

## REMEDY ISSUES IN MULTINATIONAL TORT CLAIMS: SUBSTANCE AND PROCEDURE AND CHOICE OF LAW

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After a turbulent history involving many different strands of reasoning, the High Court recently adopted the law of the place of the wrong as the substantive law to be applied to both interstate<sup>1</sup> and international<sup>2</sup> torts. I have earlier expressed my general agreement with this adoption,<sup>3</sup> and had suggested its adoption in 1994.<sup>4</sup> However, while the rules regarding the law to be applied to determine conduct regulation issues<sup>5</sup> appear now to be settled in Australia, the rules regarding the law to be applied to determine the compensation issues (or loss distribution) appear to be less clear, at least in regards to international torts. The High Court expressly reserved the point in *Regie* whether kinds and quantification of damages should be governed by the law of the place of the wrong in international torts conflicts,<sup>6</sup> justifying a fuller examination of the issue. The focus of this article, then, will be how to determine the issue of loss distribution or compensation in a tort case involving more than one country.

This article will consider possible issues that impact on liability determination in multinational tort claims. A range of possible tests the High Court might consider in future will be considered. I conclude with a recommendation that primacy be given to the law of the place of the wrong, but that some narrowly-defined flexibility is necessary.

### I INTRODUCTION

While the High Court has declared that the law of the place of the wrong is now the choice of law in all or virtually all cases,<sup>7</sup> there remains the vexed question of

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<sup>1</sup> *John Pfeiffer Pty Ltd v Rogerson* [2000] 203 CLR 503 ('*Pfeiffer*').

<sup>2</sup> *Regie Nationale Renault v Zhang* [2002] 210 CLR 491 ('*Regie*').

<sup>3</sup> Gray, 'Flexibility in Conflict of Laws Multistate Tort Cases: The Way Forward in Australia' (2004) 23(2) *University of Queensland Law Journal* 435.

<sup>4</sup> Gray, 'Conflict of Laws – Heading in the Wrong Direction?' (1994) 24 *Queensland Law Society Journal* 357. Others in the field had reached the same view – Peter Nygh, 'The Miraculous Raising of Lazarus: McKain v Miller and Co (South Australia) Pty Ltd' (1992) 22 *University of Western Australia Law Review* 386; Michael Pryles, 'The Law Applicable to Interstate Torts: Farewell to Phillips v Eyre?' (1989) 63 *Australian Law Journal* 158.

<sup>5</sup> In this context, issues such as whether or not the defendant's actions are judged to be negligent.

<sup>6</sup> Speaking of its decision in *Pfeiffer*, the unanimous court said in *Regie* 'the conclusion was reached that the application of limitation periods should continue to be governed by the *lex loci delicti* and, secondly, that "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* (original emphasis)". We would reserve for further consideration, as the occasion arises, whether that latter proposition should be applied in cases of foreign tort' (520).

<sup>7</sup> *Pfeiffer*.

whether any departures from this general position will be countenanced, and if so, in what circumstances. The Court itself has partly left the door open, suggesting that some loss distribution issues, in particular heads of damage and quantification of damages, may be dealt with by a law other than the law of the place of the wrong, at least in international cases.<sup>8</sup> Kirby J, at least, has specifically left open the question of whether a flexible exception to the general application of the law of the place of the wrong should be applied.<sup>9</sup>

## II FLEXIBILITY IS REQUIRED

It is strange that the High Court continues<sup>10</sup> not to embrace the need for flexibility in applying choice of law rules in international tort. Ironically, in considering the rules to be applied to international torts conflicts, the High Court did not seem to notice that in many other countries which have also considered this problem, either the Parliament or the courts have fashioned some kind of exception to whatever they have accepted to be the general rule. One might have thought that, in developing a new approach in Australia, the High Court would have been guided by developments in other countries.

These developments can be stated briefly in relation to several other common law jurisdictions:

- (a) England: for most torts, the law of the place of the wrong is the primary rule, subject to displacement where due to the connections between the events and another jurisdiction, it is substantially more appropriate that the law of that other jurisdiction be applied.<sup>11</sup>
- (b) United States: a variety of approaches, with the proper law of the tort, supported by the *Second Restatement*,<sup>12</sup> in the ascendancy.<sup>13</sup> The law of the jurisdiction with the closer/closest connection with the subject of the litigation will be applied, subject to possible interest analysis involving a question whether the policy behind the

<sup>8</sup> *Regie*.

<sup>9</sup> *Ibid* 535.

<sup>10</sup> Most recently *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54 ('*Neilson*').

<sup>11</sup> *Private International Law (Miscellaneous Provisions) Act 1995* (UK) s 11-12; a change from previous case law which applied double actionability subject to a flexible exception (*Red Sea Insurance Co Ltd v Bouygues SA* (1995) 1 AC 190) or a myriad of approaches in *Chaplin v Boys* [1971] AC 356, including Lords Hodson (380), Wilberforce (391) and Pearson (406) agreeing with the need for some flexibility in applying tort choice of law rules, contra Lord Guest (381) and Lord Donovan (383), but applying the law of the forum as the substantive law.

<sup>12</sup> American Law Institute, *Restatement of the Law, Second – Conflict of Laws* (1971), revised in 1988. Relevant factors include where the injury occurred, where the conduct causing the injury occurred, the residence of the parties, and where any relationship between the parties is centred (s 145). Interestingly, the *First Restatement* took the same approach as the High Court did in *Regie*, favouring the inflexible application of the law of the place of the wrong: American Law Institute, *Restatement of the Law, First – Conflict of Laws* (1934).

<sup>13</sup> Cf the High Court's observation in *Pfeiffer* claiming a trend back to the law of the place of the wrong. This observation does not withstand close scrutiny, as Kirby J noted in *Regie* at 536.

- law in question would be furthered by application to this set of facts.<sup>14</sup>
- (c) Canada has abandoned its previous adherence to the famous doctrine in *Phillips v Eyre*,<sup>15</sup> according primacy to the law of the place of the wrong, but permitting a flexible exception in international cases.<sup>16</sup>
  - (d) New Zealand continues to embrace the double actionability rule, applying the law of the forum as the substantive law, but applies a flexible exception to allow the law of the jurisdiction with the most significant relationship with the occurrence and the parties to be applied.<sup>17</sup>
  - (e) Article 146 of the *General Principles of Civil Law of China* even provides an exception to the law of the place of the wrong being applied to resolve the dispute. If both parties to the dispute are nationals of another country, the law of that country may be applied to resolve the dispute.<sup>18</sup>

I agree that the primary rule should be that the law of the place of the wrong should be applied to all substantive matters.<sup>19</sup> The rest of this article will focus on whether any exceptions should be made to the general rule in the international context, and if so, what the exception/s should be. The particular focus shall be on the question of remedies, since I have previously argued that issues of conduct regulation and issues of loss distribution must be considered separately.<sup>20</sup> The question of conduct regulation, in my view, is a matter only for the law of the place of the wrong, without exception.

