts of Parliament to inject a new strain of flexibility into European private international law or counter the rule-driven rigidity of the established European position. Professor

Kozyris[81] notes in the context of the broader scheme of the present Regulation but, nevertheless applicable for present purposes:

> ...I do not agree that the recent reforms in Europe constitute another conflicts revolution. Rather, they employ the traditional methods and criteria in more specialized ways to refine the choices, not to abandon the traditional approach through a nebulous pursuit of the Holy Grail. It is true that the American conflicts revolution had some impact abroad in the sense that it provoked a welcome rethinking of the traditional premises and that it opened up new perspectives, but it by no means changed the terrain in a fundamental way.[82]

Additionally, expressing similar sentiments, Professor Symeonides accurately notes:

> These two bodies [*Council and Commission*] must have concluded that uniformity would be in jeopardy if Rome II were to have too many flexible rules or escape clauses. This was a plausible, though not necessarily the best, conclusion.[83]

Fentiman further notes, in the broader context of the functioning of the earlier mentioned "escape" as part of the general scheme of the Regulation from a common law perspective, that:

> Time will tell how Article 4 will operate, and how the Court of Justice will mould it. But there is reason to suppose that Article 4(3) is less significant in the scheme of the Regulation than it seems. Those who saw in the flexible exception some relief from the implacable certainties of the Community approach to private international law may be disappointed. Those who put

---

[81] Professor of Law, Emeritus, Universities of Thessaloniki and Ohio State

[82] Kozyris, Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides' "Missed Opportunities" (2008) 56 Am J Comp L 471

[83] Symeonides *op. cit.* n 38 at 56 [*emphasis added*]

> their trust in the Recitals to the Regulation, with their encouraging commitment to flexibility, may find themselves frustrated by the logic of Article 4. And those for whom choice of law in tort is an ancient skill, honed in seminars and the journals, may have little chance to practise their craft within Article 4.[84]

Heffernan notes, fundamanetall, that:

> A striking feature both of the exception to the general rule and the escape clause is the mandatory character of the language. These mechanisms do not give a national judge a discretion to displace the general rule (or in the case of the escape clause, both the general rule and the exception) with a solution that the judge deems to be the best fit.[85]

It is submitted that, even at this stage in the consideration of the present Regulation, it cannot be avoided that the trend experienced in the United States of America, considered above, is unlikely to be repeated in the old world.

4.3.3 *Autonomy of Meaning*

A further general concept arising from the relationship between the present Regulation and other community instruments that must be considered, albeit more briefly, is that of autonomy of meaning within the provisions of the Regulation. The concept of autonomy of meaning is first alluded to in the recitals to the Regulation:

> The concept of a non-contractual obligation varies from one Member State to

---

[84] Fentiman, The Significance of Close Connection, Ahern & Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (2009 Nijhoff) 85 at 112

[85] Heffernan, Rome II: Implications for Irish Tort Litigation, Ahern & Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (2009 Nijhoff) 257 at 269

> another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. The conflict-of-law rules set out in this Regulation should also cover non-contractual obligations arising out of strict liability.[86]

Put simply, where a term or phrase is deemed to be an autonomous concept it is understood to have acquired a "community meaning" within the scope of application of the legislative instrument in question. The number and extent of autonomous concepts in the present Regulation is, however, much broader than Recital 11 implies. Given the position of the present Regulation with respect to the jurisprudence of the Brussels I Regulation, considered in a specific context above, it is significant that there exists a line of jurisprudence highlighting and asserting the importance and extent of autonomous concepts in European private international law. As such, it is important to mention a number of decisions of the European Court, by way of example, to illustrate the issue: *Tessili v. Dunlop;*[87] *LTU v. Eurocontrol;*[88] *Kalfelis v. Schröder*[89] and *Shearson Lehman Hutton v. TVB.*[90]

The first two cases mentioned, *Tessili* and *Eurocontrol*, represent the earliest actions in the European Court of Justice concerning the Brussels Convention but also represent conflicting interpretations and understandings of community concepts. In *Tessili* the European Court was considered whether "place of performance of the obligation in question" required a community meaning for the purposes of Article 5(1) of the Brussels Convention. The European Court asserted:

---

[86] Recital 11

[87] Case 12/76 *Industrie Tessili Italiana Como v. Dunlop AG* [1976] ECR 1473

[88] Case 29/76 *Lufttransportunternehmen GmbH v. Eurocontrol* [1976] ECR 1541

[89] Case 189/87 *Kalfelis v. Bankhaus Schröder* [1988] ECR 5565

[90] Case C-89/91 *Shearson Lehman Hutton v. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligunger GmbH* [1993] ECR I-139

> In order to eliminate obstacles to legal relations and to settle disputes within the sphere of intra-community relations in civil and commercial matters the Convention contains, *inter alia*, rules enabling the jurisdiction in these matters of courts of Member States to be determined and facilitating the recognition and execution of court judgments. Accordingly the Convention must be interpreted having regard both to its principles and objective and to its relationship with the Treaty.[91]

Further that:

> The convention frequently uses words and legal concepts drawn from civil, commercial and procedural law and capable of a differing meaning from one Member State to another. The question therefore arises whether these words and concepts must be regarded as having their own independent meaning and as being thus common to all the Member States or as referring to substantive rules of the law applicable in each case under the rules of conflict of law of the Court before which the matter is first brought.[92]

The European Court considered that there existed substantial differences between the substantive provisions of the Member States concerned and failed to elaborate a community meaning for the "place of performance of the obligation in question:"

> Having regard to the differences obtaining between national laws of contract and to the absence at this stage of legal development of any unification in the substantive law applicable, it does not appear possible to give any more substantial guide to the interpretation of the reference made by Article 5(1) to the "place of performance" of contractual obligations. This is all the more true since the determination of the place of performance of obligations depends on the contractual context to which these obligations belong.[93]

---

[91] Case 12/76 *Industrie Tessili Italiana Como v. Dunlop AG op. cit.* n 87 at para 9

[92] *ibid* at para 10

[93] *ibid* at para 14

Irrespective of the outcome in that particular instance, that the European Court of Justice did not elaborate a community meaning for the purportedly autonomous term, the significance of the decision is that the European Court entertained the idea that particular concepts necessitate a common meaning for the proper functioning of a common regime.

Moving from a decision in which the European Court failed to elaborate a community meaning to one in which it did, *LTU v. Eurocontrol* must be considered and is directly relevant for the purposes of the present Regulation. In *LTU* the European Court of Justice considered, first, the concept of autonomy of meaning and, second, the meaning of "civil and commercial matter" under Article 1(1) of the Brussels Convention. For the present purposes it is only necessary to consider the European Court's position on the issue of autonomy of meaning.

The Court elaborated a position somewhat contradictory to that in *Tessili* by asserting that a concept as fundamental and overarching as "civil and commercial matter" must be understood in the community context, free from the political and legal idiosyncrasies prevalent in individual member states. The European Court of Justice asserted emphatically that:

> As Article 1 serves to indicate the area of application of the Convention it is necessary, in order to ensure, as far as possible, that the rights and obligations which derive from it for the Contracting States and the persons to whom it applies are equal and uniform, that the terms of that provision should not be interpreted as a mere reference to the internal law of one or other of the States concerned.
>
> By providing that the Convention shall apply "whatever the nature of the Court or tribunal" Article 1 shows that the concept "civil and commercial matters" cannot be interpreted solely in the light of the division of jurisdiction between the various types of courts existing in certain States.
>
> The concept in question must therefore be regarded as independent and must

be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems.[94]

This assertion of autonomy has been accepted and consistently asserted[95] and so should be regarded as vital munitions in the European Court's armoury enabling it to effectively illuminate areas of vagueness present in European legislative instruments, and so facilitating the goal of legal certainty and predictability of outcome.

4.3.4 *Scope of the Regulation*[96]

Having considered the tensions between the purported twin objectives of certainty and flexibility in individual cases due to the interrelationship between the three European private international law instruments, and the corollary premise that particular concepts assume a common meaning across the gamut of legislative instruments, it then becomes essential to consider the main thrust of the Regulation. The examination begins with the scope of application of the Regulation set out, primarily, in Article 1(1).

> Article 1
> Scope
> 1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State

---

[94] Case 29/76 *Lufttransportunternehmen GmbH v. Eurocontrol op. cit.* n 88 at para 3

[95] eg. Case C-172/91 *Sonntag v. Waidmann* [1993] ECR I-1963; Case C-7/98 *Krombach v. Bamberski* [2000] ECR I-1956

[96] generally see Hohloch, Place of Injury, Habitual Residence, Closer Connection and Substantive Scope: The Basic Principles (2007) 9 Yearbook of Private International Law 1 at 13

authority (*acta iure imperii*).[97]

While the whole of Article 1 sets out the material scope of the Regulation it is the first sub-section, directly above, that is most significant. The remaining sub-sections set out the exclusions to the material scope of the Regulation and will be considered below, separately. The first observation to make about Article 1(1) is that there are three conditions that must be satisfied before the Regulation can apply in some form or another. First, there must be a conflict of laws. Second, there must be a non-contractual obligation and third, the action must be civil or commercial in nature. Considering the first observation, briefly, it is submitted that it would have been preferable, in the interests of neutrality and absolute clarity, to use "situations involving foreign elements" rather than the text as promulgated, it is conversely accepted that any ambiguity, however slight, will cause little issue in reality as the mere presence of a foreign elements should indicate the necessity to apply the regime of the Regulation.

4.3.5 *Non-Contractual Obligations*[98]

The second criteria set out in the first sentence of Article 1(1) poses greater difficulty. In considering the second criterion, "non-contractual obligation," the first, most essential, observation to make is that the Regulation sets it out as an autonomous concept in the manner considered above. Recital 11 sets out:

> The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. The conflict-of-law rules set out in this Regulation should also cover non-contractual

---

[97] Article 1(1)

[98] generally see Scott, Ahern & Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (2009 Nijhoff) at 57

obligations arising out of strict liability.[99]

From a common law perspective, before considering the autonomous meaning attaching to the concept, an early observation to make is that torts are specifically included in the Regulation[100] but that they are included in a manner that designated them as a sub-category of liability together with unjust enrichment,[101] *negotiorum gestio*[102] and *culpa in contrahendo.*[103] The further, critical, implication is that the Regulation purports to apply to obligations only and does not, therefore, wholly correlate with the entire corpus of tort law as understood in Ireland and in the United Kingdom. As such, traditionally understood torts such as conversion or matters relating to questions of personal status or matters relating to questions of property, in which there is no specific obligation, would all fall outside the scope of the regulation and therefore be determined by domestic provisions irrespective of the fact that there might be a cross-border element involved.

Aside from the newfound importance of obligations in the context of what is traditionally known as choice of law in tort the second, arguably more significant, aspect of the new terminology is that it is defined negatively as an obligation that is "non-contractual." Given that the present Regulation exists as a part of a greater private international law regime, and given the interpretative obligation present in Recital 7 of the present Regulation, it is clear that there is clear demarcation between the two European choice of law instruments. It is significant that language prioritising the definition of "contractual obligation" serves as the starting point for understanding the scope of "non-contractual" obligation for present purposes. In addition, much like the preceding issues, the jurisprudence of the European Court of Justice with respect

---

[99] Recital 11

[100] Articles 4 - 9

[101] Article 10

[102] Article 11

[103] Article 12

to the jurisdiction regime is significant and, as submitted above, is in fact more relevant than jurisprudence relating to the Rome I Regulation or its predecessor, the Rome Convention.

The first case example to consider is the important case of *Kalfelis v. Schröder*[104] in which there three distinct claimed heads of liability: a contractual obligation; in tort for unconscionable conduct and in unjust enrichment. A significant aspect of the European Court's decision, for present purposes, is the distinction made between "matters relating to a contract" and "matters relating to tort, delict and quasi-delict" for the purposes of establishing jurisdiction. The European Court asserted that:

> It must therefore be stated in reply to the first part of the second question that the term "matters relating to tort, delict or quasi-delict" within the meaning of Article 5(3) of the Convention must be regarded as an independent concept covering all actions which seek to establish the liability of a defendant and which are not related to a "contract" within the meaning of Article 5(1).[105]

In its final analysis, the European Court required that individual bases of jurisdiction be founded for each claimed head of liability to the extent that the heads were not so closely connected that they could not be heard together under Article 22 of the Convention.[106] However, aside from the beginnings of a definition for a "non-contractual obligation," what is truly significant about the decision in *Kalfelis*, borne out in subsequent decisions and evident in the text of the three European private international law regulations, as they stand today, is the difference in the basis upon which a choice of law can be made compared to the basis upon which jurisdiction can be selected.

The Brussels Convention and successor instrument, the Brussels I Regulation, employ

---

[104] Case 189/97 *Kalfelis v. Bankhaus Schröder Münchmeyer* [1988] ECR 5565

[105] *ibid* at para 18

[106] *ibid* at para 19 - 20

"matters relating to tort, delict or quasi delict"[107] as opposed to "non-contractual obligation"[108] as used in the present Regulation. Again, it is submitted that the terminology used is somewhat unfortunate in that there is a distinct lack of consistency between the jurisdiction and choice of law regimes with the potential effect of a lack of correspondence between the instances of application of the respective regulations.

