BREAVINGTON v. *GODLEMAN* (1988) 62 Australian Law Journal Reports 447: A NEW CHOICE OF LAW RULE FOR TORTS

Breavington v. *Godleman* has implemented radical changes to the tort choice of law rule in Australia. Despite six separate judgements in the High Court, two significant changes may be extracted from the case:

(i) The distinction between international and interstate torts.
(ii) The swing in emphasis from the lex fori to the lex loci delicti.

In response to (i) a majority of the court formulated separate choice of law rules for international and interstate torts. The preference for the law of the place of the wrong is evident in both tests. In the case of international torts a narrow interpretation to the *Phillips* v. *Eyre*[1] rule was adopted, bringing the Australian position in line with the English decision of *Chaplin* v. *Boys*.[2] The lex loci delicti is now the applicable law. Possibly Lord Wilberforce's "flexibility" exception[3] would be invoked in appropriate cases. For interstate conflicts, a single choice of law rule was adopted. The law of the place of the wrong determines the liability between the parties.

The court in *Breavington* was concerned to discourage forum shopping. But it has implemented choice of law rules which have the potential to work considerable injustice. It is to be hoped that the Court will move towards a proper law of tort approach which found only limited support in the present case. This approach would not induce forum shopping yet would allow sufficient flexibility to avoid absurd results.

The facts may be briefly stated. A motor vehicle accident took place in the Northern Territory. The appellant was a passenger in an Australian Telecommunications Commission vehicle driven by the first respondent.

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[1] (1870) L.R. 6 Q.B. 1.
[2] [1971] A.C. 356.
[3] *Chaplin* v. *Boys, supra.*

At the time of the collision both parties were residents of the Northern Territory. At the time of the negligence claim, brought in Victoria, both parties were residents of Victoria.

If Victorian (common) law applied, the appellant could recover damages for loss of earnings and damages for pain and suffering. Under the no fault compensation scheme of the Motor Accidents (Compensation) Act 1979 (NT) the claim for economic loss is excluded.

At first instance O'Bryan J. applied Victorian law as the lex fori, the plaintiff having satisfied the *Phillips* v. *Eyre* rule. The Victorian Supreme Court adopted a flexibility test, thus determining the claim according to Northern Territory law. The High Court dismissed the appeal.

The case raises various constitutional issues. For the purposes of this casenote I shall only touch on those relevant to the issue of the tort choice of law rule.

TWO TESTS

Traditionally the courts have approached tort problems on the basis that the Australian States are to be regarded as foreign countries in relation to each other.[4] Previous decisions have suggested that the common law rules provide a less than ideal means of resolving tort conflicts within Australia.[5] In particular, they fail to accommodate the federal nature of the Australian system, and may frustrate the operation of States' laws.[6]

The High Court responded to these criticisms by adopting separate rules for interstate torts. It should be noted that this position was taken by only a bare majority, namely Mason C.J., Wilson, Gaudron and Deane JJ. In formulating a separate test Mason C.J. still relied heavily on international principles. Wilson and Gaudron JJ. stated that the rule for interstate torts was dictated by constitutional considerations, while Deane J. introduced the new concept of a "national law".

Brennan J., on the other hand, felt that there was no need to differentiate between the interstate and international conflicts. Toohey and Dawson JJ. were less clear. Toohey J. acknowledged the criticisms enunciated in *Borg Warner* v. *Zupan* that the international tests were inappropriate in a federal system, but did not lay down a separate test. Similarly Dawson J. neither accepted nor rejected the idea, although some of his comments may be applicable only in the Australian context.

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[4] Per Windeyer J. in *Pederan* v. *Young* (1946) 110 C.L.R. 162 at 170; and per Williams J. in *Chaff and Hay Acquisition Committee* v. *J. A. Hemphill & Sons* (1947) 74 C.L.R. 375 at 396.