### III OPTION 1: EXCEPTION BASED ON THE UNSUITABLE SUBSTANCE OF THE LAW OF THE PLACE OF THE WRONG<sup>21</sup>

If the general position is that the law of the place of the wrong should be applied to govern issues of loss distribution, should an exception be applied where the forum court does not agree with the content of the foreign law?<sup>22</sup>

<sup>14</sup> Brainerd Currie, *Selected Essays on the Conflict of Laws* (1963) and ‘Survival of Actions: Adjudication Versus Automation in the Conflict of Laws’ (1957-1958) 10 *Stanford Law Review* 205, and Harold Korn, ‘The Choice of Law Revolution: A Critique’ (1983) 83 *Columbia Law Review* 772.

<sup>15</sup> (1870) LR 6 QB 1, requiring actionability according to the law of the forum, and that the act not be justifiable by the law of the place where it was done.

<sup>16</sup> *Tolofson v Jensen* [1994] 3 SCR 1022.

<sup>17</sup> Eg, *Baxter v RMC Group PLC* (2003) 1 NZLR 304. Refer to Elsabe Schoeman, ‘Tort Choice of Law in New Zealand: Recommendations for Reform’ (2004) *New Zealand Law Review* 537.

<sup>18</sup> Noted by the High Court in *Neilson*.

<sup>19</sup> As to the distinction between substance and procedure, see Part A of this article.

<sup>20</sup> Gray, above n 3.

<sup>21</sup> Others have frankly described the search as being for the ‘better law’ (Robert Lefflar, *American Conflicts Law* (3<sup>rd</sup> ed, 1977)), usually ending in the application of the law of the forum.

<sup>22</sup> This kind of reasoning arguably explains the result in cases like *Kilberg* and *Rosenthal*, although the decisions were supposedly based on other grounds. In the former case, the court applied forum law to compensation issues rather than the law of the place of the wrong, which was judged as providing inadequate remedies (*Kilberg v Northeast*

I submit one should be very hesitant about accepting such a rule. As Mason CJ noted in *McKain*, the importance of international judicial comity has increasingly been realized.<sup>23</sup> In a *forum non conveniens* case, a majority of the High Court noted:

There are powerful policy reasons which militate against Australian courts sitting in judgment upon the ability or willingness of the courts of another country to accord justice to the plaintiff in the particular case. Those policy considerations are not dissimilar to those which lie behind the principle of judicial restraint or abstention, which ordinarily precludes the courts of this country from passing upon the provisions for the public order of another State.<sup>24</sup>

This presumably means that, faced with a situation in either the *Kilberg* or *Rosenthal*<sup>25</sup> cases, where the forum court viewed the remedy available in the law of the place of the wrong to be inadequate, the Australian High Court would not for that reason decline to apply the law of the place of the wrong, certainly where the place of the wrong was another Australian state, and perhaps (the author recommends that it should apply also) to cases where the place of the wrong was not in Australia.

The court confirmed that in assessing *forum non conveniens* claims, the decision:

Neither turns upon an assessment of the comparative procedural or other claims of the foreign forum nor requires the formation of subjective views about either the merits of that forum's legal system or the standards and impartiality of those who administer it.<sup>26</sup>

The joint judgment contemplated a situation where an Australian court might declare that it was a clearly inappropriate forum, in a case with few or no connections to Australia, but many connections to a country which did not recognize the claim or placed strict limits on the amount of compensation available. In such a case, the majority found the Australian court should still decline jurisdiction, in effect ignoring the effect of the laws of the applicable country.

I agree with the comments of the High Court in *Voth*, though conceding they were made in a slightly different context. It is not for the Australian court to judge the merits or otherwise of the law of the place of the wrong. To do so flies in the face of respect for legal systems other than our own, and undermines judicial comity. I submit that this should be true, regardless of whether the hearing is on an application for *forum non conveniens*, or whether it is about assessing damages, once a tort has been shown by the substantive law to have been committed. So, in hindsight, the Privy Council was wrong in *The Halley*<sup>27</sup> to refuse to apply Belgian

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*Airlines Inc*, 172 NE 2d 526 (1961), [1961] 2 Lloyd's Rep 406). In the latter case, the New York court again refused to apply the law of the place of the wrong to compensation assessment, claiming that its lower compensation levels were contrary to the public policy of New York (*Rosenthal v Warren*, 475 F 2d 428 (1972)).

<sup>23</sup> *McKain v R W Miller and Co (SA) Pty Ltd* (1991) 174 CLR 1, 22-23 ('*McKain*').

<sup>24</sup> *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 559 (Mason CJ Deane Dawson Gaudron JJ).

<sup>25</sup> See above n 21.

<sup>26</sup> (1990) 171 CLR 538, 558.

<sup>27</sup> (1868) LR 2 PC 193.

liability rules to a ship collision that took place in Belgian waters. Belgian liability rules differed from those of Britain regarding the shipowners' responsibility for the actions of a pilot on board. Although the rules differed from the rules of English law, the Privy Council should with respect have applied the Belgian liability rules which clearly made the British defendant liable for the accident.<sup>28</sup>

Again, the United States experience with this kind of approach is instructive. A clear example of a court ignoring conventional choice of law rules because it did not like the result is *Rush v Savchuk*.<sup>29</sup> An accident involving the parties occurred when both were resident of Indiana. Savchuk was a passenger in a car driven by Rush. He had moved to Minnesota after the accident, and sued Rush for compensation for the accident in his newly-adopted State. Indiana law would prohibit the action by Savchuk against Rush,<sup>30</sup> Minnesota law would allow the claim.