Nevertheless, it is important, at this stage, to consider the precise understanding of "contractual obligation" for the purposes of attempting an accurate interpretation of the corollary negative definition of a "non-contractual obligation," especially given their interrationship.[109] Having already considered *Kalfelis v. Schröder* the most significant decisions of the European Court of Justice to consider in elaborating "contractual obligation" for present purposes are *Peters v. Zuid,*[110] *Handte v. TMCS*[111] and *Engler v. Janus Versand.*[112] It is not necessary to consider *Peters v. Zuid* in significant detail apart from a number of minor factors. First, *Peters v. Zuid,* like *Handte v. TMCS,* considers the implications of the Brussels Convention and so refers to "matters relating to a contract" as opposed to "contractual obligation." Second, and most significant for present purposes is that the European Court in *Peters v. Zuid* asserted that "matters relating to a contract" was another autonomous concept for European purposes, again asserting the importance of uniformity in the European legal order:

---

[107] Brussels I *op. cit.* n 44 Article 5(3)

[108] Rome II *op. cit.* n 39 Article 1(1)

[109] Tang, The Interrelationship of European Jurisdiction and Choice of Law in Contract (2008) 4 Journal of Private International Law 35

[110] Case 34/82 *Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging* [1983] ECR 987

[111] Case 26/91 *Jakob Handte & Co GmbH v. Traitements Mecano-Chimiques des Surfaces SA* [1990] ECR I-3967

[112] Case C-27/02 *Engler v. Janus Versand GmbH* [2005] ECR I-1481

> Therefore...the concept of matters relating to a contract should be regarded as an independent concept which, for the purpose of the application of the Convention, must be interpreted by reference chiefly to the system and objectives of the Convention, in order to ensure that it is fully effective.[113]

Further, most importantly, the Court asserted a tentative definition of "matters relating to a contract":

> In that regard it appears that membership of an association creates between the members close links of the same kind as those which are created between the parties to a contract and that consequently the obligations to which the national court refers may be regarded as contractual for the purpose of the application of Article 5 (1) of the Convention. [114]

What is significant about the decision of the European Court of Justice is not that it identified "matters relating to a contract" as an autonomous concept, nor that it asserted that pure membership of an association constituted a contractual relationship. The significance of the decision is that the concept of a contractual relationship, at European level, differed from the domestic position in this instance. The difference in position highlights the significance of autonomous concepts as, in this particular instance, the concept reflected the prevailing trend amongst the majority of member states with little deference to forum interests.

Turning to *Jakob Handte v. TMCS*, the European Court of Justice took a significant step further in elaborating a clear definition of "matters relating to a contract" by asserting that:

> It follows that the phrase "matters relating to a contract," as used in Article

---

[113] Case 34/82 *Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging* at paras 9 - 10

[114] *ibid* at para 13

> 5(1) of the Convention, is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another.[115]

On close reading, it is submitted that the European Court's assertion did not wholly identify the limits of a contractual obligation, rather it identified a situation which did not fall under the umbrella of "matters relating to a contract."[116] It is submitted that the decision highlights a practical implication of the terminology in the Brussels Convention and Brussels I regulation, both in force today, that a specific contractual relationship is not strictly necessary for the invocation of jurisdiction as a "matter related to a contract." This has been since identified by the Court in *Engler v. Versand*, considered in greater detail immediately below:

> ...it must be observed that it is clear from the case-law, first, that although Article 5(1) of the Brussels Convention does not require the conclusion of a contract...[117]

As such, it is submitted that the decision in *Jakob Handte v. TMCS* was not entirely satisfactory as a basis for identifying and founding contractual liability despite subsequent, repeated, affirmation in the European Court.[118]

Turning to *Engler v. Versand,*[119] the European Court of Justice considered again the nature of "contract" in the context of the Brussels Convention when considering whether an action was contractual or delictual for the purposes of that convention.

---

[115] Case 26/91 *Jakob Handte & Co GmbH v. Traitements Mecano-Chimiques des Surfaces SA op. cit.* n 111 at para 15

[116] Dickinson *op. cit.* n 32 at paras 3.113 – 3.114

[117] Case C-27/02 *Engler v. Janus Versand GmbH op. cit.* n 112 at para 50

[118] *e.g.* Case C-51/97 *Reunion Europeenne v. Spliethoff* [1998] ECR I-6511; Case C-265/02 *Frahuil SA v. Assitalia SpA* [2004] ECR I-1543

[119] Case C-27/02 *Engler v. Janus Versand GmbH op. cit.* n 112

The fact pattern of the action was that the claimant had received a "payment notice" letter that purported to identify her as a prizewinner in a cash draw to the amount of ATS 455,000 (approximately €33,000). The defendant company refused to release payment and the claimant took action under a provision of Austrian law requiring the defendant company to release the requisite funds. The question for the Court was whether the action was one in contract or one characterised more properly characterised as delictual. In characterising the action as a "matter relating to a contract" the European Court asserted that:

> Accordingly, the application of the rule of special jurisdiction provided for matters relating to a contract in Article 5(1) presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimants action is based.[120]

Further that:

> From that moment at least, the intentional act of a professional vendor in circumstances such as those in the main proceedings must be regarded as an act capable of constituting an obligation which binds its author as in a matter relating to a contract. Therefore, and subject to the final classification of that obligation, which is a matter for the national court, the condition concerning the existence of a binding obligation by one party to the other, referred to in the case-law cited in paragraph 50 of the present judgment, may also be regarded as satisfied.[121]

As such, it appears from the reasoning of the European Court that the fundamental requirement for jurisdiction under the provisions of the Brussels Convention and Regulation, and so the applicable law in the context of the present Regulation, is dependent on "an obligation freely consented to" by the parties. However, in the particular instance in *Engler v. Janus Versand* the European Court

---

[120] *ibid* at para 51

[121] *ibid* at para 56

uncharacteristically offered guidance for the Austrian national court for its determination of the characterisation question inevitable as a result of the European Court's decision:

> Legal proceedings such as those brought in the main proceedings by the consumer are intended to claim, as against a professional vendor, the award of a prize ostensibly won and whose payment has been refused by the latter. Therefore it is founded specifically on the prize notification, since the ostensible beneficiary invokes the failure to award the prize as the reason for bringing the proceedings.
>
> It follows that all the conditions necessary for the application of Article 5(1) of the Brussels Convention are satisfied in a case such as that in the main proceedings.[122]

The European Court's further assertion is significant in that it, aside from the direct guidance offered to the Austrian court in assisting with an inherently domestic question, identifies the second essential requirement for contractual liability to be possible under the scheme of the Brussels Convention, and so the present Regulation by corollary. That second requirement is that the claim be specifically based on the "contract" as interpreted for the purposes of the European regime. As such, it is submitted that in the context of the present Regulation, Rome II, that the starting point for a general definition of "non-contractual obligation" falling under the scope of application of the Regulation is:

- All obligations not voluntarily assumed; and
- Voluntarily assumed obligations where a resultant dispute is not strictly founded on the assumed obligation.

However it is must be noted that:

---

[122] *ibid* at paras 57 - 58

> Whilst Community law supplies the *definition* of 'non-contractual obligations' national laws still have a significant role to play, providing the data which explain exactly what is claimed by a claimant.[123]

Moving from the general scope of application of the Regulation in Article 1(1) the Regulation sets out a number of categories of events and actions that are specifically excluded from the scope of application of the Regulation in Article 1(2). It is not proposed to consider the exclusions aside from mentioning them for completeness:

- Family relationships and relationships deemed to have comparable effects;
- Matrimonial property regimes and regimes of relationships deemed to have comparable effects;
- Bills of exchange, cheques and other promissory notes and negotiable instruments;
- Companies, other corporate and unincorporated bodies;
- Actions related to trusts
- Nuclear damage
- Violations of privacy and rights relating to personality, including defamation;
- Evidence and procedure.[124]

4.3.6 *Civil and Commercial Matters*

Having considered the meaning and extent of "non-contractual obligations" for the purposes of the present Regulation it is necessary to briefly consider the final condition to trigger the general applicability of the Regulation, that the matter be a "civil and commercial matter." Having already considered the relationship between

---

[123] Scott, Ahern & Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (2009 Nijhoff) 57 at 83

[124] Articles 1(2) – 1(3)

the present Regulation and the other European private international law instruments, it is clear that "civil and commercial matters" is equally autonomous and must be interpreted in accordance with, and arguably subservient to, the Brussels I Regulation. However, before considering the primary jurisprudence of the European Court it is significant to note that, unlike other concepts considered, the Regulation does offer some guidance as to the intended meaning of the concept apart from an intended correspondence with the concept as elaborated for the purposes of the Brussels I Regulation. The second sentence of Article 1(1), above,[125] gives some limited guidance by asserting that revenue, customs and administrative matters are not within the scope of the Regulation. However, it is the final part of the sentence that is most important and worthy of consideration.

The Regulation sets out that "the liability of the State for acts and omissions in the exercise of State authority"[126] are excluded from the scope of application of the regulation. The language employed with respect to state liability does not, however, fully elaborate the understanding of "civil and commercial matter" as understood for the purposes of the Brussels jurisdiction regime at Convention and Regulation levels. On closer examination of the relevant decisions of the European Court of Justice it is apparent that, again, a negative definition is offered. In *LTU v. Eurocontrol* the Court asserted that actions concerning public authorities acting in the exercise of their authority would not be "civil or commercial matters" for present purposes:

> Although certain judgments given in actions between a public authority and a person governed by private law may fall within the area of application of the Convention, this is not so where the public authority acts in the exercise of its powers.[127]

In the later case *Sonntag v. Waidmann,* mentioned above, the Court asserted again a

---

[125] *op. cit.* n 97

[126] *ibid*

[127] Case 29/76 *Lufttransportunternehmen GmbH v. Eurocontrol op. cit.* n 88 at para 4

similar manner of definition:

> It follows from the judgments in the *LTU* and *Rüffer* cases, cited above, that such an action falls outside the scope of the Convention only where the author of the damage against whom it is brought must be regarded as a public authority which acted in the exercise of public powers.[128]

There is one further observation to make in fully setting out the position with respect to the interpretation of "civil and commercial matters" for the purposes of the present Regulation, the significance of the recitals to the Regulation with respect to the issue of state liability and the understanding of "civil and commercial matters." Recital 8 sets out:

> This Regulation should apply irrespective of the nature of the Court or tribunal seised.[129]

The importance of this particular recital to the Regulation is significant it that it has had the net effect of blurring the distinction between inherently civil actions and criminal actions in certain member states. The, above mentioned, case of *Sonntag v. Waidmann*[130] is a particularly significant example in that the European Court of Justice asserted that a civil claim brought during the course of criminal proceedings, and before a criminal court, does constitute a "civil or commercial" matter for the purposes of the Brussels Convention:

> The answer to the second question referred by the national court must therefore be that "civil matters" within the meaning of the first sentence of the first paragraph of Article 1 of the Convention cover an action for damages brought before a criminal court against a teacher in a State school who, during

---

[128] Case C-172/91 *Sonntag v. Waidmann op. cit.* n 95 at para 20

[129] Recital 8

[130] Case C-172/91 *Sonntag v. Waidmann op. cit.* n 95

> a school trip, caused injury to a pupil through a culpable and unlawful breach of his duties of supervision and that this is so even where cover is provided under a social insurance scheme governed by public law.[131]

As such, it is clear that the nature of the adjudicative body presiding over an action is irrelevant for the purposes of the present Regulation whether that body be civil, criminal, administrative or otherwise.

Further, and concerning state liability, Recital 9 is significant in that it further elaborates the concept of state civil liability for the purposes of the present Regulation:

> Claims arising out of *acta iure imperii* should include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. Therefore, these matters should be excluded from the scope of this Regulation.[132]

It is clear that Recital 9 is significant in that it purports to equate public officials, office-holders and authorities with the State in the event of an *acta iure imperii*. First, it is submitted that this position represents a codification preceding reasoning of the European Court of Justice in cases such as *Sonntag v. Waidmann,* above:

> The first point to be noted in that respect is that the fact that a teacher has the status of civil servant and acts in that capacity is not conclusive. Even though he acts on behalf of the State, a civil servant does not always exercise public powers.[133]

As such, and in the broader context of State liability, the understanding of *acta iure*

---

[131] *ibid* at para 29

[132] Recital 9

[133] Case C-172/91 *Sonntag v. Waidmann op. cit.* n 95 at para 20

imperii and it's equation with public powers becomes crucial. It is submitted that reverting to public international law yields the position that *acta iure imperii* should be interpreted as equating to sovereign, public, acts of State. Dickinson notes that the distinction between "public" and "private" law is unfamiliar to common law lawyers[134] but offers[135] the reasoning of the House of Lords in *Kuwait Airways Corporation v. Iraqi Airways Co.*[136] as clarification:

> The ultimate test of what constitutes an *iure imperii* is whether the act in question is of its own character a governmental act, as opposed to an act which any private citizen can perform.[137]

Given all the above, it is submitted that in keeping with the spirit of negative definitions in the present Regulation, to this point in its consideration, it would be appropriate to offer such a negative definition. Closely guided by the assertions of the European Court of Justice, above,[138] it is submitted that a "civil and commercial matter" does not exist when a State's sovereign authority is legitimately exercised irrespective of whomever legitimately exercises that authority and, further, irrespective of the nature of a tribunal charged with determining any purported consequence of that authority's exercise.