[5] For example *Anderson* v. *Eric Radio & TV Pty Ltd* (1965) 114 C.L.R. 20 at 46.

[6] Per Marks J. in *Borg Warner (Australia) Ltd* v. *Zupan* [1982] V.R. 457 at 460-61.

INTERNATIONAL TORTS

The conflict before the court was an interstate one. Nevertheless the traditional principles applicable to international torts received much attention. Since they were the starting point for four of the judges, it is appropriate to deal with them first.

Prior to *Breavington* v. *Godleman*, the basis of the choice of law rule was the case of *Phillips* v. *Eyre*.[7] A particular passage of Willes J. was seized upon in subsequent cases:[8]

> "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England . . . Secondly, the act must not have been justifiable by the law of the place where it was done . . ."[9]

The various statutory-like interpretations this passage has received in England and in Australia has been the source of much confusion. The editors of Cheshire & North's *Private International Law*[10] describe the test as far from satisfactory. It is the only choice of law rule which places upon the plaintiff the burden of satisfying two sets of laws.

Under the first limb of the *Phillips* test, the wrong had to give rise to a cause of action under the lex fori. At this stage, defences were ignored.[11] The view in *Anderson* v. *Eric Anderson Radio* in relation to this branch of the rule probably still holds for foreign torts after *Breavington*. It was not actually in contention in this appeal. However Brennan J. did reformulate the entire *Phillips* v. *Eyre* rule at p. 467-68, and in so doing gave a narrower interpretation to the first limb. The circumstances must be such as to give rise to:

> " . . . a cause of action . . . entitling the plaintiff to enforce against the defendant a civil liability of the kind which the plaintiff claims to enforce . . ."

It is the second limb which has caused judges and academics alike the most difficulty. Under this branch, the act must be "not justifiable" by the law of the place where it was done. This is open to at least four interpretations.[12]

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[7] (1870) L.R. 6 Q.B. 1 per Willes J. The case has been adopted in Australia in *Koop* v. *Bebb* (1951)84 C.L.R. 629, and in *Anderson's* case, *supra*.

[8] *Carr* v. *Francis Times & Co.* 1902 A.C. 176 at 182. *Chaplin* v. *Boys, supra*.

[9] (1870) L.R. 6 Q.B. 1 at 28-29.

[10] 11th Edition 1987.

[11] *Anderson's* case, *supra*, established this.

[12] See Sykes and Pryles *Australian Private International Law* (2nd Edition 1987 Law Book Company) at p. 513-516, and also Phegan *Tort Defences in Conflict of Laws—The Second Condition of the Rule in Phillips v. Eyre in Australia* (1984) 58 A.L.J. 24.

At one extreme "not justifiable" under the lex loci delicti has been held to mean "not innocent".[13] In the leading case of *Machado* v. *Fontes* criminal liability was sufficient to make the act not justifiable even though there was no civil liability. This approach places minimal emphasis on the law of the place of the wrong.

Machado v. *Fontes* has been criticised by both text writers and judges,[14] yet its status prior to *Breavington* was unclear. In England two members of the House of Lords in *Chaplin* v. *Boys*[15] declined to overrule it. In Australia, it was held in *Koop* v. *Bebb* that the last word had not been said on the subject and in *Anderson* the court regarded the matter unsettled. Consequently Kerr J. in *Hartley* v. *Venn*[16] considered it binding on him!

At the other extreme the defendant must be civilly liable to the plaintiff in respect of each head of loss claimed. As the plaintiff in *McElroy* v. *McAllister* discovered,[17] such an interpretation allows recovery only where there is exact coincidence of types of damage under the two laws. The lex loci delicti is given maximum emphasis here: it determines the extent of liability. This strict approach was taken by Lord Wilberforce in *Chaplin* v. *Boys*,[18] and in at least two cases in Australia[19] prior to *Breavington*. Yet the tendency in Australia had been to adopt a more lenient intermediate interpretation, that the wrong must give rise to civil liability between the parties. This view was taken in *Koop* v. *Bebb*,[20] and also by O'Bryan J. at first instance in *Breavington*.