At the time of the accident, given that both parties resided in Indiana, and the accident occurred there, it might be thought that Indiana law would apply to the problem. However, the Minnesota court determined that its law should apply. It reasoned that the State's legitimate interest in facilitating recovery for resident plaintiffs 'may override traditional choice of law analysis', noting that a state's interest in providing for a forum for its residents (even new ones) was particularly strong 'where an alternative forum would not have permitted recovery'.<sup>31</sup> Some links may be made between this kind of analysis and the so-called 'better law' approach.<sup>32</sup>

This approach is perhaps explicable, as Lord Hodson said in *Chaplin v Boys*, on the basis that:

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<sup>28</sup> *The Halley* decision is an important one, because it formed the basis for the troubled decision in *Phillips v Eyre* (1870) LR 6 QB 1, which greatly influenced Australian jurisprudence in this area from 1870 until it was finally abandoned by the High Court in 2000 in *Pfeiffer*.

<sup>29</sup> 272 NW 2d 888 (1978).

<sup>30</sup> It had both a guest statute (forbidding action by an injured passenger in a vehicle against the driver) and a contributory negligence provision stating that any contributory negligence on the plaintiff's part (there was claimed to be some here) would extinguish the plaintiff's claim for compensation.

<sup>31</sup> 272 NW 2d 888, 891-2 (1978). The Supreme Court overturned the verdict on jurisdiction grounds, but declined to comment on the Minnesota court's statements about choice of law: *Rush v Savchuk*, 433 US 902 (1977). Similarly the Californian Court in *Offshore Rental Co v Continental Oil Co*, 583 P 2d 721 (1978) dismissed the plaintiff's claim, based on Louisiana law, as 'attenuated and anachronistic', and see similarly *Yazell v Yazell*, 382 US 341, 351-3 (1966) and *Clark v Clark*, 222 A 2d 205 (NE, 1966).

<sup>32</sup> Robert Leflar, 'Choice-Influencing Considerations in Conflicts Law' (1966) 41 *New York University Law Review* 267, Joseph Singer, 'Pay no Attention to That Man Behind the Curtain: The Place of Better Law in a Third Restatement of Conflicts' (2001) 75 *Indiana Law Journal* 659. Others have favoured the avoidance of law which the 'main stream of cases has passed by': Paul Freund, 'Chief Justice Stone and the Conflict of Laws' (1946) 59 *Harvard Law Review* 1210, 1216, and Larry Kramer, 'Rethinking Choice of Law' (1990) 90 *Columbia Law Review* 277, 334-46 suggests rejecting 'obsolete' nonforum law. The approach was recently favoured by Louise Weinberg, who noted the original draft of the Second Restatement called for the 'justice of the case' as a relevant factor, but was later omitted. She suggests it should be reinstated as the overriding factor: 'A Structural Revision of the Conflicts Restatement' (2001) 75 *Indiana Law Journal* 475, 501.

It is expected that a court will favour its own policies over those of other states, and be inclined to give its own rules a wider application than it will give to those of other states.<sup>33</sup>

Nevertheless, it is surely not defensible in modern conflict of laws. How does parochialism further the objectives of the conflict of laws?

Similarly, elsewhere in *Chaplin* adverse judgments were made about the law of another country. Although a double actionability approach was generally taken there, there is reference to the adequacy of the remedies on offer in the law of the place of the wrong. Lord Pearson considered the possibility of the law of the place of the wrong being applied as the substantive law, then concluded that if this occurred, an exception would be required:

To enable the plaintiff in a case such as the present case to succeed in his claim for *adequate* damages.<sup>34</sup>

I am not suggesting that an Australian court take a similar approach. While some might advocate that this adhoc approach is justified in the interests of justice, and while I recognize that this is an important consideration, I believe it is extremely important to develop a consistent theoretical framework, to promote some certainty in the relevant legal principles to be applied, and to bring the law to an intellectually defensible position. On what basis does the court of one country judge that the remedies provided for by another legal system, the law of the place of the wrong, are not 'adequate'? What if the remedies provided for by the law of the forum are considered by the judge to be 'inadequate'? Presumably the judge would not ignore local laws judged to provide 'inadequate' remedies, according to the subjective view of the judge. One wonders at the rationale for ignoring foreign laws for the same reason.<sup>35</sup>

#### IV OPTION TWO: EXCEPTION BASED ON PUBLIC POLICY OF THE FORUM<sup>36</sup>

Some argue that the original classic rule in *Phillips v Eyre*,<sup>37</sup> requiring actionability according to the law of the forum, reflected a desire not to be compelled to recognize and apply laws from the place of the wrong that were contrary to the public policy of the forum. There is some evidence of this in Lord Selwyn's judgment in *The Halley*,<sup>38</sup> which was in turn cited by Willes J in *Phillips* in connection with the requirement for actionability according to the law of the

<sup>33</sup> (1971) AC 356, 380.

<sup>34</sup> Ibid 406 (emphasis added).

<sup>35</sup> With respect, I agree with the comments of Cardozo J in *Loucks v Standard Oil*, 120 NE 198, 201 (1918) that 'we are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home', but would express this comment as a hope rather than always reflecting the past reality.

<sup>36</sup> While I see the application of these principles as logically distinct, the line between them has been blurred by decisions of courts that have found public policy reasons for applying the law of the forum because the law of the place of the wrong leads to undesirable results.

<sup>37</sup> (1870) LR 6 QB 1.

<sup>38</sup> (1868) LR 2 PC 193 (*The Liverpool, Brazil and Rive Plate Steam Navigation Coy Ltd v Benham*).

forum (read England). Lord Selwyn noted that English Courts may disregard a foreign judgment if it appeared to be ‘manifestly contrary to public justice’. However, he did not find the foreign law in *The Halley* to be contrary to public justice.<sup>39</sup> The court did not apply the foreign law in the end in that case because, according to the law of the forum, the defendant was not liable to pay compensation.<sup>40</sup>

Some have crafted an exception to the general use of the law of the place of the wrong to resolve torts conflicts disputes on the basis of public policy.<sup>41</sup> It is interesting to consider the comments of the High Court in this context. The court in *Regie*, after rejecting a flexible exception for choice of law questions in international tort conflicts, added that:

Questions which might be caught up in the application of a flexible exception to a choice of law rule fixing upon the *lex loci delicti* in practice may often be subsumed in the issues presented on a stay application, including one based on public policy grounds.<sup>42</sup>

Kirby J concluded there was an exception to the application of the law of the place of the wrong where:

public policy considerations would make the enforcement by the forum of the law of the place of the wrong contrary to the public policy of the forum.<sup>43</sup>

It is difficult to know what the High Court judges are referring to here in terms of public policy, and it is submitted the judges should be more explicit in terms of what is meant by public policy.<sup>44</sup> Certainly public policy should not be equated to

<sup>39</sup> Indeed, it would have been difficult for the court to so find, unless it were to equate ‘contrary to public justice’ to ‘contrary to British law’.