4.3.7 *The General Rule*

Having considered the scope of application of the Regulation is it essential to consider the regime elaborated by the same Regulation.

---

[134] Dickinson *op. cit.* n 32 at para 3.276

[135] *ibid*

[136] *Kuwait Airways Corporation v. Iraqi Airways Co.* [1995] 1 WLR 1147

[137] *ibid* at 1160;

[138] *op. cit.* nn 127 - 128

Article 4

General rule

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

The general rule set out in Article 4(1), above, represents the central provision of the entire regime elaborated by the Regulation. The effect of the provision is to require, unless displaced by another provision, for the application of the law of the country in which the damage occurs, the *lex loci damni,* subject to the provisions of Article 4(2) and 4(3). It is submitted, at this early stage, that despite being the rule purported to apply generally it might not, in fact, operate as the generally operative rule given the vast number of special provisions in Articles (5) – (9).

Nevertheless, the general provision of Article 4(1) stands as the purported default. Together with the main text of Article 4(1) it is essential to, again, turn to the recitals to the Regulation. In this regard, Recitals (16) and (17) are critical:

> Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the dam- age, and also reflects the modern approach to civil liability and the development of systems of strict liability.[139]
>
> The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.[140]

The most striking observation to make, at this stage, is the precision with which "the country in which the damage occurs" is set out within the provision itself. What is also significant is that the position outlined in the present Regulation represents a marked break from the language, and subsequent interpretations, of the Brussels jurisdiction regime. The text of Article 4(1) sets out that "damage occurs" in the country in which the harm is suffered to the exclusion of the country in which the event giving rise to the damage occurs. However, when viewed from the perspective of the Brussels jurisdiction regime, there manifests a difference between the supposedly complimentary instruments.

The European Court of Justice, in *Bier v. Mines De Potasse,*[141] elaborated the prevailing position with respect to the Brussels regime. The significant factual

---

[139] Recital 16

[140] Recital 17

[141] Case 21/76 *Handelskwekerij GJ Bier BV v. Mines de Potasse d'Alsace* [1976] ECR 1735

elements in *Bier v. Mines de Potasse* were that it was claimed that the defendant company discharged mining effluent into the Rhine River from France causing damage to the claimants land in The Netherlands that necessitated costly remedial works. The question for the Court was to determine the meaning of "place of the harmful" event in the context of Article 5(3) of the Brussels Convention for the purposes of establishing jurisdiction. The European Court of Justice asserted a dual meaning for the autonomous concept, the place of the event giving rise to the damage and the place where the harm was suffered:

> As regards this, it is well to point out that the place of the event giving rise to the damage no less than the place where the damage occurred can, depending on the case, constitute a significant connecting factor from the point of view of jurisdiction.[142]

The Court went on to assert:

> To exclude one option appears all the more undesirable in that, by its comprehensive form of words, Article 5 (3) of the Convention covers a wide diversity of kinds of liability.[143]

What is clear, as a result of a comparison of the "flexibility" offered by the interpretation of the jurisdiction regime under the Brussels Convention and Regulation and the position outlined in the present Regulation, is that the flexibility afforded in the context of jurisdiction is absent in the context of applicable law. It must be recognized that the language used in the final words of Article 4(1), making reference to indirect consequences, mirrors similar restrictions elaborated by the European Court in the context of establishing jurisdiction on the basis of indirect consequences.[144] However Scott and Rushworth have argued against the applicability

---

[142] *ibid* at para 15

[143] *ibid* at para 18

[144] Case C-220/88 *Dumez France SA v. Heissische Landesbank* [1990] ECR I-49; Case C-364/93 *Marinari v. Lloyds Bank plc* [1995] ECR I-2719

of the decision in *Dumez* in the context of the present Regulation[145] although Dickinson is unconvinced.[146]

Further, the difference in language must be read in the light of Recital 16, above,[147] promoting the enhancement of foreseeable outcomes. Bach asserts a rationale for the narrow, new, approach adopted by Article 4(1) and illuminated by Recital 16:

> First, equal consideration of the interest of both tortfeasors and victims required applying neither the law of the *situs* of wrongful action nor the law of the countries in which consequential damages occurred. The place of action is often unforeseeable for and of no importance to the victim and can easily be manipulated by the tortfeasor, while the place of consequential damages is unforeseeable to the tortfeasor and can be easily manipulated by the victim. Second, relying on both the place of action and the place of damage would leave a choice between two possible applicable laws to the Court (or even to a party which would render applicable law unforeseeable and thus create legal uncertainty.[148]

However, it is submitted that, given the difference between the basis of jurisdiction as a direct result of the consistent application of *Bier v. Mines de Potasse* under the Brussels Convention and Regulation, and the new, narrower, language used in the present Regulation, that there is created a new tension between instruments purportedly to be interpreted in cognizance with each other under the provisions of Recital 7. Fundamentally, the tension arises from the possible exclusion of the *lex fori* as an applicable law in instances where that very forum is a wholly legitimate governing jurisdiction. The Commission asserted, in its original proposal, that

---

[145] Rushworth & Scott, Rome II: Choice of law for non-contractual obligations (2008) LMCLQ 274

[146] Dickinson *op. cit.* n 32 at paras 4.40 – 4.42

[147] *op. cit.* n 139

[148] Bach, Huber (ed) Rome II Regulation: Pocket Commentary (2011 Sellier) at 71, 72

absolute certainty was necessary for the purposes of the prevention of forum shopping and certainty of outcome:

> Admittedly, the Court acknowledged that each of the two places could constitute a meaningful connecting factor for jurisdiction purposes, since each could be of significance in terms of evidence and organisation of the proceedings, but it is also true that the number of forums available to the claimant generates a risk of forum-shopping.[149]

Further, having already submitted[150] that the present Regulation is in fact subservient to the Brussels regime, the Commission's apparent dissatisfaction with the potential for forum-shopping under the provisions of the Brussels regime is little justification for the resultant, inconsistent, regime implemented under the present Regulation. It is submitted that the narrow effect of Article 4(1), although admittedly constructed through the use of specifically different terminology, is inconsistent with the Brussels regime.

Nevertheless, given the inherently rigid and mechanistic nature of the rule elaborated in Article 4(1) comparisons have been drawn between it and the rejected regimes in the United States of America.[151] Professor Symeonides has gone so far as to sound the warning bell against the provisions of the general rule given the experience in the United States of America, considered earlier in this text:

> Thus, the general rule of Rome II is nothing but a restatement of the traditional *lex loci delicti* rule, with its "last event" sub-rule. It purports to be as categorical as the corresponding rule of the American First Restatement. In its penchant to avoid any ambiguity, the Restatement provided numerous minute localisation sub-rules that, for example, defined the place of injury as the place

---

[149] Commission Proposal COM(2003) 427 at 6

[150] *op. cit.* nn 77 - 82

[151] Restatement (First) of Conflict of Laws

> where "the harmful force takes effect upon the body" in personal injury cases, and the place where "the deleterious substance takes effect" in cases of poisoning. The fact that the Restatement never attained certainty, despite having attained clarity, is a lesson that subsequent codifies ignore at their peril.[152]

Before moving to consider the concept of damage, it is important to consider the very nature of the general rule from the perspective of the eventually made selection. Recalling the consideration, in particular, of the state of the multiple private international regimes in the United States of America it is clear that there is a particular distinction between approaches inherently focused on jurisdiction selection[153] with respect to choice of law questions as opposed to approaches focusing on determining between the applicability of individual laws.[154] In the context of the present Regulation, it is submitted that it is clear that the scheme of the Regulation operates as a jurisdiction selection-type regime, further lending to the mechanical nature of the instrument. However, it must be noted at this stage that Article 26, allowing the overriding application of forum public policy, specifically contemplates rule-selection.

In addition to the comparison to existent common law regimes, in particular the Second Restatement in the United States of America, for the purposes of considering the nature of the general rule, it is also worth noting that the present Regulation adopts a significantly different approach to the individualisation of issues with respect to choice of law determinations.

Focusing on the concept of issue-by-issue analysis and its corollary concept of *depeçage,* it has been observed that it might be appropriate to refine questions of choice of law and narrow their scope of application to individual issues as opposed to

---

[152] Symeonides *op. cit.* n 38 at 187

[153] *e.g.* First Restatement; Second Restatement

[154] *e.g.* Interest Analysis; Comparative Impairment

the entirety of the action. Professor Symeonides notes that:

> ...rather than seeking to choose a law as if all aspects of the case were in dispute, the modern decisionmaker focuses on the narrow issues with regard to which a conflict exists and proceeds accordingly. Such issue-by-issue analysis is easier and more likely when the decisionmaker is not bound by statutory choice of law rules. When such rules exist, however, such an analysis is possible only to the extent the rules permit it. In turn, this depends on whether these rules are phrased in broad terms designating the law that would govern the case as a whole, or whether they are phrased in narrower terms.[155]

For example, the comments to the Second Restatement in the United States of America, provides that:

> The Courts have long recognised that they are not bound to decide all issues under the local law of a single state.[156]

In the context of a regime, such as one elaborated by present Regulation, or the First Restatement in the United States of America, where certainty of outcome is effectively prioritised over flexibility and individual justice[157] it appears that the desired certainty prevents a complete elaboration of refined rules. Rather, it is submitted that certainty of outcome requires a "blunter" instrument. In the context of issue-by-issue analysis and the present Regulation, the Council and Commission rejected attempts by Parliament to incorporate it directly into Article 4 with the eventually agreed text promulgated without reference to issue-by-issue analysis or *depeçage.*

However, that is not to say that there is no potential for flexibility in this regard with

---

[155] Symeonides *op. cit.* n 38 at 187

[156] Restatement Second § 145 cmt. d

[157] *op. cit.* n 43 *et. seq.*

respect to the text of the Regulation today. The first observation to make in this regard is that the Regulation is silent on the issue. The second, more important, observation is that the language and terminology used in in the course of the Regulation does anything but exclude the possibility that multiple laws might apply in a multi-issue action.

The Regulation employs the language of "law applicable to a non-contractual obligation arising out of a tort/delict"[158] with similar phraseology employed in subsequent provisions.[159] What is significant about the language, in the context of issue-by-issue analysis, is that the language neither specifically prohibits the division and individualisation of particular issues nor does it set out the provision in terms of "law applicable to ***the*** non-contractual obligation." Dickinson asserts that:

> ...it is now too late to re-write history. The current position is clear: neither Art 4(2) nor Art 4(3) permits *depeçage*, which occurs under the Regulation only to the extent that it is mandated or permitted under Chapter V or as a result of the exclusion of matters of evidence and procedure.[160]

While Dickinson is correct in that *depeçage* is not specifically permitted in the mentioned Articles, it is submitted however that it is neither within the Article 4(2) nor 4(3) in which there lies the possibility for issue-by-issue analysis under the present Regulation. It is further submitted that given the above there exists in the general rule, Article 4(1), the potential scope for a number of obligations to arise from a tort/delict and so potentially facilitating issue-by-issue analysis and the natural corollary concept of *depeçage.*

4.3.8 *Exceptions to the General Rule*

---

[158] Article 4(1)

[159] Articles 5(1), 6(1), 6(3)(a), 7, 8, 9, 10(1), 11(1), 12(1), 14

[160] Dickinson *op. cit.* n 32 at para 4.78

Recital 18 sets out the rationale for the existence of exceptions to the general rule while also setting out the manner in which the exceptions contained in Articles 4(2) and 4(3) operate:

> The general rule in this Regulation should be the *lex loci damni* provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an "escape clause" from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country.[161]

As such, there is one significant observation to be made at this stage from the above relating to the operation of Articles 4(2) and 4(3), namely that the former operates in a general fashion while the latter operates as the "escape" of last resort. It is clear from the recital that the provisions are intended to operate in a cascading fashion ,although the relative difficulty in triggering the respective provisions is equally evident in the substantive text of the provisions. The distinction in language is that with respect to Article 4(2) the law of common domicile applies without a qualifying trigger whereas the Article 4(3) alternate law applies only where there is a manifestly closer connection. Before moving to consider the provisions of the "exceptions" in greater detail it is worth noting that the fallback "escape" in Article 4(3) is couched in language advancing the cause of jurisdiction selection with little regard for the substantive impact of competing laws through the selection of the law of the place of particular connection to the fact pattern in question.

4.3.8.1 *Common Habitual Residence*

Article 4(2), reproduced above, represents the first exception of general application to the general rule providing that if the tortfeasor and the victim both have their habitual residence in the same country, then the law of that county, the common habitual

---

[161] Recital 8

residence, "shall"[162] apply to the action.

Before moving further, it is important to highlight that the operative connecting factor for the purposes of establishing the special jurisdiction is the habitual residence of the parties. It must also be observed that habitual residence forms one of the central connecting factors in the regime of the Regulation and As such, is defined in the Regulation itself, albeit only partially:

> Article 23
> Habitual residence
>
> 1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.
>
>   Where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.
>
> 2. For the purposes of this Regulation, the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business.

In considering the definition, above, of habitual resident it is striking that it is defined for legal persons fully but only partially for natural persons. In this regard it is defined only in terms of natural persons acting in the course of their business activities. It must also be observed that habitual residence is not mentioned in the jurisdiction scheme elaborated by the Brussels I Regulation but that it is mentioned in the Rome I Regulation in Article 19 of that instrument.