The High Court in *Breavington* adopted the *McElroy* approach. Indeed, by any other approach the plaintiff would have satisfied the *Phillips* v. *Eyre* conditions. The Court acknowledged the criticisms of *Machado*, and that it had been overruled in *Chaplin*.[21] The views of the Court are illustrated by the following comment by Toohey J. at p. 489:

"It should no longer be regarded as good law in Australia."

Since the intermediate approaches are inconsistent with the *McElroy* interpretation, they too can be taken to be discarded. Mason C.J., Toohey

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[13] *Machado* v. *Fontes* [1897] 2 Q.B. 231.

[14] In Australia in *Varawa* v. *Howard Smith & Co. Ltd (No. 2)* [1910] V.L.R. 509 at 523 per Hodges J., at 526-33 per Cussen J.; and in England in *Chaplin* v. *Boys* [1971] A.C. 356 Lord Wilberforce and Lord Hodgson overruled it.

[15] *Supra*. The two were Lord Donovan and Lord Pearson.

[16] (1967) 10 F.L.R. 151.

[17] 1949 S.C. 110. The case was described as a "gross injustice" by Morris *Conflict of Laws* 2nd Ed. 1980 at 253.

[18] *Supra* at 389.

[19] Namely in *Li Lian Tan* v. *Durhan* [1966] S.A.S.R. 143, and in *Corcoran* v. *Corcoran* [1974] V.R. 164, per Adam J.

[20] (1951) 84 C.L.R. 629 per Dixon, Williams, Fullagar and Kitto JJ.

[21] Per Mason C.J. at 450, per Wilson and Gaudron at 459, per Brennan J. at 466-67, per Dawson J. at 483, per Toohey at 489; Deane J. did not consider the issue.

J., and by inference Wilson and Gaudron JJ., adopted Lord Wilberforce's interpretation in *Chaplin*, ergo the strict view. Brennan J. (at p. 467) restated the second limb incorporating the *McElroy* approach, in line with his narrow interpretation of the first limb.

Dawson J. is not so clear. His Honour says that the view in *Koop* v. *Bebb* should be accepted. Thus he seems to prefer the more lenient approach. But then he goes on to say (at p. 483):

> "I would adopt the words of Lord Wilberforce (at p. 389) as being that civil liability in respect of the relevant claim should exist as between the actual parties under the law where the act was done."

It is suggested that Dawson J. in fact adopts the stricter *Chaplin* approach rather than the one in *Koop* v. *Bebb*, and the discrepancy arises because in his honour's opinion *Chaplin* adopts *Koop*.

Deane J. did not address the common law principles at all.

The Applicable Law

Once through the *Phillips* v. *Eyre* rule, the courts would then search for a law by which the substantive liability of the parties would be determined. In Australia prior to *Breavington*, the lex fori was almost certainly to be applied.[22] Indeed the High Court acknowledged that *Anderson's* case and *Koop* v. *Bebb* established the lex fori as the governing law, and that to hold otherwise would require a significant overturning of authority.[23] Nevertheless the majority of the court was sufficiently influenced by the decision of *Chaplin* v. *Boys*[24] to reconsider the position. Toohey J. put it thus (at p. 490):

> "It is appropriate for this Court to recognise the developments in the common law, especially as reflected in the judgements in *Chaplin* v. *Boys* . . ."

In *Chaplin* v. *Boys* Lord Wilberforce held that in general the lex loci delicti will determine liability. There may be special circumstances however, which justify the application of some other law, usually the lex fori. Lord Wilberforce referred to this displacement of the lex loci delicti as the "flexible" application of the rule in *Phillips* v. *Eyre*.

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[22] See Mason C.J. at 451, Wilson and Gaudron JJ. at 459; cf. Brennan J. who refused to overrule these decisions.