<sup>40</sup> ‘It is alike contrary to principle and to authority to hold that an English court of justice will enforce a foreign municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed’ (204). The case arose out of a collision occurring in Belgian waters. The collision was said to be due to the actions of a Pilot on board the defendant’s boat. The Pilot was required to be there by Belgian law, but the defendant did not choose the Pilot or have any control over their activities. Under Belgian law, the defendant would be liable for any accident caused by the Pilot’s negligence; under British law the defendant would not be liable (vicariously), since it had no control over the Pilot’s activities.

<sup>41</sup> This exception has been attributed originally to Joseph Story, who proposed the non-application of laws on matters such as incest and polygamy on the ground of public policy: *Commentaries on the Conflict of Laws* (1834) ss 25-26, 328, 359. The learned author noted that foreign judgments could be disregarded if they were manifestly contrary to public justice. This exception has come to be universally accepted: for example, Article 16 of the *Rome Convention on the Law Applicable to Contractual Obligations*, opened for signature 19 June 1980, allows a departure from the application of foreign law that is ‘manifestly incompatible’ with the public policy of the forum.

<sup>42</sup> [2002] 210 CLR 491, 519.

<sup>43</sup> *Ibid* 535. The Canadian Supreme Court in *Tolofson v Jensen* [1994] 3 SCR 1022, 1054 agreed that in international torts conflict cases, the governing law should generally be the law of the place of the wrong, but the forum should have residual discretion to apply local law instead. Importantly, the court could ‘imagine few cases where this would be necessary’.

<sup>44</sup> J J Fawcett, ‘Policy Considerations in Tort Choice of Law’ [1984] *Modern Law Review*

mere disagreement with the content of the law of the place of the wrong, or perceived injustice to the parties if the law of the place of the wrong were applied to loss distribution issues, which has occurred. As with the substance/procedure distinction, it should not be seen by a court as an 'escape device'.

In this context, we can again take heed of the experience of the United States courts in flirting with such principles. In *Kilberg*, the court was clearly motivated to classify limitations periods as procedural by a desire to 'provide protection for our own State's people against unfair and anachronistic treatment of lawsuits' (disagreeing with a damages ceiling applicable in another state and refusing to apply it).<sup>45</sup> And in *Rosenthal*, the New York court refused to apply the ceiling on damages of the law of the place of the wrong because 'for our courts to be limited by the Massachusetts damage ceiling ... is so completely contrary to our public policy that we should refuse to apply that part of the Massachusetts law'.<sup>46</sup>

A similar finding occurred more recently in *Mills v Quality Supplier Trucking Inc.*<sup>47</sup> The accident occurred in Maryland. A statute in that state provided that any contributory negligence on the part of the plaintiff was a complete bar to recovery. The law of West Virginia, the forum state, had adopted a rule that where contributory negligence was found, damages could be reduced proportionately, but still allowed the plaintiff to bring the action and claim compensation to the extent of the defendant's fault. The court ruled it should generally apply the law of the place of the wrong, here Maryland, in which case the plaintiff's action could not proceed. However, this would not occur where the application of the law of the foreign state would contravene the public policy of West Virginia. The court declared, with little justification, that the application of Maryland's complete bar rule for contributory negligence would contravene public policy in West Virginia, and refused to apply the rule. The court stated the obvious, that the plaintiff would benefit from application of West Virginia's contributory negligence rule.<sup>48</sup>

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650, 669 makes a similar point in discussing the judgments in *Boys v Chaplin*: 'If the underlying policy considerations had been more openly acknowledged in [the case] we might have received more guidance for solving the 'hard' cases where policies clash'. Lord Hodson in the same case noted that 'to resort to public policy is to mount an unruly horse' (378).

<sup>45</sup> *Kilberg v Northeast Airlines Inc*, 173 NE 2d 526 (1961). However, in another case *Oltarsh v Aetna Insurance Co*, 204 NE 2d 622 (1965) resort to arguments about public policy was not successful. A New York resident was injured in a building owned by a Puerto Rico corporation, insured by a New York company. In answer to the question whether the plaintiff could use Puerto Rico's 'direct action statute' and sue the insurance company direct (such an action was unknown in New York), the court answered in the affirmative. It (correctly it is submitted) rejected an argument that the Puerto Rico statute was offensive to New York's public policy.

<sup>46</sup> In the international context, the *Second Restatement* allows for departure from a foreign law, even where it has the most significant relationship with the particular issue, if the foreign law violates the forum's public policy: American Law Institute, above n 12, s 90. On public policy see Paulsen and Sovren, 'Public Policy in the Conflict of Laws' (1956) 56 *Columbia Law Review* 969 and Korn, above n 14, 914-16, 938-42. Beach in 'Uniform Interstate Enforcement of Vested Rights' (1918) 27 *Yale Law Journal* 656, 662 regarded as dangerous rejection of foreign law on the ground of substantive deficiency, because it could be taken as an 'intolerable affection of superior virtue' by the forum court.

<sup>47</sup> 510 SE 2d 280 (W Va, 1998).

<sup>48</sup> *Ibid* 282-3: 'It is the strong public policy of this State that persons injured by the negligence of another should be able to recover in tort ... we therefore adhere to the rule

I have suggested that some of the various decisions in *Boys v Chaplin* proceeded from a determination to give a British subject the opportunity of British remedies, and this may have influenced some of the members of the House of Lords in their classification of matters as substantive or procedural.<sup>49</sup> However, Lord Wilberforce was adamant in that case that:

Maltese law cannot simply be rejected on grounds of public policy, or some general conception of justice. For it is one thing to say or presume that domestic rule is a just rule, but quite another, in a case where a foreign element is involved, to reject a foreign rule on any such general ground.<sup>50</sup>

While I agree with the outcome of most of the cases, the means derived to achieve them may be questioned. It is submitted the grounds used to refuse to apply the law of the place of the wrong are, with respect, incorrect. A mere difference in approach to compensation issues between the law of the place of the wrong and the law of the forum should not justify the forum court in resorting to its compensation rules.<sup>51</sup> An exception to the application of the law of the place of the wrong based on policy grounds should not reflect the comments of the Canadian Supreme Court that:

these public policy arguments simply mean that the court does not approve of the law that the legislature having power to enact it within its territory has chosen to adopt.<sup>52</sup>