As such, the inescapable conclusion is that habitual residence in the context of natural

---

[162] Article 4(2)

persons acting in their personal capacity remains undefined in the context of the European private international law regime and given the importance of the concept in the overall scheme of the present Regulation it would seem reasonable to submit that it would likely generate an autonomous meaning in same manner as concepts considered earlier.[163]

In advance of a definitive adjudication by the European Court of Justice on the concept of habitual residence it is important to turn to a number of actions[164] concerning the European Staff Regulations and the understanding of habitual residence in that context. Without revisiting the substance of those decisions they were encapsulated and refined by the English High Court in the decision in *M v. M:*[165]

> Accordingly, in my judgment, the phrase "habitually resident" in Article 3(1) has the meaning given to that phrase in the decisions of the ECJ, a meaning helpfully and accurately encapsulated by Dr Borrás in para [32] of his report:
>
> > "the place where the person had established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence"
>
> and by the Cour de Cassation in *Moore v McLean*:
>
> > "the place where the party involved has fixed, with the wish to vest it with a stable character, the permanent or habitual centre of his or her

[163] "civil and commercial matters", "non-contractual obligation", "tort/delict" etc.

[164] Case C-90/97 *Robin Swaddling v. Adjudication Officer* [1990] ECR I-1075; Case 76/76 *Silvana di Paulo v. Office National de l'Emploi* [1977] ECR 315; Case C-102/91 *Knoch v. Bundesanstalt für Arbeit* [1992] ECR I-1431

[165] *M v. M* [2007] EWHC 2047 (Fam); *C v. S* [2010] EWHC 2676 (Fam)

interests."[166]

It is submitted that the reasoning of the High Court in *M v. M* is fundamentally sound but that it is incomplete as it does not address questions likely relevant in the context of the European choice of law regime elaborated in the Rome I and present Regulations. Such questions would likely concern the very nature of habitual residence, for example: the criteria for acquisition of habitual residence; the degree of habituality necessary for the displacement of one habitual residence in favour of another; whether it is possible to have more than one habitual residence.

It must also be observed that the High Court asserted also that habitual residence is contextual, depending on the nature of the particular legal instrument its consideration was connected with in a particular instance:

> There is one important point I should add. In deciding where the habitual centre of someone's interests has been established, one has to have regard to the context. Many of the ECJ cases to which I have referred are cases where what was in issue was the entitlement of a worker to social security benefit. So the claimant's place of work was obviously an important factor in ascertaining the location for that purpose of the habitual centre of his interests. Here, in contrast, the issue is as to the identification of the Court (or courts) which have jurisdiction in relation to family matters, specifically, in the context of Article 3 of the Regulation, in relation to matters of divorce, legal separation or annulment. So the place where the matrimonial home is to be found, the place where the family lives, *qua* family, is equally obviously an important factor in ascertaining the location for that rather different purpose of the habitual centre of a spouse's interests.[167]

It is submitted that while the flexibility offered by a contextual interpretation of the connecting factor is useful but that it is not consistent with an overall appraisal of a

---

[166] *ibid* at para 33

[167] *ibid* at para 34

natural persons affairs. Further, it would have the corollary effect of individualising habitual residence for the purposes of each individual instrument that utilises it as the dominant connecting factor rather than promoting a singular, factual, determination of habitual residence universally applicable. It is submitted that guidance as to the correct interpretation and elaboration of habitual residence will necessitate an opinion of the European Court of Justice.

It is significant that given the rejection of interest analysis as a methodology with respect to the determination of the applicable law, considered above, interest analysis finds a place in the determination of habitual residence.[168] Of itself, interest analysis of the kind evident in the United States of America, and considered earlier, is not an inherently unfair or unjust ideology but in the context of the purportedly mechanistic, rule-driven, overall scheme of the Regulation it seems somewhat out of place, albeit apparently confined to the determination of the connecting factor to a choice of law decision. Again, a decision of the European Court of Justice is necessary in this regard.

Returning to the exception itself, it has already been asserted that where the tortfeasor and the victim share a common habitual residence that the law of that place will apply. It is critical, however, not to loose sight of the fact that there are two qualifying elements to the exception.

The first qualifying element is that the application of the exception operates as the rule rather than a discretionary exception. The language elaborated in the Regulation is strict and unambiguous – "the law of that country shall apply."[169] Taken together with the submissions, above, regarding the almost unnoticed potential incorporation of interest analysis into the scheme of the Regulation as part of the understanding of "habitual residence" and its role as the sole determinative factor of applicable law in the exception, and others in the Regulation, it is submitted that the compulsory nature of the exception creates the potential for the compulsory revival and incorporation of

---

[168] *op. cit.* n 166

[169] Article 4(2)

interest analysis into the scheme of European private international law. It is submitted, again, the guidance of the European Court of Justice is necessary.

The second qualifying element is that there is a temporal element to the exception. For it to apply, the parties must have shared the common habitual residence at the time of the damage, the time when the injury was suffered. In the event of parties not changing habitual residence from the time of accrual of damage the exception poses no problem in its application, but it does not take account of instances where the parties to an event change habitual residence, either to a common new habitual residence or to separate habitual residences. Premised on the idea that the state of common habitual residence has the greatest interest in governing a dispute, the inclusion of an unqualified temporal element might not achieve a desirable outcome in instances where common domicile is no longer shared after a tortious or delictual event.

Taking an overview of the common habitual residence exception to the general rule, it is significant to note that its operation as a rule-based exception to the general rule draws comparisons with the choice of law regime elaborated by Professor Beale in the First Restatement in the United States of America, considered earlier. As such, it attracts the same observations and criticisms of its mechanistic nature and application chiefly that a prescribed exception to a rule is simply another rule.

On the other hand it has been noted in the relation to the United States of America that there is great similarity between the above and the eventual outcomes of the strands of development of the choice of law revolution in that country, considered in detail above:

> Article 4(2) also mirrors parallel developments in the United States…32 of the 42 cases decided since the 1960s in which an American court of last resort abandoned the *lex loci* rule involved the common-domicile patters. Subsequently, an additional 18 common-domicile cases have reached the highest courts of the states that had previously abandoned the *lex loci* rule, thus raising to 50 the total number of common-domicile cases that have reached state supreme courts in the post-*lex loci* era. Of these 50 cases, 44

cases (or 88%) have applied the law of the common domicile, *regardless* of the particular choice of law methodology the Court followed.[170]

Given all the above, it is ultimately submitted that the mandatory exception, Article 4(2), to the general rule, Article 4(1), might not be as rigid and mechanistic as apparent at first glance. It is unfortunate, for the purposes of promoting ultimate certainty, that refined definitions and clarifications were not provided in elaboration of the provisions and autonomous concepts contained in Article 4 but it might, conversely, positively serve the interests of individual justice which the writer has earlier[171] asserted are a virtual fiction in the context of Article 4(3), below. Perhaps time will tell?

Before moving from the common habitual residence exception, it is significant to note that the exception also appears in Article 5 on product liability, Article 6 on unfair competition where the interests of a specific competitor are affected and Article 9 on industrial action. The above applies equally to those provisions and will not be considered.

4.3.8.2 *The Closer Connection Escape*

The final provision of the general rule, Article 4(3) above, is an "escape" providing that, in instances where the circumstances of the case indicate that the tort/delict is "manifestly more closely connected" with a country other than the country where the damage occurred or the country of common habitual residence, the law of the country manifestly more closely connected shall apply. The tension inherent in the Regulation between certainty and flexibility, in particular, in the context of Article 4(3) has been considered[172] earlier with the writer already asserting that certainty would likely

---

[170] Symeonides *op. cit.* n 38 at 194

[171] *op. cit.* n 53 *et. seq.*

[172] *ibid*

prevail despite claims that Article 4(3) and similar provisions[173] throughout the Regulation are the manifestation of the expressed[174] desire to do justice in individual cases in certain circumstances.

In explanation of the "escape," Recital 18 sets out that:

> Article 4(3) should be understood as an "escape clause from Article 4(1) and (2), where it clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country.

However, the exact nature of "manifestly more closely connected" remains unclear in the context of Article 4(3) as it does little to provide clarity apart from highlighting that a pre-existing contractual relationship *might* constitute a closer relationship. In addition, the provision does not identify what element of the connection to that other country is the operative connection. It has already been observed that the Regulation ostensibly seeks to prevent issue-by-issue analysis (although asserted otherwise by the writer) and it is clear that the focus of Article 4(3) is not on the issue that might arise from a tort/delict but rather the focus is on the tort/delict itself, the whole tort/delict. As such, it is reasonable to assert that the provision operates on a "whole or nothing" basis.

Given, then, that the focus is on the tort/delict the question then is what aspect of the tort/delict is the focus of the connection? It is clear, from the construction of Article 4(3) and the general scheme of the Regulation, that geographical elements are to the fore in respect of all aspects where a connection is considered. As such, it is submitted that in the context of the "manifestly closer connection" that, in the absence of issue-by-issue analysis or even a qualitative analysis of the geographical connection to a country, the "escape" must operate on the basis that "manifestly" is interpreted to mean that "quantitatively more geographical connections." Professor Symeonides

---

[173] Article 5(2), Article 6(2), Article 10(4), Article 11(4), Article 12(2)(c), Article 14(2)

[174] Recital 14

asserts that:

> To simply say that one should look for a "closer" connection gives courts little meaningful guidance and entails the risk of degenerating into a mechanical counting of physical contacts.[175]

Although, in response, Fentiman has asserted that:

> ..."closeness" is inherently an evaluative concept. It implies a distinction between the existence of a connection and the measure or quality of that connection – between a connecting factor and its *significance*.[176]

Further that:

> Principle certainly suggests that the close connection test cannot involve a mere accumulation of territorial connecting factors, an arithmetical preponderance of elements.[177]

It is submitted that the guidance of the European Court of Justice will be necessary to fully and correctly understand the manner in which the "manifestly closer connection" "escape" operates, but it is submitted that the question identified by Fentiman, below, correctly identifies the issue relevant with respect to the degree of connection necessary for the "escape" to operate:

> ...is the test one of *inferior* connection, or *superior* connection? Is displacement permitted only if the primary law has no close or significant connection with the tort (the *narrow* view); or may displacement occur even if the primary law has such, a connection, if the secondary law has a closer or

---

[175] Symeonides *op. cit.* n 38 at 198

[176] Fentiman *op. cit.* n 84 at 93

[177] *ibid* at 94

more significant connection (the *broad* view)?[178]

In conclusion, the general scheme of the Regulation, the default position, is one asserted to be certain, clear and in furtherance of the dual aims of certainty and individual fairness. However, it is submitted that the general scheme, the most important component of the Regulation is none of the above. It has been argued that there exists significant ambiguity, imprecision in the provisions of Article 4. Further, it has been submitted that there exists traces of inherent flexibility in Article 4, for example the similarity with section 6 of the Second Restatement in the United States of America, considered earlier in this text, asserting the need to seek out the "most significant relationship" in determining an applicable law. Further, it is submitted that the "escape," as asserted in this section earlier, might not be as effective as purported to be.

Ultimately, it must observed that the scope of applicability and general scheme of the Regulation considered to this point, purports to mark the instrument as the solution to providing certainty, yet fairness, to a Community of 27 Member States and 400 Million citizens. It is submitted that, given the submission above, neither has been fully achieved but that significant progress has been accomplished in the aim of providing a reasonably certain, but unified corpus of private international law at European level.

4.3.9 *Forum Influence – Overriding Mandatory Provisions, Public Policy and Damages*

4.3.9.1 *Public Policy*

Article 26

Public policy of the forum

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible

[178] *ibid* at 104

with the public policy (*ordre public*) of the forum.

Article 26 is the first of two provisions, the second being Article 16, providing for the application if the *lex fori* in place of the governing law as otherwise determined by the provisions of the Regulation. It is significant to set out Recital 32 in the context of both Articles as it highlights the extraordinary nature of the provisions:

> Considerations of public interest justify giving the Courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing noncompensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the Court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum.

What is significant in elaborating the extent and effect of Article 26 is that the accompanying recital, above, provides examples as to what might constitute an infringement of public policy. In this regard Carruthers suggests that it might serve the purpose of subordinating forum public policy by creating a *Community* public policy:

> Recital (32) may be said to give a strong hint to any forum as to what its public policy should be, reminding courts that each and every Member State forum is a servant to the European system. In an examination of forum control, increasingly one must be mindful that there is a third player, namely the Community itself.[179]

---

[179] Carruthers, Has the Forum Lost Its Grip, Ahern & Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (2009 Nijhoff) at 33

Carruthers might, perhaps, over-extend the reach of Community influence in the realm of precise public policy objectives but the influence of jurisprudence of the European Court of Justice in the context of the public policy exception in Article 27(1) of the Brussels Convention. The European Court asserted clearly in *Krombach v. Bamberski* that:[180]

> So far as Article 27 of the Convention is concerned, the Court has held that this provision must be interpreted strictly inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention. With regard, more specifically, to recourse to the public-policy clause in Article 27, point 1, of the Convention, the Court has made it clear that such recourse is to be had only in exceptional cases.
>
> It follows that, while the Contracting States in principle remain free, by virtue of the proviso in Article 27, point 1, of the Convention, to determine, according to their own conceptions, what public policy requires, the limits of that concept are a matter for interpretation of the Convention.