[23] Brennan J. felt that those cases were too well established to be discarded.

[24] The High Court was certainly not required to follow or even consider *Chaplin* v *Boys* supra, especially since the case had no single ratio. The heavy reliance on the case is probably due to the significance of the changes in the law introduced by it. It has been the judgement of Lord Wilberforce which has attracted the attention, since his was the most innovative. His judgement was supported in many respects by Lord Hodgson and Lord Guest, and has been regarded as the definitive statement on the law relating to tort choice of law in England, e.g. *Church of Scientology of California* v. *Metropolitan Police Commissioner* (1976) 120 120 Sol. Jo. 690, *Coupland* v. *Arabian Gulf Petroleum Co.* [1983] 3 All E.R. 226, *Armagas Ltd* v. *Mundogas* [1986] A.C. 717. See Cheshire & North *Private International Law* (11th Edition 1987) at 536.

In Australia prior to 1988 flexibility had a mixed reception. In South Australia,[25] Queensland,[26] and Victoria[27] the notion had been accepted. But in *Kolsky* v. *Mayne Nickless Ltd* the New South Wales Court of Appeal wholeheartedly rejected it:[28]

> "The established law of this country in this respect is on the side of certainty rather than flexibility."

Owing to the dearth of torts conflicts cases,[29] it was seventeen years before the High Court was given the opportunity to consider both *Chaplin's* preference for the lex loci delicti, and the flexibility exception. The Court responded as follows:

MASON C.J. (pp. 458-445): In an encouraging judgement, Mason C.J. rejects the lex fori as the applicable law. Only by giving primacy to the lex loci delicti can the law provide an adequate safeguard against forum shopping. He observes that *Chaplin* v. *Boys* identifies either the lex loci delicti or the lex loci delicti subject to the flexibility exception as the governing law, and approves the judgement of Lord Wilberforce. It is fairly clear that Mason C.J. favours the concept of flexibility.

Thus where the plaintiff fails to satisfy the second condition in *Phillips* v. *Eyre*, as happened in *Chaplin*, if on the special circumstances of the case fairness requires the rule to be applied flexibly, then the lex loci delicti should be displaced altogether. In the result, if a plaintiff satisfies *Phillips*, then the lex loci delicti applies. If however the plaintiff fails to satisfy the rule but is allowed through flexibly, then some other law applies (probably the lex fori, in which case we are back to *Anderson's* case).

This appears to be a rather convoluted analysis. But the complicating factor is *Phillips* v. *Eyre*. If that case is abandoned, Mason C.J.'s approach becomes simple. In fact he is adopting the proper law type approach which was suggested in Model 1 of the Law Commission Paper.[30] At p. 453 he approves:

> "That alternative (which) involves the application of the lex loci delicti subject to an exception involving the application of the law of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection."

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[25] *Kemp* v. *Piper* [1971] S.A.S.R. 25.

[26] *Warren* v. *Warren* [1972] Qd. R 386.

[27] *Corcoran* v. *Corcoran* [1974] V.R. 164; and in *Borg Warner (Aust) Ltd* v. *Zupan* [1982] V.R. 437. The Victorian Full Court also applied the exception in this case.

[28] *Kolsky* v. *Mayne Nickless Ltd* (1970) 72 S.R. (NSW) 437 at 439. It was also rejected in *Schmidt* v. *Government Insurance Office of NSW* [1973] 1 N.S.W.L.R. 59.

[29] The *Phillips* v. *Eyre* rule simply placed too onerous a burden on the plaintiff who had to satisfy two sets of laws, to make it worthwhile to bring an action.

[30] Law Commission Working Paper No. 87, *Private International Law: Choice of Law in Tort and Delict* (1984). See also for comment Dicey & Morris *The Conflict of Laws* 11th Ed. at p. 1417; Jaffey *Introduction to the Conflict of Laws* 1988 at p. 188; Fawcett (1985) 48 M.L.R. 439.