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that the doctrine of *lex loci delicti* will not be invoked where the application of the substantive law of a foreign state contravenes the public policy of the state'. One wonders – is this anything more than a 'better law' approach (or preference for the law of the forum) dressed up with public policy arguments? The precise formulation differed but the sentiment was very similar in *Boone v Boone*, 25283 23/4/2001 (Supreme Court of South Carolina) involving the question whether one spouse could sue the other in tort. Legislation in some States provided this was not possible; laws in other States allowed the action. The Boones lived in a State (South Carolina) where such action was possible, but were involved in an accident in a State where recovery was not permitted (Georgia). The court there discarded the law of the place of the wrong, Georgia, on the basis that its non-recovery principles were 'against good morals or natural justice' (193). Again, is this anything more than a 'better law' approach, or preference for the law of the forum dressed up with public policy arguments?

<sup>49</sup> As one of the Lords stated explicitly in the case, 'there certainly seems to be some artifice in regarding a man's right to recover damages for pain and suffering as a matter of procedure' (Lord Wilberforce, 393).

<sup>50</sup> [1971] AC 356, 392. One wonders what the High Court of Australia would make of this comment, given its finding in the *Regie* case.

<sup>51</sup> I agree with the statements about this made by Lord Wilberforce in *Boys v Chaplin* [1971] AC 356, 392-3 who commented: '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 loci 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 ... There certainly seems to be some artifice in regarding a man's right to recover damages for pain and suffering as a matter of procedure'.

<sup>52</sup> *Tolofson v Jensen* [1994] 3 SCR 1022, 1058 (La Forest J delivering the judgment of the court).

I do support a *very limited*<sup>53</sup> exception to the application of the law of the place of the wrong to govern liability issues. I expect that the test would have a very high threshold, only met in very exceptional circumstances. Indeed I respectfully suggest the test should be something like that proposed by Cardozo J in *Loucks v Standard Oil Co of New York*,<sup>54</sup> asking whether the foreign law ‘shocks our sense of justice’ or ‘menaces the public welfare’, or ‘violates some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal’.<sup>55</sup> The exception would also apply to stop the enforcement of a claim that would be damaging to Australian security and foreign relations.<sup>56</sup>

A recent example of the public policy test in the context of a conflicts issue is *Kuwait Airways Corporation v Iraqi Airways Company and Others*.<sup>57</sup> That case involved the invasion of Kuwait by Iraqi forces in 1990. During the invasion, Iraq seized ten commercial aircraft at Kuwait airport owned by Kuwait Airways Corporation (KAC). Shortly after, the Iraqis passed a law dissolving KAC, and transferring all of its assets worldwide to the state-owned Iraqi Airways Co (IAC). KAC sued IAC in English courts for the tort of conversion. This case was decided on the double actionability rules formulated by the House of Lords in *Chaplin*.<sup>58</sup>

It was common ground that the alleged wrongs were committed in Iraq, and there was little connection between the wrongs and other countries, including England, apart from the fact that both organizations involved in the litigation had offices in many cities around the world, including London. The court had rejected a *forum non conveniens* application by IAC earlier in the proceedings.<sup>59</sup>

Lord Nicholls, with whom Lord Hoffmann agreed, noted:

Given also the absence of any particular connection with any other country, it is to be expected that when adjudicating upon KAC’s claims an English court would apply the law of Iraq.<sup>60</sup>

<sup>53</sup> I note and accept the concerns expressed by Lorenzen in relation to the use of public policy. He complained that the ‘term is used in different senses according to the general point of view of the school to which the particular writer belongs or the individual writer himself ... the doctrine of public policy is merely a convenient safety-valve to prevent the application of foreign law’: Ernest Lorenzen, ‘Territoriality, Public Policy and the Conflict of Laws’ (1924) 33 *Yale Law Journal* 736, 746-7.

<sup>54</sup> 120 NE 98, 202 (1918).

<sup>55</sup> In similar regard was the House of Lords decision in *Oppenheimer v Cattermole* [1976] AC 249, refusing to recognize a 1941 German decree depriving Jewish people of their German citizenship, and as a result depriving them of their property. The law was not recognized due to its gross invasion of human rights (277-8).

<sup>56</sup> To take on board the fact situation in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30.

<sup>57</sup> [2002] UKHL 19.

<sup>58</sup> This was because the facts that gave rise to the litigation occurred prior to the introduction of the *Private International Law (Miscellaneous Provisions) Act 1995* (UK).

<sup>59</sup> However, one might perhaps argue whether English courts should have heard the matter given the minimal links between that country and the events in question: see the judgment of Lord Scott. Although *forum non conveniens* was not argued on appeal, Lord Scott dismissed KAC’s action, concluding there was little connection between England and the conversion, and that it was not a function of English law to provide tortious causes of action to citizens in foreign countries injured by acts in those countries committed by other citizens of foreign countries (at [198]).

<sup>60</sup> At [12], interesting because of the state of English common law at the time these

In any event, the House of Lords was unanimous here that Iraqi law, as the law of the place of the wrong, should not be applied to resolve the case. It was increasingly important to take into account standards of conduct established by international law.<sup>61</sup> It was unarguable that the Iraqi appropriation law was unacceptable according to that body of law. It was a serious infringement of a fundamentally important right to own property. It amounted to an ‘international delinquency’,<sup>62</sup> so the public policy exception applied.

Lord Nicholls justified this departure from the law of the place of the wrong by resorting to the *Chaplin* flexible exception, arguing that ‘the rule should be interpreted flexibly so as to leave some latitude in cases where it would be against public policy to admit or to exclude claims’.<sup>63</sup> Again, this is unfortunate reasoning, given that the leading exponent of the exception in *Chaplin*, Lord Wilberforce, said something very different in *Chaplin* in formulating the flexible exception: ‘This Maltese law cannot simply be rejected on grounds of public policy’.<sup>64</sup> I have no objection to this kind of use of the public policy exception, but submit the Court should be frank about its approach. It should not, with respect, draw support from the formulation of the flexible exception in *Chaplin*, when the formulation was clearly not in that case based on public policy.