The decision of the European Court is significant in that it asserts a hybrid approach, balancing the societal sensitivities of the forum against the limits acceptable in a unified, community, private international law regime. However, on closer inspection it appears the decision in *Krombach v. Bamberski*, while empowering Member States to determine their own public policy, actually vests in the European Court the competence to decide what constitutes a breach of Member State public policy rather than the Member State itself.

Subsequent to *Krombach v. Bamberski*, *Renault v. Maxicar*[181] added clarification to the position in the former decision:

---

[180] Case C-7/98 *Krombach v. Bamberski* [2000] ECR I-1956

[181] Case C-38/98 *Regie Nationale des Usines Renault SA v. Maxicar SpA* [2000] ECR I-2973

> Recourse to the clause on public policy in Article 27, point 1, of the Convention can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.[182]

The assertion of the European Court, directly above, is useful in illuminating the nature of a reach of public policy but it does not address the submission made concerning the competence of the European Court to determine the limits of Member State public policy. This question remains to be determined.

Nevertheless, it is apparent that recourse to the public policy exception, in the context of the recognition and enforcement of judgment under the Brussels regime and now in the context of the regime under the present Regulation, appears to be limited to instances where the application of the otherwise applicable law would fundamental offend forum interest.

There is one further assertion to make about the measure elaborated in Article 26, that it appears to introduce a further element of potential flexibility into the regime elaborate in the present Regulation over and above a simple displacement of the otherwise governing law in favour of the *lex fori*. Article 26 does not speak of the whole law of the country selected by the geographically orientated, jurisdiction selecting, rules elsewhere in the Regulation. Rather it speaks of "a provision of the law of any country specified by this Regulation."[183] It is submitted that language of Article 26 implicitly contemplates *depeçage* as an operative reality in that, as it

---

[182] *ibid* at para 30

[183] Article 26

stands, the forum would be required to continue to apply the provisions of the governing law not otherwise objectionable to forum interests.

Given this, and the manifest nature of a breach before the activation of the provision, it is submitted that potential forum influence pursuant to Article 26 would be limited.

4.3.9.2 *Overriding Mandatory Provisions*

> Article 16
> Overriding mandatory provisions
> Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

Article 16 concerns the applicability of a body of rules otherwise known as *lois de police* which is to be taken to be rules which must apply in a forum at all times. In this sense, mandatory overriding provisions of a forum are not subject to the negative aspect of public policy rules in that those rules operate to displace objectionable provisions if their *application* would offend forum policy or interests. The present measures, overriding mandatory provisions, apply irrespective of any law otherwise applicable. In this regard it is significant that the word "overriding" is used as it affirmatively indicates the primacy of provisions designated by the forum as mandatory.

However, it is significant to observe that there is no definition of overriding mandatory provisions in the body of the Regulation although the concept is defined in the Rome I Regulation in Article 9(1):

> Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

It is submitted that the unequivocal nature of the provision concerning overriding mandatory provisions of the forum elevates the importance and impact of Article 16 as opposed to Article 26 and serves to further forum interests in the process. It has been asserted that there might be a community aspect to the demarcation and limits of public policy but it is submitted that no such influence exists as a result of Article 16 with respect to overriding mandatory provisions. As such, from the perspective of a Member State wishing to ensure the protection of its societal and public norms it is submitted that the encapsulation of those societal and public norms, in primary legislation in those Member States would offer greater protection from the application of foreign law and the potential future influence of the European Court of Justice in its interpretation of the present Regulation.

4.3.9.3 *Damages*

> Article 15
> (c) the existence, the nature and the assessment of damage or the remedy claimed

The consideration of Article 15(c), following, is an example not of forum influence but of forum impotence. For the common law lawyer, the inclusion of Article 15(c) in its present location represents a significant change from established common law principle. Most recently considered, from the common law perspective, in *Harding v. Wealands,*[184] and considered in detail earlier in this text, the House of Lords highlighted and reaffirmed the traditional common law position that the quantification of damages is properly characterized as a procedural matter and so subject to the *lex fori* rather than any otherwise governing law:

---

[184] *Harding v. Wealands* [2007] AC 1; Beaumont & Tang, Classification of Delictual Damages – *Harding v. Wealands* and the Rome II Regulation (2008) 12 Edinburgh L.Rev 135

> There can however be no doubt about the general rule, stated by Lord Mackay in the House of Lords debate, that "issues relating to the quantum or measure of damages" are governed by the lex fori.[185]

However, the effect of Article 15(c) is to strip the *lex fori* of control over the quantification of damages in favour of the *lex causae.* Further it is evident from the construction and placement of Article 15 that the new characterisation of the quantification of damages as substantive cannot be avoided but by the reliance on Article 16 and Article 26, considered above:

> There is no overt means in Article 15 by which the forum is able to inhibit the application of the *lex causae.*[186]

It would seem correct and logical that, in a rule-driven regime prioritising certainty of outcome that what is, in reality, the most important aspect of any action, the quantification of damages should be governed by the same legal regime as the other aspects to an action. However, given this importance it would also seem logical and correct that the forum would retain influence over the resultant remedy, particularly where that remedy is not one the forum typically understands. It is ultimately submitted that, while the provisions of Article 15 are clear and unambiguous purporting to completely strip the *lex fori* of control of measures therein, the forum has not lost complete control. Unlike the absolute exclusion from displacement evident in Article 16, considered above, it is clear that Article 15 can be displaced by Articles 16 and 26, although it is also submitted that in the context of Article 26 and the accompanying recital, Recital 32, that reference to excessive damages only is a particular deficiency in the Regulation. As a result, damages under the governing law which might be small enough to be considered derisory in the eyes of the forum might not be capable of displacement on the basis of Article 26. Nevertheless, for all intents and purposes, what was once the exclusive preserve of the forum in the eyes of the

---

[185] *Harding v. Wealands ibid* at para 51

[186] Carruthers *op. cit.* n 179 at 45

common law is now subject to the governing law as determined by the provisions of the present Regulation.

4.3.9.4 *Kelly v. Groupama*

Finally, it is worth mentioning a recent Irish case on the issue of the quantification of damages. *Kelly v. Groupama*[187] is significant as it marks the first instance where an Irish court has directly considered the quantification of damages in the European context. The facts of the case were that an Irish claimant was involved in a vehicle accident while on holidays in France and the instant case was a direct action against the French insurer. The key issue in the case was not the imposition of liability, but the quantification of damages. O'Neill J recognised that the quantification of damages took on a new dimension with the adoption of the Rome II Regulation:

> It is commoncase, by virtue of Regulation 864/2007 EC, better known as "Rome II" which came into force on 11th January 2009 and which introduced general principles applicable to non-contractual obligations, that the substantive law applicable to the assessment of damages in this case is French law, the law of the place where the damage occurred.[188]

The interest in the decision lies in the manner in which the Irish court dealt with the consequent assessment. O'Neill J. began by asserting the recognised method of assessment under French law, the *lex loci damni*:

For this purpose, there is available to all judges in France a book which is a compilation of the awards made in the courts throughout France from which a judge can select a comparable case or comparable cases to ascertain the appropriate level of damage to ascribe to each category of loss or deficit.

It is clear from the evidence of Monsieur Poindessault that the judge retains a

---

[187] *Kelly v. Groupama* [2012] IEHC 277

[188] *ibid* at para 10

> full discretion in deciding on the amount of compensation to be awarded in each category so that the individual features of every case can sound in damages, but nevertheless, it is the invariable practice of judges throughout France to consult or have regard to this book in making awards of damages so that awards are consistent throughout France and thereby, ultimately, to maximise fairness and consistency in awarding of damages.[189]

In, then, applying the *lex loci damni* to the instant facts, O'Neill J. sought to draw a distinction between matters of substance and matters of procedure under the *lex loci damni*, French law. He asserted that:

> I am of opinion that whereas the methodology of assessment of damages is prescribed by French law and therefore must be adhered to in this assessment of damages, the choosing of the amount of compensation, as a matter of French law remains a matter of judicial discretion. The practice of French judges to have regard to a book of previous awards is no more than a practice and is not an obligation of French law. This book is a tool or a guide and does not fetter the discretion of the judge in deciding what is a fair amount of compensation. Apart altogether from the fact that French law permits the exercise of that discretion, the use in the French courts of a Book of Quantum is merely a non-obligated practice, and as matters of practice are governed by the *lex fori,* therefore this Court, in choosing the amounts of compensation to be ascribed to each category of loss as discerned in accordance with French law, in addition to enjoying an unfettered discretion under French law, in a matter of practice, should apply the *lex fori, i.e.* Irish law, and thus can have regard to levels of compensation awarded in the Irish courts in respect of similar losses.[190]

The effect of the O'Neill J's assertion was to, essentially, ignore the re-classification, under the provisions of the Regulation, of questions attached to the assessment and

---

[189] *ibid* at paras 14 - 15

[190] *ibid* at para 17

quantification of damages as substantive in nature. In applying French law to the quantification of damage, the Irish court grasped onto the discretionary nature of quantification, under French law, and used that characterization as a means to revert to the traditional, common law, characterization of damages as procedural. The net outcome, in the Irish action, was the application of the *lex fori* to the assessment of damages.

There are two main issues arising from the decision of the Irish court in *Kelly v. Groupama*. The first, most obvious, issue is mentioned immediately above: the deliberate reversion to the *lex fori* by a common law court. It is significant that the homing tendency, in this instance, resulted in the tripling of damages awarded in the action. It is submitted that the Irish court was incorrect in reverting to the *lex fori* as, considered above, the legislative intent manifest in the Regulation was the characterization of quantification issues as substantive in nature, requiring the application of the *lex loci damni* in all instances. It is submitted that the decision of the Irish court does little to further the, essential, aims of certainty and systemic predictability manifest in the jurisprudence of the European Court of Justice.

The second, more subtle, issues turns on the extent of the content of the *lex loci damni* that is applicable under the provisions of the Regulation. From the decision of the Irish Court, above, it appears as though the court characterized the French discretion, from an Irish perspective, as procedural in nature thus justifying, from an Irish perspective, its exclusion. The issue, put simply, is whether the effect Regulation, in characterizing the quantification of damages as substantive thus requiring the application of the *lex loci damni*, is to require the application of the whole of the *lex loci damni* or simply its substantive provisions. It is submitted that the Regulation requires, in the interests of the aims of certainty and predictability, the application of the whole of the *lex loci damni*, and not simply the substantive provisions in the manner in which the Irish court applied them. It is, further, submitted that questions then present relating to the exercise of a foreign discretion in a forum court. Should they be exercised in a manner consistent with the foreign forum or should the discretion be exercised in a manner consistent with prevailing forum considerations? It is, ultimately, submitted that clarification is necessary from the European Court of Justice on these questions but that the decision in *Kelly v. Groupama* is unsatisfactory

in its application of the Regulation. It seems the Irish court found a way for the forum to regain control over the quantification of damages, contrary to Carruthers' assertion above.[191]

In conclusion, from the submissions immediately above and earlier, it is evident that the forum has seen an adjustment in its competence and power with respect to the actions heard. However, it would be too much to say that the forum is wholly impotent, merely that:

> What has happened, at least on paper, is the transfer to the realm of the *lex causae* of certain matters which hitherto, being classed in the United Kingdom view as procedural, one might have through the forum would have retained.[192]

4.3.10 *Specific Example – Product Liability*

Article 5:

1. Without prejudice to Article 4(2), the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

    a. the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,
    b. the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,
    c. the law of the country in which the damage occurred, if the product was marketed in that country.

    However, the law applicable shall be the law of the country in which

[191] *op. cit.* n 179

[192] Carruthers *op. cit.* n 179 at 46

the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c)

2. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Having considered the most important provisions of the present Regulation it is appropriate to consider an example of a specifically tailored provision, that for products liability. The provisions of Article 5, above, provide for a cascading tier of applicable laws subject to two provisos: habitual residence of the person claimed to be liable if marketing of the product was not foreseeable in the cascading provisions; the manifestly closer connection "escape" considered above in the context of the general rule.

Before considering the specific rules, it is important to outline the scope of application of the provision. In the same manner in which Article 4(1) is phrased so does Article 5(1) speak of a non-contractual obligation arising out of damage caused by a product as opposed to speaking of simply damage caused by a defective product. It is submitted that this is the first observation of note concerning Article 5(1) in that it goes beyond what is traditionally understood to be the realm of liability for products – those that are defective. Further it is significant that the language of the present Regulation differs from EC Directive 85/374[193] in that the Directive refers specifically

[193] Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29

to defective products in Article 6 of that instrument. A defective product, for the purposes of the Directive is:

> A product [is defective] when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:
>
> a) The presentation of the product;
> b) the use to which it could reasonably be expected that the product would be put;
> c) the time when the product was put into circulation.[194]

By utilising language similar to the Directive, it is submitted that the potential scope of application of the Regulation might expand to embrace damage caused by non-defective products, although Professor Stone suggests otherwise:

> Thus Article 5 should probably be construed as limited to claims in respect of physical injury (or death of) a person, or of physical damage to property other than the product itself; and as not extending to claims for purely economic loss, not arising from physical injury or damage.[195]

Professor Kozyris notes that:

> A major definitional problem, unfortunately not recognized in the literature, involves the very basic term used in this category: "product" liability…this should be clarified, perhaps through interpretation or even amendment, as necessary.[196]

---

[194] *ibid* Article 6

[195] Stone, Product Liability under the Rome II Regulation, Ahern & Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (2009 Nijhoff) at 181 - 182

[196] Kozyris *op. cit.* n 82 at 487 - 488

Further concerning the scope of application of Article 5(1) it is worth noting the additional distinction from the Directive respect of the categories of persons liable for damage arising from that product. The Directive speaks of "producer"[197] whereas the present regulation simply speaks of "the person claimed to be liable," although Dickinson suggests that the latter concept is likely to be interpreted in a fashion similar to "producer" for the purposes of the Regulation.[198]

It is submitted that, like much of the Regulation, the breadth of application of Article 5(1) and the precise meaning of "product" requires opinion from the European Court of Justice.