The true proper law of tort approach, originally formulated by Morris, chooses that law "which on policy grounds seems to have the most significant connection" with the wrong.[31] It is the interest-analysis approach[32] which has taken hold in America in the leading case of *Babcock* v. *Jackson*,[33] and to a limited extent in England in *Chaplin* v. *Boys*. Mason C.J. advocates a modification of the American approach.[34] The lex loci delicti prima facie applies, but it may be displaced if the interests of the parties themselves reveal that another law has a closer connection with the parties. In this respect, Mason C.J. prefers to give effect to the legitimate or reasonable expectations of the parties, rather than the policy underlying the law of a relevant jurisdiction.

This approach leaves no room for the rule in *Phillips* v. *Eyre*. Mason C.J. concedes that *Chaplin* contemplates its retention, but says at p. 453:

> " . . . the *Phillips* v. *Eyre* conditions have little to offer and present a needless complication once the new approach is adopted."

It is suggested that this new approach achieves both certainty and justice. Were the High Court to implement such a test, the complications in relation to torts would disappear. The reference to two systems of law would no longer be required. The plaintiff would not need to satisfy the requirements of two laws. All that would be necessary would be to determine in what circumstances the lex loci delicti would be displaced.

WILSON and GAUDRON JJ. (pp. 455-65) briefly consider the private international law principles. They also prefer the lex loci delicti to the lex fori as the applicable law. The approach in *Anderson* is unsatisfactory in legal principle and an inducement to forum shopping. They state that the court ought to adopt a new choice of law rule and then cite Lord Wilberforce's judgement in *Chaplin* v. *Boys* (at p. 459). Presumably they would apply flexibility to foreign torts, but their position is not clear.

TOOHEY J. (pp. 486-94) felt it was necessary to give effect to the recent developments in the common law, especially those evident in the judgements of *Chaplin* v. *Boys*. He adopts Lord Wilberforce's judgement in relation to *Phillips* v. *Eyre* and the applicable law. Toohey J. also supports flexibility. In order to maintain certainty, however, the exception will only be invoked where it is clear that the law of the place of the wrong has "no real connection" (at p. 490) with the proceedings. (A stricter approach than Mason C.J.)

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[31] Morris, *The Proper Law of Tort* (1951) 64 Harv.L.R. 881 at 888.

[32] For the various approaches to the proper law of tort see Nygh, *Some Thoughts on the Proper Law of Tort* (1977) 26 I.C.L.Q. 932.

[33] (1963) 12 N.Y. 2d 473 where it was held that the governing law was the law of the state which has the most significant relationship or greatest interest with the parties.

[34] This approach is also favoured by Pryles in Sykes & Pryles supra at p. 506ff.

BRENNAN J. (pp. 465-72): After restating a narrower version of the *Phillips* v. *Eyre* test, Brennan J. refuses to overturn *Anderson*. The lex fori determines the extent of liability;[35] but if the lex loci delicti denies any civil liability then none arises under the lex fori (at p. 468).

Although Brennan J. insists that the law of the forum is the applicable law, the effect of the narrower interpretation of the *Phillips* v. *Eyre* rule means that the lex loci delicti has a significant role in determining liability. The defendant has the benefit of both the lex fori and the lex loci delicti defences. Unlike the majority Brennan J. is content that a strict *Phillips* rule is sufficient to discourage forum shopping.[36]

In the interest of certainty and the uniform enforceability of liability for torts Brennan J. rejects flexibility. It is suggested that the allusion to uniformity here is inconsistent with his preference for the lex fori indicated above. Moreover a stringent *Phillips* v. *Eyre* test which is not mitigated by a flexibility exception is particularly onerous on the plaintiff, as the defendant has the advantage of defences under both laws.