The judgments certainly illustrate the perpetual difficulty with the public policy exception, that public policy means very different things to different people, and can be interpreted and used (abused?) in many ways. Taking this on board, I still believe

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statements were made. The House of Lords had in *Chaplin* and the Privy Council had in *Red Sea* applied a double actionability test, with the better view that the law of the forum was to be applied as the substantive law, at least in most cases. It seems that Lord Nicholls and Lord Hoffmann were taking a different view.

<sup>61</sup> Lord Nicholls (at [28]) (with whom Lord Hoffmann agreed), Lord Steyn (at [114]), Lord Hope (at [140]), Lord Scott (at [192]). Refer also to Hans Van Houtte, ‘From a National to a European Public Policy’ in James Nafziger and Symeon Symeonides (ed), *Law and Justice in a Multistate World* (2002) who suggests obtaining evidence of public policy via relevant European conventions on point, in the context of conflict issues in that region (847). The Australian High Court has not considered to what extent public policy in this context might be influenced by international law, but has considered the extent to which international law might inform the common law – see *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42 (Brennan J, Mason CJ and McHugh J concurring), *Dietrich v R* (1992) 177 CLR 292, and the judgments of Kirby J in *Al-Kateb v Godwin* [2004] HCA 37 and *Newcrest Mining (Western Australia) Ltd v Commonwealth* (1997) 190 CLR 513. Refer also to Ernst Willheim, ‘Globalisation, State Sovereignty and Domestic Law: A New Approach to the Relationship Between International Law and Domestic Law’ (Paper presented at Australian Society of Law and Philosophy Conference, Sydney, 30 April 2005) – it is not (yet) an orthodox Australian position to use international law to inform common law, at least in areas of ambiguity.

<sup>62</sup> Lord Hope (at [148]); refer also to Mann, ‘International Delinquencies Before Municipal Courts’ (1954) 70 *Law Quarterly Review* 181.

<sup>63</sup> At [33].

<sup>64</sup> [1971] AC 356, 392. His Honour had referred to ‘policy’ but this was an enquiry of the reasons why the foreign law was passed, and whether those interests would be served by application of that law to the current case: ‘consideration whether, in relation to that issue, the relevant foreign rule ought, as a matter of policy, to be applied. For this purpose it is necessary to identify the policy of the rule, to inquire to what situations, with what contacts, it was intended to apply; whether or not to apply it in the circumstances of the instant case, would serve any interest which the rule was designed to meet’ (391). As a result, it is clearly not correct (with respect) to draw support for the position in the *Kuwaiti* case from the flexible exception as espoused in *Chaplin*.

the exception should be part of the law here, but the exception must be defined very closely and carefully.<sup>65</sup> Public policy may well be an unruly horse,<sup>66</sup> but we need to know exactly what kind of animal we are dealing with.

A recent United States example of admirable restraint in the areas of public policy is *Stuart v Colorado Interstate Gas Co.*<sup>67</sup> There a conflict arose in relation to workers' compensation laws. States provided for immunity from suit arising from an accident at work for 'statutory employers', but States defined 'statutory employer' differently. An accident occurred on a work site in Colorado. Under the law of that State, the defendant would qualify as a statutory employer and would be immune from a common law action in tort. Under Wyoming law, where the action was brought and where the plaintiff lived, the action was possible against the employer. The court rejected an argument that the policy underlying the Colorado law should be discarded, on the basis that such recognition 'would not rise to the level of repugnancy such that it would violate Wyoming public policy'.<sup>68</sup>

Similarly, a forum court would not be justified in refusing to apply a limitation period from the law of the place of the wrong, on the basis of public policy. As the Canadian Supreme Court said in *Tolofson*, the extent to which limitation statutes should go in protecting individuals against stale claims involves policy considerations 'unrelated to the manner in which a court must carry out its functions, and the particular balance may vary from place to place'.<sup>69</sup>

In my view it is certainly in the interests of public policy to discourage forum shopping,<sup>70</sup> and this end would be best served by a narrow application of the exception to applying the law of the place of the wrong, on the basis of public policy. The court might also be guided by how public policy has been interpreted elsewhere in the conflict of laws, on the grounds of coherence and consistency.<sup>71</sup> It could even be guided by how public policy has been interpreted in other areas of substantive law.<sup>72</sup>

<sup>65</sup> Of similar opinion is Elizabeth Crawford who in her article 'The Adjective and the Noun: Title and Right to Sue in International Private Law' (Elizabeth Crawford, 'The Adjective and the Noun: Title and Right to Sue in International Private Law' (2000) *Juridical Review* 347), advocated that the applicable law was primary the law of the place of injury or damage, 'subject to the public policy of the forum – which we assume will be held in check' (354).

<sup>66</sup> Lord Hodson in *Chaplin* at 378: 'I am conscious that to resort to public policy is to mount an unruly horse'.

<sup>67</sup> 271 F 3d 1221 (10<sup>th</sup> Cir, 2001).

<sup>68</sup> *Ibid* 1229.

<sup>69</sup> (1994) 3 SCR 1022, 1073.

<sup>70</sup> Noted in *Boys v Chaplin* [1971] AC 356 by Lord Hodson (378) Lord Donovan (383) and Lord Pearson (406).

<sup>71</sup> For example, in the context of the enforcement of foreign judgments, which can be denied for reasons of public policy, Tamberlin J in *Stern v National Australia Bank* (1999) FCA 1421 (decision affirmed by the Full Federal Court at (2000) 171 ALR 192 without deciding the conflicts issue) held that such denial was only available when the offence to public policy was of a very high order, including on fundamental questions of moral and ethical policy. In the context of enforcement of a contract governed by the proper law of another country, Phillip Nygh and Martin Davies in *Conflict of Laws in Australia* (7<sup>th</sup> ed, 2002) suggest again a narrow interpretation to the exception, applicable only where to apply the agreement according to foreign law would require the doing of something in the forum contrary to public policy (347).

<sup>72</sup> For example, contract law. Consider the facts of *Intercontinental Hotels Corp v Golden*, 203 NE 2d 210 (NY, 1964) involving the enforcement of a gambling debt incurred by a

A perfect example of the suggested wrong way to use public policy appears in an article on *Tolofson v Jensen* where the author, Jean-Gabriel Castel QC, states:<sup>73</sup>

Of course, there is always the possibility of resorting to public policy to avoid the application of the foreign *lex loci delicti*. Thus, where the forum has a serious relationship to the issues or the parties, it could apply its own law and in so doing base its choice on considerations of public policy as, for instance, if the *lex loci delicti* gave little or no recovery at all.