A further concept worth identifying as needing judicial elaboration, in advance of considering the specific rules of the Regulation, is the concept of "marketed" given its prominence in the text of Article 5. Criticised, in particular by Professor Kozyris he goes on to ask:

> Things get worse due to the failure to define the key word "marketed." The context suggests that we should interpret it to extend only to commercial distribution, not occasional sales between private parties. But does it cover only the products of the defendant market by the defendant, directly or indirectly? Or does it extend also to (identical) products of others and/or marketed by others?[199]

Professor Kozyris astutely highlights a potential difficulty with the provision in that it generates liability on the "producer", for present purposes, in the event of an identical product being marketed by another. It is submitted that a provision such as this is extremely pro-plaintiff and, in fact, places a severe burden on producers within the

---

[197] Products Liability Directive Article 3

[198] Dickinson *op. cit.* n 32 at para 5.13

[199] Kozyris *op. cit.* n 82 at 489

Community by attaching instant potential liability in a Member State should they choose to compete with an existing product in that Member State. Finally asserted by Professor Kozyris:

> The possible interpretation of the above language to cover acts and/or products of others unrelated to the defendant seriously undermines the soundness of the Rome II provisions in this field.[200]

What is clear from the above pages is that, much like many other provisions of the Regulation, there exists significant scope for improvement in clarity and precision.

Moving from these difficulties to briefly consider the cascading rules of the provision itself. Evident from the text of the provision, reproduced above, the cascade operates as changing connecting factors in the same pattern *i.e.* habitual residence, place of acquisition, place of damage and all what the product was marketed there, followed by the default of the place of the person claimed to be liable if the product was not marketed in any of the three options in the cascade. It is significant to note that, unlike Article 4(1), Article 5(1) does not exclude indirect damages from the realm of recoverability and it is submitted that Dickinson is correct in asserting that the exclusion of indirect damages would have the effect of potentially fragmenting the choices of law and even compulsorily selecting the law of a jurisdiction when that jurisdiction has no significant connection to the tort/delict, considered additionally earlier:

> If the Art 4(1) restriction of "damage" is not read into Art 5(1)(A) and Art 5(1)(c), applying the law of the country in which the damage occurred, these sub-rules may have the effect not only of fragmenting the applicable law in many cases but also of identifying the law of one or more countries that do not have a significant connection to the tort/delict…[201]

---

[200] *ibid*

[201] Dickinson *op. cit.* n 32 at para 5.30

A further issue relevant in consideration of Article 5(1)(a), is that no particular account is taken of scenarios involving damage with a long gestation period which may also involve movement between Member States. The core difficulty for present purposes is the identification of the place where the damage occurred for the purpose of establishing the connecting factor for Article 5(1)(a). Branded a "conundrum" by Dickinson he also proposes three solutions: Apply the mosaic principle elaborated *Shevill v. Press Alliance;*[202] disregard Article 5(1)(a) and move on to Article 5(1)(b); favour the claimant's habitual residence at time of principal injury.[203]

Dickinson suggests either the second or third suggestion, above; however, it is submitted that, in the context of long-term exposure type products, neither suggestion provides an adequate solution with the second having the problem that acquisition would typically not be confined to a single instance. In long-term exposure scenarios it is submitted that the typical fact pattern would be that acquisition, the first acquisition, would typically be the first in a series of acquisitions each with a compounding effect. Further, the third suggestion about would equally be insufficient as for the same reasons it would be difficult to establish the principal injury for the purposes of establishing a geographical anchor. As such, it is submitted as an alternative that a more workable alternative might be to select the habitual residence of the claimant on manifestation of the damage.

The second tier of the cascade operates only in instances where the first fails with the effect that the country of acquisition of the product is selected as the applicable law. Despite being a clear and apparently precise provision it is submitted that the central component is the "country in which the product was acquired". Without definition in the Regulation it is submitted that the concept of acquisition will require interpretation as an autonomous concept by the European Court of Justice but that in the interests of consistency with distance selling and electronic commerce instruments that the place of actual receipt of the product would be the appropriate interpretation as until that point effective control of the product would never have been assumed.

---

[202] Case C-68/93 *Shevill v. Press Alliance* [1995] ECR I-415

[203] Dickinson *op. cit.* n 32 at para 5.32

The third tier of the cascade requires little more than to say that in the event of the first two tiers failing that place of the damage would govern.

In conclusion there are two main observations to make with respect to Article 5. First, that all of the provisions of the Article are subject to the mandatory operation of Article 4(2) in an instance where claimant and the person claimed to be liable share a common domicile. Second, there appears to be too much ambiguous complexity in the provisions of the Article. Professor Stone advocates a radical reformulation of Article 5, in fact an amalgamation of Article 5 into Article 4:

> The existing Article 5 would have been deleted, and product liability claims would have been subjected to the main rules laid down by Article 4 for most other torts, with just one additional provision specific to product claims. The additional provision would have specified that, in applying Article 4(1) to a product liability claim brought by the acquirer of the product, or by a person associated with the acquirer of the product, reference should be made to the law of the place of acquisition, rather than the place of injury. This additional provision would not have affected claims by bystanders (such as pedestrians injured by an unsafe vehicle), and in any event would have operated subject to Article 4(2), in favour of a common residence, and Article 4(3), in favour of a manifestly closer connection.[204]

Further, most fundamentally that:

> ...the substance of Article 5 could have been achieved by a much simpler provision.[205]

In this suggestion, the writer cannot but agree with Professor Stone for the same reasons. As evident above, while straightforward in application the cascading bundle

---

[204] Stone *op. cit.* n 195 at 197

[205] *ibid*

of rules present too many ambiguities and specific difficulties that do not justify their separation from the general rule.

4.4 *SAMPLE SCENARIOS CONSIDERED*

Scenario A – Traffic Accident

In considering the application of the regime of the Rome II Regulation to the instant fact pattern, it must again be noted that the aim underpinning the substantive harmonisation of choice of law at European level is to eliminate forum influence, save instances where forum public policy objectives have are imminently threatened. As such, at European level, the jurisdiction selection considerations should not overtly influence a court in determining the *prima facie* applicable law.

In applying the scheme of the Regulation to the instant fact pattern, and from the preceding chapter, it must be noted that Article 4, the general rule, is the relevant provision to consider. Article 4 of the Regulation provides for the application of the *lec loci damni*, the law of the country in which the damage occurs.

Tempering the application of the, default, *lex loci damni* rule are exceptions, discussed earlier, providing for the application of the law of common habitual residence or the law of a country manifestly more closely connected to the fact pattern.

As such, it is submitted that the scheme of the Regulation provides for the application of the law of State C to any action arising. In the instant fact pattern there arises no common habitual residence amongst the parties to the action. Further, it is submitted that it cannot be strongly asserted that the tort is manifestly more closely connected with a country other than State C. It must be recognised that the two genuinely connected countries to the action are State A, where Bob is habitually resident, and State D, where the vehicle insurer is habitually resident. As such, despite providing certainty to the law applicable it is submitted that the Regulation results in the application of a law with little genuine interest in the determination of a dispute between the parties, other than the damage happened to occur in that country.

Scenario B – Publication of Defamatory Material

In the context of interstate defamation and the scheme of the Regulation, it must be noted that the Regulation specifically excludes defamation actions from its scope of application. Article 1(2)(g) provides that:

> 2. The following shall e excluded from the scope of this Regulation:
> (g) non-contractual obligations arising out of violations of privacy and rights relating to personalty, including defamation.

As such, in the European context, choice of law for defamation actions reverts back to the individual, domestic, private international regimes of the member states.

It is, however, appropriate to mention the issue of jurisdiction with respect to defamation actions in the European regime, otherwise outside the scope of this thesis. The recent decision of the European Court of Justice in *eDate Advertising GmbH*[206] has specifically considered the issue of jurisdiction with respect to internet defamation actions. The decision serves to build on the earlier decision in *Shevill v. Press Alliance*[207] by asserting and adding the option that, in the context of infringements of personality rights, the person who considers that his or her rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the center of his or her interests is based.

It is suggested that the lack of choice of law rule for defamation actions represents a deficiency in the scheme of the Regulation. It is submitted that, given the decision in *eDate* with respect to jurisdiction, a prudent potential choice of law rule might call for the application of a law coinciding with the selection of jurisdiction. Not only would

---

[206] *Cases C-509/09 & C-161/10 eDate Advertising GmbH*

[207] *Case C-68/93 Shevill v. Press Alliance* [1995] ECR I-415

this achieve an elegant coincidence between jurisdiction and applicable law but it would also achieve the aims of the interpretative obligation in Recital 7 of the Regulation, considered above.

Scenario C – Products Liability

Given the extensive consideration of the Article 5(3) of the Rome II Regulation relating to the applicable law for products liability, above, it is not intended to consider the finer points of the provisions. However, for the purposes of their application to the instant fact pattern, it is submitted that it is Article 5(1)(a) that is relevant. The provision sets out that the law applicable will be:

> The law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country.

Bearing in mind the extensive submissions, above, in the provisions of Article 5, it is submitted that Thomas had his habitual residence in State 1. Further, that the product was satisfactorily marketed in State 1 for the purposes of triggering the application of the above Article.

As a further observation, it must be noted that, were Article 5(1)(a) inapplicable, the provisions of the remaining tiers in the cascade, Articles 5(1)(b) – (c), would also designate the law of State 1 as the applicable law. As such, all roads lead to the law of State 1: the *lex loci damni, lex fori,* the habitual residence, the *lex acquisitionis.*

4.5 CONCLUSION

This chapter has attempted to consider the troubled history and gestation of the Rome II Regulation together with considering the main provisions of the Regulation. It has also been attempted to consider the new European choice of law regime in the context of other choice of law regimes, in particular those in the United States of America.

Further, this chapter has attempted to identify what the writer perceives to be particular failings, difficulties and misconceptions towards the present Regulation and offer, where possible, suggested solutions and interpretations. It was not within the scope of this work or chapter to consider the entirety of the Regulation but more appropriately to consider it as part of the global choice of law regime in which it exists.

Professor Kozyris lauds the Regulation as a whole:

> Rome II must be praised for eschewing the "revolutionary" methodologies, especially of the American variety, and for employing definitive, recognizable, and practical connecting factors to determine the applicable law.[208]

While, on the other hand, Professor Symeonides is less enthusiastic:

> In the end, Rome II is what it is. In this author's view, it is a missed opportunity to do much better.[209]

It the submitted, however, that the present Regulation is neither as good as nor as bad as the respective Professors assert. Given the submissions in this chapter it is submitted that it is reasonable to assert that Rome II is an incomplete instrument burdened with the result of a "one-sided," two-sided, legislative process. The Regulation will certainly harmonise European choice of law for non-contractual obligations but it does so at the price of absolute certainty and, equally, fairness. The inconsistencies, ambiguities and unnecessary complications, in places, do little to mark the Regulation as champion of certainty, nor fairness, nor predictability. Despite unwittingly incorporating elements of American choice of law development, the flexibility associated did not carry over equally. Nevertheless the writer welcomes

---

[208] Kozyris *op. cit.* n 82 at 497

[209] Symeonides *op. cit.* n 38 at 216

unequivocally the Regulation as it is, even in present form. The net result is immeasurably more certain, predictable, and fair than the comparable federal state of the United States of America.

Asserted by Professor Briggs in the context of Rome I it is submitted, again, that the following is equally relevant to Rome II, apt but should be taken positively in respect of European private international law:

> Private international law and lawyers are now having done to them what was done almost 40 years ago to the system of weights and measures. We are finally being made to go metric. We are all in Rome now.[210]

[210] Briggs, When in Rome Choose as the Romans Choose (2009) 125 LQR 191, 195

CONCLUSION

This thesis has sought to consider the overall position with respect to choice of law for torts while individually considering the constituent components in arriving at an overall assessment in the wider, global, context.

Chapter 1 set out and considered a number of underpinning theories of private international law with the intention of touching on, briefly, the competing justifications for the existence and continuing development of private international law. The broader intention of this, preliminary, chapter was to illuminate a number of conceptual tensions underpinning the broader subject matter in advance of a detailed consideration of choice of law issues specifically.