DAWSON J. (pp. 481-86) similarly felt constrained by authority to hold that the lex fori ought to determine the nature and extent of liability (at p. 482). His position as regards flexibility is more equivocal. The desire for flexibility was easily understood in the context of the special circumstances of *Chaplin's* case. But then he says at 484:

> "The rule in *Phillips* v. *Eyre* has never been thought by this Court to have a flexible application within Australia and . . . I do not think that any benefit is to be gained from so regarding it . . . This is so because the very fact of federation tends against the view that one State cannot have a significant interest in the operation of its laws upon acts committed within its borders . . ."

It is obvious he rejects flexibility in relation to interstate torts, but what of international torts? All that can be said is that he neither reject nor affirms the concept.

INTERSTATE TORTS

As stated above, a majority of the High Court has adopted a single choice of law rule in respect of interstate torts. The extent of liability is to be determined solely by reference to the lex loci delicti. This is the net result of the judgements, but the judges reached it by very different routes.

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[35] Brennan J.'s adherence to the lex fori here is surprising in the light of his preference for the lex loci delicti in the context of remission. In *Robinson* v. *Shirely* (1982) 56 A.L.J.R. 237 his honour held that an action in tort ought to be remitted to the locus delicti. See generally Pryles, *The Remission of High Court Actions to Subordinate Courts and the Law Governing Torts* (1984) 10 Syd.L.R. 352.

[36] For a more thorough examination of Brennan J.'s judgement, see Pryles, *The Law Applicable to Interstate Torts: Farewell to Phillips v Eyre?* (1989) 63 A.L.J.R. 158.

Mason C.J. addressed the principles in the context of international torts. He stated that Australia was one country and one nation. When travelling interstate Australian citizens do not enter a foreign jurisdiction with which they have no connection. Consequently there may be a stronger case for looking to the law of the place of the tort as the governing law. In the result he applied the law of the Northern Territory to the facts of the case.

There is no doubt that the nature of the Australian system should be taken into account. The Court could not ignore the factual context of the action. But in some cases the court relied on assumptions as to the effect of the federation which are open to question. For instance, Mason C.J. declares that the Australian citizen is "conscious" of moving from one legal regime to another when travelling interstate and would be likely to expect a substantially different local law. Equally it might be said that a Victorian resident with the view that Australia is one unified country would expect the law of the Northern Territory to be substantially the same. Indeed she might be more likely to assume a difference between Victorian law and French law than between Victorian law and Northern Territory law. In other words, it is extremely difficult to determine the effect of the Australian system on its citizens or their views about it. Yet the court felt it was equipped to do so.

Nor did the court adequately explain why, even if one accepts that the "one nation" concept demands the application of one rule, it follows that the lex loci delicti is the appropriate choice of law. It might lead to absurd results if the law of the place of the wrong were applied irrespective of the circumstances of the case. Mason C.J. would permit some flexibility (he states that there is merely a stronger inference for the lex loci delicti), but he still relies heavily on the law of the place of the wrong, without really considering whether some other law would be appropriate—for example the proper law. In this case the correct result was achieved because the law of the place of the wrong was also the system with the most significant connection to the accident (the parties were residents of the Northern Territory at the time of the accident). But this will not always be the case.

For Wilson and Gaudron JJ. the choice of law was dictated by section 118 of the Commonwealth Constitution. That section required that there be only one possible body of law governing a particular set of facts. They said that this can only be achieved by a mechanical application of the lex loci delicti. Thus Lord Wilberforce's flexibility and the first limb of *Phillips* v. *Eyre* constitute a violation of section 118.

The reliance placed by their honours on section 118 is unprecedented. Section 118 has in the past received some substantive effect,[37] but never

[37] Such as in *Harris* v. *Harris* [1947] V.L.R. 44. But the Court in *Anderson* rejected the view now put forward by Wilson & Gaudron JJ.

so wide an interpretation as to determine a conflicts choice of law rule. Apart from Deane J., the rest of the Court felt the section had little application in this case, or that it was confined to an evidentiary role.