Let me reiterate that whether or not the law of the place of the wrong provides for a remedy that is thought by another court to be inadequate should not be to the point.<sup>74</sup> It is, with respect, a serious error to decline to apply the law of the place of the wrong to resolve a case, because the court hearing the case does not personally agree with the outcome if this law is applied, or that the law of the forum differs.<sup>75</sup> As an author of the *Second Restatement* wrote, 'it is only to be expected that a court will favour its own local policies over those of other states'.<sup>76</sup> It may be expected,

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New York resident at a Puerto Rico casino. Such debts are legal obligations in Puerto Rico law but not under New York law. Although a majority of the court in that case applied Puerto Rico law and found the agreement enforceable, this kind of case might be one where, taking into account public policy arguments, the contract so offends the forum's sense of justice and morality that it declines to give the plaintiff a remedy in that jurisdiction. (Gambling contracts are generally unenforceable in the common law world on the grounds of public policy.)

<sup>73</sup> Jean-Gabriel Castel, 'Back to the Future! Is the New Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?' (1995) 33 *Osgoode Hall Law Journal* 35, 68.

<sup>74</sup> Friedrich Juenger likewise laments this concern generally with interest analysis. Referring to a case *In Re Paris Air Crash of March 3, 1974* (1975) 399 F Supp 732 where he argues the reasoning proffered by the court does not justify the result reached, he suggests the case 'illustrates the propensity of government interest analysis to serve as a subterfuge for teleology' (or the preferred law): *Choice of Law and Multistate Justice* (1993) 211. I submit that the same danger exists when judges resort to public policy considerations. (In the *Paris Air Crash* case, Supreme Court of California, the forum court, applied its own provisions to the question of recovery of compensation arising from the crash of a Turkish aircraft near Paris. The Warsaw Convention applicable in Europe would have confined damages to a relatively low amount; the Californian court applied its more liberal assessment of damages, justifying the conclusion on the basis of interest analysis – that California would want to deter the wrongful conduct of local aircraft manufacturers, and would want to impose a uniform rule on wrongful death damages. Californian law should, the court found, apply both to American and non-American plaintiffs, on the ground that different treatment of different plaintiffs could amount to a denial of equal protection under the *United States Constitution*.)

<sup>75</sup> In other cases, I suggested that courts have properly *refused* to ignore foreign law on the basis that it provides for remedies that differ from local remedies. A good example of this is *Oltarsh v Aetna Insurance Co*, 204 NE 2d 622 (1965), where a New York resident was injured in Puerto Rico by a building owned by a Puerto Rican corporation. Puerto Rican law allowed direct action by the plaintiff against the insurer. New York law did not authorize such actions. The New York court, in rejecting arguments that the Puerto Rican law was contrary to public policy of New York and that the law permitting direct action was procedural only, applied the foreign law to allow the action to continue. Puerto Rican law was applicable, as being the place where both the injury and the wrongful conduct occurred, where the insurer did business, where the wrongful conduct occurred, and where the insured tortfeasor was incorporated.

<sup>76</sup> Willis Reese, 'Conflict of Laws and the Restatement Second' (1963) 28 *Law and*

but it is suggested that such parochialism should not be tolerated.<sup>77</sup> Judicial comity and respect for legal systems other than our own are too important, particularly in the increasingly globalised and integrated world we are now in. If parochialism were ever defensible, it is surely becoming less and less so in the twenty-first century. The great Lord Wilberforce would have no truck with it, and nor should we.

The High Court has made some comments about policy and the flexible exception. Recall the view of the joint judgment in *Regie* that:

Questions which might be caught up in the application of a ‘flexible exception’ to a choice of law rule fixing upon the *lex loci delicti* in practice may often be subsumed in the issues presented on a stay application, including one based on public policy grounds.<sup>78</sup>

Recall the facts of the KAC case, where the House of Lords considered the application of foreign law validating an expropriation of KAC’s property without compensation.<sup>79</sup> Let us assume away the *forum non conveniens* question by assuming KAC is an Australian resident company whose property in Kuwait was confiscated by the invading government, which then validated the action. If KAC brought an action in an Australian court for the tort of conversion, what would the High Court do? Presumably it will not want to apply the law of the place of the wrong (as the House of Lords did not). The problem is that the rules that have currently been formulated are arguably inadequate to deal with the issue – the issues are too complex to be dealt with on a stay application. This was recognized by Toohey J in *Breavington* where in discussing choice of law rules, he concluded:

The argument on behalf of the appellant that if the forum chosen by him is not the natural or appropriate forum, his action may be stayed, is not sufficient. The question is not one of *forum non conveniens*; it is more deeply rooted than that.<sup>80</sup>

If the majority continue to refuse to allow any other exception to the application of the law of the place of the wrong, will they then apply the objectionable law? Or will they find that an Australian court is not convenient, when clearly, if the plaintiff is an Australian resident and given the test the High Court has adopted for stay applications, this would be a very strained conclusion?

By stark contrast, the position taken by Kirby J in *Regie* is completely equipped to deal with this scenario. Recall Kirby J’s position that:

The general rule is that stated in *Pfeiffer* [ie the law of the place of the wrong is applied]. In international torts there is an exception to the application of that general rule. That exception may be invoked by reference to public policy considerations that would make the enforcement

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*Contemporary Problems* 679, 683.

<sup>77</sup> Bruce Posnak would agree. Speaking of the public policy exception, he suggested it be abolished, ‘it is about time that this hoariest and most malleable of all the escape devices bites the dust’ (‘The Restatement Second: Some Not so Fine Tuning for a Restatement (Third)’ (2001) 75 *Indiana Law Journal* 561, 562).

<sup>78</sup> [2002] 210 CLR 491, 519.

<sup>79</sup> See above n 57 and accompanying text.

<sup>80</sup> *Breavington v Godleman* (1988) 169 CLR 41, 171.

by the forum of the law of the place of the wrong contrary to the public policy of the forum.<sup>81</sup>

If the facts of KAC were to be brought to the High Court, with the slight change that KAC were an Australian resident company, Kirby J would be able to deal with the matter (presumably) by refusing to apply the law of the place of the wrong, Kuwait, on public policy grounds. I have no doubt that such a law would be offensive to the public policy of Australia, just as the House of Lords found it to be offensive to the public policy of England.