Chapter 2 considered, in extensive detail, the difficult position in the United States of America in choice of law for torts. The origins of private international law, generally, and choice of law, specifically, were considered. The first attempt at achieving national unity in private international law, the First Restatement as elaborated by Professor Beale, was considered as an entire concept doomed to failure. The criticisms and gradual rejection of the First Restatement's *lex loci delicti* rule was considered in light of a detailed examination of the prevailing methodologies of that regime, its critics and proponents. As an example of unworkable rigidity, in a discipline requiring flexibility, judicial dexterity and individualisation of decision, the First Restatement was potent.

The resultant aftermath of the judicial and academic revolution against the First Restatement was considered in extensive detail with a number of competing approaches considered: interest analysis, proper law and comparative impairment. It is clear from the considerations that from the ashes of harmony arose discord and inconsistency amongst the States of the Union.

The Second Restatement's provisions and effect as a consolidating instrument was considered in details with particular emphasis on the "most significant relationship" test elaborated therein. Further, the New York "centre of gravity" approach as elaborated in *Babcock v. Jackson* was considered in detail.

It is submitted that it is clear that each of the competing approaches and rule-driven regimes in the United States of America falls foul of significant issues, as considered above. In addition, it is submitted that is clear that the continuing existence of multiple competing regimes creates an inherently untenable position in the United States of America, and an example for the wider world of the stagnation and unwieldy outcome of persistent refusal to harmonise.

Certainly, private international law, generally, and choice of law, specifically, in the United States of America is as fragmented and ambiguous today as it was a generation ago. It is submitted that it is not unreasonable to characterise the regimes as an incoherent and virtually incomprehensible myriad of approaches, variations on approaches and embracing, rigid, rules. The time is undoubtedly right for a return to the drawing board in the United States of America.

Chapter 3 considered the alternative common law approaches in The United Kingdom, Canada, Australia and Ireland with particular emphasis placed on the fresh life breathed into the *lex loci delicti* rule in Canada following the decisions of *Tolofson v. Jensen* and *Lucas v. Gagnon*, and in Australia in the decisions *Regie v. Zhang* and *John Pfeiffer v. Rogerson*. Further, and in direct contrast with the prevailing trend in modern private international law, the revival of *Renvoi* in Australia was considered with particular emphasis, although significant difficulties were identified and argued.

Finally, Chapter 4 considered, in detail, the main provisions and prevailing approach of the European Union measure on choice of law for non-contractual obligations, the Rome II Regulation. The Regulation, asserting a general *lex loci damni* rule, was considered with the intention of highlighting particular inconsistencies and instances of ambiguity in need of elaboration and clarification from the European Court of Justice before the Regulation's aims of certainty and predictability might be achieved.

More fundamentally, however, is the inescapable observation that while the United States stood still, Europe forged ahead with its project of harmonisation, integration and homogenisation through the adoption of a common *lex loci damni* general rule

undoubtedly influenced by the resurgence of the *lex loci delicti* in other jurisdictions. In this regard it submitted that Europe stands more United than the United States of America and can, and ought to, serve as impetus for renewal and reform there.

The more general, and more important, conclusion reached in this thesis is that in the absence of harmonisation and integration of substantive law, private international law, and choice of law for torts in particular, is unacceptably fragmented and disjointed at a global level. In the increasingly global village, coherent, elaborate and refined rule-based regimes, of the kind promulgated in the United Kingdom and European Union, and adopted in similar terms at common law in Canada and Australia, are absolutely vital to further the interests of the Unions in the old and new worlds, and otherwise sovereign states. In this regard, the "old dogs" learned a new trick that hasn't yet been copied or enhanced – a comprehensive rule-based regime centred on the *lex loci damni.*

Professor Reese commented that:

> ...the risk of failure should not deter an attempt at rule making in choice of law – just as it does not do so in other areas of the common law – whenever there is a good basis for the belief that a proposed rule would lead to good results under most circumstances. And a rule which has proved its worth in practice should not be refused application in a case that falls within its proper scope merely because it would lead in that case to a result that might be thought unfortunate...perfection is not for this world. The advantages which good rules bring are worth the price of an occasional doubtful result.[1]

This thesis has sought to identify, analyse and illuminate the "imperfections" in this world, to identify prevailing concepts and trends and to contribute to the improvement of the regimes on both sides of the Atlantic as a result.

---

[1] Reese, Choice of Law: Rules or Approach (1972) 57 Cornell L.Rev 315 at 322

CASE LIST

Adams v. Cape Industries Plc [1990] Ch 433

Alabama Great Southern RR Co v. Carroll (1893) 11 So. 803

Allstate Ins v. Hague (1980) 449 US 302

Allstate Ins. Co. v. Elkins (1979) 396 N.E.2d 528

Amaca PTY Ltd. v. Bernard George Frost [2006] NSWCA 173

An Bord Trachtála v. Waterford foods plc [1994] FSR 316

Armagas Ltd v. Mundogas SA [1986] AC 717

Armstrong v. Armstrong (1968) 441 P.2d 699

Auten v. Auten (1954) 208 NY 155

Babcock v. Jackson (1963) 12 NY 2d 473

Baffin Land Corp. v. Monticello Motor Inn, Inc. (1967) 425 P.2d 623

Balts v. Balts (1966) 142 NW 2d 66

Barclay's Bank Plc v. Inc Incorporated [2000] 6 WWR 511

Beaulieu v. Beaulieu (1970) 265 A.2d 610

Bellotti v. Stair [2002] QDC 161

Bernhard v. Harrah's Club (1976) 546 P.2d 719

Bishop v. Florida Specialty Paint Co. (1980) 389 So. 2d 999

Breavington v. Godleman (1988) 169 CLR 41

Brickner v. Gooden (1974) 525 P.2d 632

Bristow Helicopters Ltd v. Sikorsky Aircraft Corporation [2004] 2 Lloyd's Rep 150

C v. S [2010] EWHC 2676 (Fam)

Camp v. Lockwood (1788) 1 US (1 Dall) 393

Case 12/76 Industrie Tessili Italiana Como v. Dunlop AG [1976] ECR 1473

Case 189/97 Kalfelis v. Bankhaus Schröder Münchmeyer [1988] ECR 5565

Case 21/76 Handelskwekerij GJ Bier BV v. Mines de Potasse d'Alsace [1976] ECR 1735

Case 26/91 Jakob Handte & Co GmbH v. Traitements Mecano-Chimiques des Surfaces SA [1990] ECR I-3967

Case 29/76 Lufttransportunternehmen GmbH v. Eurocontrol [1976] ECR 1541

Case 34/82 Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging [1983] ECR 987

Case 76/76 Silvana di Paulo v. Office National de l'Emploi [1977] ECR 315

Case C-102/91 Knoch v. Bundesanstalt für Arbeit [1992] ECR I-1431

Case C-120/78 Cassis de Dijon [1979] ECR 649

Case C-172/91 Sonntag v. Waidmann [1993] ECR I-1963

Case C-220/88 Dumez France SA v. Heissische Landesbank [1990] ECR I-49

Case C-265/02 Frahuil SA v. Assitalia SpA [2004] ECR I-1543

Case C-27/02 Engler v. Janus Versand GmbH [2005] ECR I-1481

Case C-281/02 Owusu v. Jackson Case [2005] ECR I-1383

Case C-288/92 Custom Made Commercial Ltd v. Stawa Metallbau GmbH [1994] ECR I-2913

Case C-364/93 Marinari v. Lloyds Bank plc [1995] ECR I-2719

Case C-38/98 Regie Nationale des Usines Renault SA v. Maxicar SpA [2000] ECR I-2973

Case C-51/97 Reunion Europeenne v. Spliethoff [1998] ECR I-6511

Case C-68/93 Shevill v. Press Alliance [1995] ECR I-415

Cases C-509/09 & C-161/10 eDate Advertising GmbH

Case C-7/98 Krombach v. Bamberski [2000] ECR I-1956

Case C-89/91 Shearson Lehman Hutton v. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligunger GmbH [1993] ECR I-139

Case C-90/97 Robin Swaddling v. Adjudication Officer [1990] ECR I-1075

Casey v. Manson Construction (1967) 428 P.2d 898

Castillo v. Castillo (2005) 2 SCR 870, 2005 SCC 83

Chambers v. Dakotah Charter Inc (1992) 488 N.W.2d 63

Chaplin v. Boys [1971] AC 356

Clark v. Clark (1966) 107 NH 351, 222 A.2d 206

Crossley v. Pacific Employers Ins. Co. (1977) 251 N.W.2d 383

Cuba Ry. v. Crosby (1912) 222 U.S. 473

Direct Energy Marketing Ltd v. Hillson [1999] 12 WWR 408

Distillers Co. (Biochemicals) Ltd. v. Thompson [1971] AC 458

Dow Jones & Company Inc v. Gutnick (2002) 210 CLR 575

Drews v. Insurance Corporation of British Columbia (1998) 55 BCLR (3d) 281

Edmunds v. Simmonds [2001] 1 WLR 1003

Ehredt v. DeHavilland Aircraft Co. (1985) 705 P.2d 446

Emory v. Grenough (1797) 3 US (3 Dall) 369

Erie Railway v. Tompkins (1938) 304 U.S. 64

Estate of Fuld; Hartley v. Fuld (No 3) [1968] P 675

Fabricius v. Horgen (1965) 132 N.W.2d 410

First National Bank v. Rostek (1973) 514 P.2d 314

Fitts v. Minnesota Mining & Manufacturing Co (1991) 581 So. 2d 819

Fitzgerald v. Austin (1997) 715 So. 2d 795

Forsman v. Forsman (1989) 779 P.2d 218

Fox v. Morrison Motor Freight Inc. (1971) 267 N.E.2d 405

Gill v. Gill 2000 BCSC 870

Grant v. McAuliffe (1953) 41 Cal 2d 859

Grehan v. Medical Incorporated and Valley Pines Association [1986] IR 528

Griffith v. United Air Lines (1964) 203 A.2d 796

Grimes v. Cloutier (1990) 69 O.R. (2d) 641

Guardian of Matt v. Barber (2002) 216 DLR (4th) 453

Guinness v. Miller (1923) 291 Fed. 269, (1924) 299 Fed 539

Gutierrez v. Collins (1979) 583 S.W.2d 312

Hanlan v. Sernesky (1997) 35 O.R. (3d) 603 (Ont. Gen. Div.)

Harding v. Wealands [2006] UKHL 32, [2005] 1 All ER 415

Hataway v. McKinley (1992) 830 SW 2d 53, 58

Hicks v. Guinness (1925) 269 US 71

Hopkins v. Lockheed Aircraft Corp. (1967) 201 So.2d 743

Hubbard Mfg. Co. v. Greeson (1987) 515 N.E.2d 1071

Hulse v. Chambers [2002] 1 All ER 812

In re Estate of Murnion (1984) 686 P.2d 893

Ingersoll v. Klein (1970) 262 N.E.2d 593

Iran v. Berend [2007] EWHC 132 (QB)

Issendorf v. Olson (1972) 194 N.W.2d 750

Jagers v. Royal Indem. Co. (1973) 276 So. 2d 309

John Pfeiffer Pty Ltd v. Rogerson [2000] HCA 36, (2000) 172 ALR 625, (2000) 203 CLR 503

Johnson v. Pischke (1985) 700 P.2d 19

Kansas v. Colorado (1901) 185 US 125, 146 - 147

Kelly v. Groupama [2012] IEHC 277

Kennedy v. Dixon (1969) 439 S.W.2d 173

Kilberg v. Northeast Airlines (1961) 9 NY 2d 34

Kuwait Airways Corporation v. Iraqi Airways Co. [1995] 1 WLR 1147

LeBlanc v. Stuart (1972) 342 F. Supp. 773

Lilienthal v. Kaufman (1964) 395 P.2d 543, 239 Or 1

Loucks v. Standard Oil Co. of New York (1918) 224 NY 111

Lucas v. Gagnon [1993] 11 O.R. (3d) 422

M v. M [2007] EWHC 2047 (Fam)

Machado v. Fontes [1897] 2 QB 231

Macmillan Inc v. Bishopsgate Investment Trust plc (No 3) [1995] 1 WLR 978, 1008

McCann v. Foster Wheeler LLC (2010) 48 Cal 4th 68, 225 P.3d 516

McLean v. Pettigrew [1945] S.C.R 62

Mellk v. Sarahson (1967) 229 A.2d 625

Mercantile Mutual Insurance (Australia) Ltd v. Neilson (2004) 28 WAR 206

Metall und Rohstoff AG v. Donaldson Lufkin & Fenrette Inc [1990] 1 QB 391

Milkovich v Saari (1973) 203 NW 2d 408

Mitchell v. Craft (1968) 211 So. 2d 509

Mitchell v. McCulloch 1973 SC 1

Morgaurd Investments Ltd. v. De Savoye [1990] 3 S.C.R. 1077

Murdoch v. City of Memphis (1874) 87 U.S. 590

Neilson v. Overseas Projects Corporation of Victoria Ltd [2005] HCA 54, (2005) 221 ALR 213, [2004] WASCA 60