Even without section 118 they insist that it would lead to a manifest absurdity if one set of facts could give rise to different legal consequences depending on where the action is brought. It cannot be denied that this is unsatisfactory and leads to forum shopping. Yet, as pointed out above, it does not follow that the only solution is an inflexible application of the lex loci delicti. For example the proper law of the tort which is objectively ascertainable would be constant regardless of the forum. At least the lex loci delicti could hardly be the optimal choice when the place of the tort is fortuitous and the only connection with that law.

Deane J. rejected private international law principles altogether. They ignore the significance of the federation. The Australian Constitution simply leaves no room for their application to interstate torts. The intention of that document was to create a unitary system of law "objectively ascertainable" and "internally consistent". The preference for the lex fori indicated in the private international law principles is simply inconsistent with that system.

Deane J. derives from these considerations a national law comprised of the law of the state where the wrong occurred as modified by overriding Commonwealth law provisions. He rejects the lex fori as a candidate for this national law, and chooses the lex loci delicti. But he does not explain why a rejection of the lex fori as the suitable system of law means that the lex loci delicti is the only other appropriate law. This two-way vision of the alternative laws is one of the rare instances where Deane J. is in conformity with some of the other judgements in the case!

It is, with respect, unfortunate that Deane J. refused to consider the traditional principles. His judgement is difficult to reconcile with the other dicta in the case. Nor is it clear why these federal considerations should suddenly dictate the choice of law rules to the extent suggested by Deane J.

Brennan J. held that the common law principles as stated by him were applicable to interstate torts. Toohey J. acknowledged the significance of the federation and applied the law of the Northern Territory, but did not lay down separate principles. Dawson J. applies *Phillips* v. *Eyre* with no flexibility.

Two further issues which arise in torts problems must be considered.

The first is the nature of the *Phillips* v. *Eyre* test. Whether the *Phillips* v. *Eyre* test is a choice of law rule or merely a "threshold"[38] question or a combination of both[39] has been the source of much academic debate.

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[38] Per Glass J.A. in *Walker* v. *WA Pickless Pty Ltd* [1980] 2 N.S.W.L.R. 281 at 289.

[39] See Cheshire & North *supra* p. 526.

In *Pozniak* v. *Smith*[40] Mason J. concluded that the balance of authority tended towards the view that the second limb was jurisdictional (the lex fori determining issues of substance).[41] Yet in *Breavington* those judges who considered the issue were in favour of the choice of law rule.

On the issue of res judicata the classification has some practical importance. In theory, if the rule were a threshold one only, then the action could be heard again in another forum—if the claim failed on *Phillips* v. *Eyre* the 'merits' of the case would not yet have been considered. It is unlikely that another court would rehear the action regardless of how the rule is categorized. In effect therefore the rule may have always been treated as a choice of law rule.

Except on the above issue the question whether the rule is jurisdictional or a choice of law has little effect.[42] A strict interpretation of *Phillips* v. *Eyre* effectively renders both limbs choice of law rules. And where the rule has been discarded altogether (as for interstate torts) the controversy likewise disappears.

The second issue is one of greater importance. It relates to damages. The High Court followed Lord Wilberforce's view in *Chaplin* v. *Boys* that the heads of damages are issues of substance and not procedure. In fact the *McElroy* interpretation of the second limb necessitates this approach. But Lord Wilberforce then held that the assessment of damages was a procedural matter to be determined by the lex fori. On this point Mason C.J. disagreed. It would be artificial to regard quantification as a matter of procedure:

> "The measure of damages is plainly a question of substantive law."

The only other judge to address this issue was Brennan J. He based his answer on Part IV of the Services and Execution of Process Act, which required uniformity in the quantification of damages by any Australian forum (pp. 471-72), so applied the lex loci delicti.

CONCLUSIONS

It seems that in relation to international torts the *Phillips* v. *Eyre* rule, as amended by *Chaplin* v. *Boys* still applies. A majority of the court would then apply the lex loci delicti as the governing law. Mason C.J., Toohey J., Wilson and Gaudron JJ., and possibly even Dawson J. would then allow flexibility in the case of a foreign tort. The controversy over

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[40] (1982) 151 C.L.R. 38 at 49.

[41] This view was also taken in *Hartley* v. *Venn supra, Kolsky* v. *Mayne Nickless* (1970) 72 S.R. (NSW) 437 at 444, *Walker* v. *WA Pickless Pty Ltd* [1980] 2 N.S.W.L.R. 281 at 289 and *Anderson's* case at 41. In England according to the authors of Cheshire & North at 526: "on balance the traditional interpretation (is) that *Phillips* v. *Eyre* relates to choice of law and not to jurisdiction." In *Chaplin* v. *Boys* Lord Wilberforce thought so too.

[42] For an explanation of why this is so see the article by Professor Phegan, *Tort Defences in Conflicts of Laws, supra.*

the second limb of the *Phillips* rule has been settled, but there may now be other difficulties in determining when the exception will be invoked.[43]

It seems therefore that the *Phillips* v. *Eyre* rule is still applicable to international torts. The focus is now on the lex loci delicti rather than the lex fori as the court sought to minimize the possibility of forum shopping.

As long as the *Phillips* v. *Eyre* test remains, the tort choice of law rule will retain its infamous character as being the only rule imposing the onerous burden upon the plaintiff of satisfying two laws. In so far as *Breavington* implemented an even narrower *Phillips* v. *Eyre* rule, it has exacerbated this problem. This defect in the law could be remedied by the adoption of the proper law type of approach put forward by Mason C.J., whereby the lex loci delicti prima facie applies but may be displaced by other considerations. This approach would allow sufficient flexibility to achieve justice in each case without sacrificing certainty.

In relation to interstate torts a majority of the court applied the lex loci delicti (Brennan and Dawson JJ. applied the lex fori). In the result the law of the Northern Territory determined the substantive issues in the case. The *Phillips* v. *Eyre* rule and the confusion it creates has been abandoned here. Only a minority were in favour of flexibility for interstate torts (albeit to a limited degree). The result is an inflexible application of the lex loci delicti.

This approach abrogates the complexity and confusion of the *Phillips* v. *Eyre* rule, but may lead to injustice in particular cases. It is in effect the "vested rights" theory as propounded by Holmes J.[44] Ironically individual members of the Court in *Breavington* rejected that very approach since it placed too heavy an emphasis on the place of the wrong.

The American experience suggests that this position will not last indefinitely. In the US in the 1960's[45] an inflexible application of the lex loci delicti was abandoned in favour of the proper law of tort because of the injustice the former test caused. It may be reasonable to have a presumption in favour of the lex loci delicti to take account of the Australian context (as Mason C.J. suggests), but a mechanical application of that law cannot accommodate every case. Although in the present case there were other connecting factors besides the location of the accident (the parties were residents of the Northern Territory at the time of the accident), this will not always be the case.

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[43] For a discussion of this problem in England, see Cheshire & North *supra*, p. 536.

[44] Holmes J. emphasised the "obligatio" theory in *Slater* v. *Mexican National Rail Co.* 1904 U.S. 120 at 126. The doctrine was espoused by Professor Beale and was the basis of the 1934 American Restatement of Laws. See Cheshire & North *supra* p. 514-15, Morris p. 303.

[45] *Babcock* v. *Jackson* supra.

It is to be hoped that the Court will move towards the approach suggested by Mason C.J. in relation to international torts. The nature of the Australian system would be an important factor in the calculation of the choice of law.[46] Then there would be a simple choice of law rule applying to interstate and international torts alike, with a different focus in each case.

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[46] In *Perrett* v. *Robinson* (1988) unreported, delivered shortly after *Breavington* on 18 August, the High Court applied *Breavington* since the fact situation was exactly the same.