Neumeier v. Kuehner (1972) 31 NY 2d 121

Nystrom v. Tarnava (1996) 44 Alta. L.Rev 355 (Q.B.) 32

O'Connor v. O'Connor (1986) 519 A.2d 13

Oceanic Sun Line Special Shipping Co Inc v. Fay (1988) 165 CLR 197

Oliver B. Cannon & Son Inc. v. Dorr-Oliver Inc. (1978) 394 A.2d 1160

Orzel v. Seward (2011) ONSC 6767

Pearson v. Boliden Ltd (2002) 222 DLR (4th) 453

Pepper v. Hart [1993] AC 593

Peters v. Peters (1981) 634 P.2d 586

Petkus v. Becker [1980] 2 S.C.R. 834

Pevoski v. Pevoski (1976) 358 N.E.2d 416

Phillips v. Eyre (1870) LR 6 QB 1

Raiffeisen Zentralbank Osterreich v. Five Star General Trading [2001] QB 825

Red Sea Insurance Co. Ltd. v. Bouges S.A. [1995] 1 AC 190

Regie National des Usines Renault SA v. Zhang [2002] HCA 10

Reich v. Purcell (1967) 432 P.2d 727, 67 Cal.2d 551

Reid v. AGCO Australia Ltd [2000] VSC 363

Roerig v. Valiant Trawlers Ltd. [2002] 1 All ER 961, 1 WLR 2304

Romero v. International Terminal Operating Co (1959) 358 US 354

Ross v. Ford Motor Co. [1998] NWTR 175

Routley v. Bridgestone Australian Limited [2004] NSWDDT 4

Scheer v. Rockne Motors Corp (1934) 68 F 2d 942

Schibsby v. Westenholz (1870) L.R. 6 Q.B. 155

Schultz v. Boy Scouts of America Inc. (1985) 65 NY 2d 189

Schwartz v. Schwartz (1968) 447 P.2d 254

Sellers v. Head (1954) 73 So. 2d 747

Sexton v. Ryder Truck Rental Inc. (1982) 320 N.W.2d 843

Shane v. JCB Belgium NV (2003-11-14) ONSC 02-CV-19871

Siegmann v. Meyer 100 F 2d 367 (2d Cir 1938)

Slater v. Mexican National Railroad Co (1903) 194 US 120

Somers v. Fournier (2002) 214 [DLR] (4th) 611

Spar Aerospace v. American Mobile Satellite (2002) 4 SCR 205

Stevens v. Head (1993) 176 CLR 433

Tab Constr. Co. v. Eighth Judicial Dist. Ct. (1967) 432 P.2d 90

The Halley (1868) LR 2 PC 193

Tolofson v. Jensen [1994] 3 S.C.R. 1022

Tooker v. Lopez (1969) 24 NY 2d 569

Union Shipping New Zealand Ltd v. Morgan (2002) 54 NSWLR 690

University of Calgary v. Colorado School of Mines (1995) 179 AR 81

Voyage Company Industries Inc v. Craster (1998-08-11) BCSC C976871

Wallis v. Mrs. Smith's Pie Co. (1977) 550 S.W.2d 453

Wartell v. Formusa (1966) 213 N.E.2d 544

Werner v. Werner (1974) 526 P.2d 370

Wessling v. Paris (1967) 417 S.W.2d 259

Wilcox v.Wilcox (1965) 133 N.W.2d 408

Wong v. Lee (2002) 211 DLR (4th) 69

Wong v. Wei (1999) 65 BCLR (3d) 222

Woodward v. Stewart (1968) 243 A.2d 917

Young v. Masci (1933) 289 US 253, 53 S.Ct 599, 77 L.Ed 1158

BIBLIOGRAPHY

Ahern & Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (2009 Nijhoff)

Ahern, *Renvoi*'s Australian Outing (2007) 15 ISLR 89

Anderson, International Torts in the High Court of Australia (2002) 10 Torts LJ 132

Beale, *A Treatise on the Conflict of Laws* (1935)

Beale, *Cases on the Conflict of Laws* (1901)

Beaumont & Tang, Classification of Delictual Damages – Harding v. Wealands and the Rome II Regulation (2008) 12 Edinburgh L.Rev 135

Bingham, Book Review (1937) 85 U Pa L.Rev 857

Briggs, When in Rome, Choose as the Romans Choose (2009) 125 LQR 191

Brilmayer, Governmental Interest Analysis: A House Without Foundations (1985) 46 Ohio St. LJ 459

California Law Revision Commission, *Recommendation and Study Relating to Choice of Law Governing Survival of Action* (Feb 1957)

Camara, Costs of Sovereignty (2005) 107 West Virginia L.Rev 385

Cardozo, *The Paradoxes of Legal Science* (1928)

Carruthers, Has the Forum Lost Its Grip, Ahern & Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (2009 Nijhoff)

Carter, The Private International Law (Miscellaneous Provisions) Act 1995 (1996) 112 LQR 190

Castel, *Canadian Conflict of Laws* (3rd ed 1994)

Cavers, A Critique of the Choice of Law Problem (1933) 47 Harv L.Rev 173

Cavers, Restatement of the Law of Conflict of Laws (1935) 44 Yale LJ 1478

Cavers, *The Choice of Law Process* (1965)

Cavers, The Two "Local Law" Theories (1949) 63 Harv L.Rev 822

Cavers, The Value of Principles Preferences (1971) 49 Tex. L.Rev 211

Cheatham & Reese, Choice of the Applicable Law (1952) 52 Colum L.Rev 959

Cheatham, Griswold, Reese & Rosenberg, *Conflict of Laws* (5th ed., 1964)

Cheshire, *North & Fawcett, Private International Law* (14th ed., 2008)

Chief Justice Traynor, Book Review (1965) 14 Duke LJ 426

Cook, "Substance" and "Procedure" in the Conflict of Laws (1933) 42 Yale LJ 333

Cook, An Unpublished Chapter of the Logical and Legal Bases of the Conflict of Laws (1943) 37 Ill L.Rev 418

Cook, The Logical and Legal Bases of the Conflict of Laws (1924) 33 Yale LJ 457

Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942)

Cox, Substantive, Multilateral and Unilateral Choice-of-Law Approaches (2001) 37 Willamette L.Rev 171

Currie, Comments on Babcock v. Jackson (1963) 63 Colum L.Rev 1212

Currie, Notes on Method and Objectives in the Conflict of Laws (1959) 8 Duke LJ 171

Currie, *Selected Essays on the Conflict of Laws* (1963)

Currie, The Disinterested Third State (1963) 28 Law & Contemp Probs 754

Dicey & Morris, *The Conflict of Laws* (12th ed.)

Dicey & Morris, *The Conflicts of Laws* (11th ed.)

Dicey, Morris & Collins, *The Conflict of Laws* (14th ed. 2006)

Dicey, *The Conflict of Laws* (3rd ed. 1922)

Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (OUP 2008)

Dworkin, Hard Cases (1975) 88 Harv L.Rev 1057

Ehrenzweig, A Counter-Revolution in Conflicts Law? From Beale to Cavers (1966) 80 Harv L.Rev 377

Fawcett, Is American Governmental Interests Analysis the Solution to English Tort Choice of Law Problems (1982) 31 ICLQ 150

Fentiman, Choice of Law in Europe: Uniformity and Integration (2008) 82 Tulane L.Rev 2021

Fentiman, *Foreign Law in English Courts* (Oxford University Press, 1998)

Fentiman, The Significance of Close Connection, Ahern & Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (2009 Nijhoff) 85

Goldsmith Posner, Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective (2004) 31 J Leg Stud 115

Gray, Flexibility in Conflict of Laws Multistate Tort Cases: The Way Forward in Australia (2004) 23 University of Queensland LJ 435

Gwynn Morgan, *A Judgment Too Far?: Judicial Activism and the Constitution* (Cork 2001)

Habermas, Struggles for Recognition in the Democratic Constitutional State, Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton 1994)

Heffernan, Rome II: Implications for Irish Tort Litigation, Ahern & Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (2009 Nijhoff) 257

Henkin, *How Nations Behave* (Columbia 1979)

Hohloch, Place of Injury, Habitual Residence, Closer Connection and Substantive Scope: The Basic Principles (2007) 9 Yearbook of Private International Law 1

House of Lords Select Committee on the European Union, *The Rome II Regulation*, 8th Report, Session 2003–04, HL Paper 66

Huber (ed) *Rome II Regulation: Pocket Commentary* (2011 Sellier)

Jennings & Watts (eds), *Oppenheim's International Law* (Harlow 9th ed 1992)

Juenger, Leflar's Contribution to American Conflicts Law (1980) 31 S.C L.Rev 413

Junger, Proposed Choice of Law Methodology for Tort in Canada: Comparative Evaluation of British and American Approaches (1994) 26 Ottawa L.Rev 75

Karrer & Arnold, *Switzerland's Private International Law Statute of December 18, 1987, The Swiss Code on Conflict of Laws and Related Legislation* (Kluwer 1989)

Kozyris, Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides' "Missed Opportunities" (2008) 56 Am J Comp L 471

Leflar, *American Conflicts Law* (1968)

Leflar, Choice of Law: A Well-Watered Plateau (1977) 41 Law & Contemp. Prob. 10

Leflar, Choice-Influencing Considerations in Conflicts Law (1966) 41 NYU L.Rev 267

Leflar, Conflicts Law: More on Choice-Influencing Consideration (1966) 54 Cal L.Rev 1584

McDougal, Toward Application of the Best Rule of Law in Choice of Law Cases (1984) 35 Mercer L.Rev 483

McMahon & Binchy, *Law of Torts* (Butterworths 3rd ed. 2000)

Michaels, The New European Choice of Law Revolution (2008) 82 Tulane L.Rev 1607

Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge 2009)

Morris, Law and Reason Triumphant or: How Not to Review a Restatement (1973) 21 Am J Comp L 322

Morris, *The Conflict of Laws* (3rd ed., 1984)

Morse, Torts in Private International Law: A New Statutory Framework (1996) 45 ICLQ 888

Mortensen, "Troublesome and Obscure": The Renewal of Renvoi in Australia (2006) 2 Journal of Private International Law 1

Nadelmann, The Benelux Uniform Law on Private International Law (1970) 18 Am J Comp L 406

Reed, The Private International Law (Miscellaneous Provisions) Act 1995 and the Need for Escape Devices (1996) 15 Civil Justice Quarterly 305

Reed, The Anglo-American Revolution in Tort Choice of Law Principles: Paradigm Shift or Pandora's Box? (2001) 18 Arizona Journal of International and Comparative Law 867

Reese, Choice of Law: Rules or Approach (1972) 57 Cornell L.Rev 315

Reese, Conflict of Laws and the Restatement Second (1963) 29 Law & Contemp Probs 679

Reese, Foreword (1972) 72 Colum L.Rev 219

Restatement (First) of Conflict of Laws (1934)

Restatement (Second) of Conflict of Laws (1971)

Rushworth & Scott, Rome II: Choice of law for non-contractual obligations (2008) LMCLQ 274

Scholes, Hay, Symeonides, Borchers, *Conflict of Laws* (3rd ed. 2000)

Smith, Choice of Law in the United States (1987) 38 Hastings LJ 1041

Solimine, The Impact of Babcock v. Jackson: An Empirical Note (1993) 56 Albany L.Rev 773

Stone, Product Liability under the Rome II Regulation, Ahern & Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (2009 Nijhoff)

Story, *Commentaries on the Conflict of Laws* (Hilliard Gray & Co 1834)

Sumner, Choice of Law Governing Survival of Actions (1957) 9 Hastings LJ 128

Symeonides, Revolution and Counter-Revolution in American Conflicts Law: Is There a Middle Ground? (1985) 46 Ohio St. LJ 549, 553

Symeonides, Rome II and Tort Conflicts: A Missed Opportunity (2008) 56 Am J Comp L 173, 180

Symeonides, Twenty-Fourth Annual Choice of Law Survey (2011) 58 Am J Comp L 303, 330

T.J.B, The Impact of Babcock v. Jackson (1966) 52 Virginia L.Rev 302, 307

TA Cowan, Renvoi Does Not Involve a Logical Fallacy (1938) 37 University of Pennsylvania L.Rev 34

Tang, The Interrelationship of European Jurisdiction and Choice of Law in Contract (2008) 4 Journal of Private International Law 35

The Law Commission and the Scottish Law Commission, *Private International Law: Choice of Law in Tort & Delict* (Law Commission Report No. 193, Scottish Law Commission No. 129) (London: HMSO, 1990)

Traynor CJ, Is this Conflict Necessary? (1959) 37 Tex L.Rev 657

Traynor CJ, War and Peace in the Conflict of Laws (1976) 25 ICLQ 121

Trimble, A Revisionist View of Customary International Law (1986) 33 UCLA L.Rev 665

Von Mehren, Book Review (1964) 17 J. Legal Ed 91

Walker, "Are We There Yet?" Towards a New Rule For Choice of Law in Tort (2000) 38 Osgoode Hall L.J. 331

Weintraub, "At Least To Do No Harm" Does the Second Restatement of Conflicts Meet the Hippocratic Standard? (1997) 56 Md. L.Rev 1284

Weintraub, Choice of Law for Quantification of Damages: A Judgment of the House of Lords Makes a Bad Rule Worse (2007) 42 Tex Int LJ 311

Weintraub, Interest Analysis in the Conflict of Laws as an Application of Sound Legal Reasoning (1984) 34 Mercer L.Rev 629

Ynetma, The Restatement of the Conflict of Laws (1936) 36 Colum L.Rev 183