However, I think it clear that issues of public policy cannot be satisfactorily dealt with, as the majority of the High Court claims, on a stay application. Issues of jurisdiction and issues of choice of law, while related, remain distinct. The High Court said so itself in *Pfeiffer*.<sup>82</sup>

Questions of jurisdiction (in the sense of authority to decide) are better kept separate from questions of the applicable law ... The assumption of jurisdiction raises no question as to the law to be applied in deciding the rights and duties of the parties ... That last question might, in some cases, affect whether the court should decline to exercise its jurisdiction and stay the proceedings.

But by adamantly refusing to recognize an exception to the law of the place of the wrong, the High Court has left itself little room to manoeuvre. Many questions remain. If the law of the place of the wrong is offensive to the public policy of Australia, will the High Court accept a forum non conveniens application by one of the parties? Or will a more general jurisdiction to decline be used? Does it exist in all States? What would then happen to the matter – neither party would obtain any redress, at least in an Australian court. They might try their luck in an Iraqi court, or if they have some connection with England, at least the courts of that country have indicated they would be prepared to hear the matter and apply English law to it. Would the High Court's position change if both the plaintiff and defendant were resident in Australia? I submit that the formulation by Kirby J is to be much preferred.

In summary, public policy should be allowed to stand as an exception to the application of the law of the place of the wrong, but only where the law meets the very narrow formulation of the exception proposed by Justice Cardozo, in other words that the foreign law is grossly offensive to fundamental principles of justice and morality, including that the law breaches clear principles of international law, or that it compromises Australia's national security and/or foreign relations. By contrast, mere disagreement with the law of the foreign country, or disagreement with its remedies (kind or quantum), is short, *and well short*, of sufficient justification for refusing to apply that law or remedy on the ground of public policy. This line must be held.

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<sup>81</sup> [2002] 210 CLR 491, 535.

<sup>82</sup> [2000] 203 CLR 503, 521.

V OPTION 3: EXCEPTION BASED ON THE PROPER LAW/INTEREST ANALYSIS<sup>83</sup>

The original *Restatement* called for the strict application of the law of the place of the wrong in terms of tort conflicts,<sup>84</sup> only to be revised in the *Second Restatement* in favour of a proper law approach, one calling for a weighing of various interests related to the dispute.<sup>85</sup>

By analogy, in the context of loss distribution issues, I would suggest that the primary rule in international torts conflicts cases should be that the law of the place of the wrong should be applied to determine remedies issues including heads of damage and quantum, unless due to the relationship of the parties, another jurisdiction has the greater concern with the issues. This was applied by some of the judges in the *Boys v Chaplin* case,<sup>86</sup> involving an accident occurring in Malta involving two British soldiers stationed there. Maltese law provided for a very low amount of general damages; the plaintiff would have been entitled to a much greater amount if the law of the forum, British law, applied to the question of assessment of damages.

In relation to which law should apply to allocate the loss between the parties, it was right to say that Malta, the place of the wrong, had little or no other connection with the parties. Specifically, neither of the parties lived there. As a result, Lord Hodson applied English law to the issue of compensation, being the law of the

<sup>83</sup> I have considered whether to treat together or separately questions of the proper law and interest analysis. There is a divergence of views on this issue. For the purposes of this article, I have considered them together, in that usually, questions of which is the 'proper law' involve questions of the contacts or links that a jurisdiction has to the matter in dispute. Another way of saying this might be to question whether a jurisdiction has an interest, and to what extent, in the issues being determined. Interest analysis and the concept of the proper law are more fully discussed in the earlier article Anthony Gray, above n 3.

<sup>84</sup> American Law Institute, *Restatement of the Law, First – Conflict of Laws* (1934).

<sup>85</sup> American Law Institute, above n 12. Relevant factors in tort choice of law questions were stated to include (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, 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 centred. The above contacts are to be evaluated according to their relative importance in the particular dispute (s 145(2)). This Restatement was issued after the decision of the United States Supreme Court in *Allstate Insurance Co v Hague*, 449 US 302 (1981) nominated a contact-weighting approach. Calls for a Third American Restatement have recently been made – see for example Symeon Symeonides, 'The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)' (2001) 75 *Indiana Law Journal* 437; William Reppy Jr, 'Codifying Interest Analysis in the Torts Chapter of a New Conflicts Restatement' (2001) 75 *Indiana Law Journal* 591.

The United Kingdom has legislated a similar approach, requiring primary to be given to the law of the place of the wrong, subject to displacement if having considered the factors that connect a tort with the country in which it was committed, and the factors that connect a tort with other countries, it is substantially more appropriate for the applicable law to be that of another country: *Private International Law (Miscellaneous Provisions) Act 1995* (UK) s 12; to similar effect, see the Privy Council's decision in *Red Sea Insurance Co v Bouygues SA* [1995] 1 AC 190, 206: 'the law of England recognizes that a particular issue between the parties to litigation may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties'.

<sup>86</sup> [1971] AC 356.

jurisdiction with the greater concern with the specific issue raised in the case.<sup>87</sup> Lord Wilberforce noted that:

To fix the liability of two or more persons according to a locality with which they may have no more connection than a temporary, accidental and perhaps unintended presence, may lead to an unjust result.<sup>88</sup>

His Lordship also applied the law of England to the question of remedies, as the proper law with the closer connection with the parties.<sup>89</sup>

The proper law approach was embraced in the celebrated New York Court of Appeals decision in *Babcock v Jackson*,<sup>90</sup> involving an action by one New York resident against another New York resident arising from a car accident they were involved in while travelling in Ontario for the weekend. In terms of compensation, Ontario law would bar recovery in this case as it did not permit a passenger in a car to sue the driver, while no such restriction applied in New York law. The Court explained its position thus:

The center of gravity or grouping of contracts doctrine adopted by this court in conflicts cases involving contracts impresses us as likewise affording the appropriate approach for accommodating the competing interests in torts cased with multi-state contacts. 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.<sup>91</sup>

This case has been the foundation of much of the development of American conflicts of law doctrine in torts conflicts since that time,<sup>92</sup> and has the advantage of being in harmony with conflict of law principles in other contexts.<sup>93</sup>

<sup>87</sup> Ibid 380, *contra* Lord Donovan (383). Lord Guest decided on different grounds and did not consider the question of the 'proper law' of the tort.

<sup>88</sup> Ibid 388.

<sup>89</sup> Ibid 392. Lord Pearson agreed that if the law of the place of the wrong applied to determination compensation issues, an exception would be required to allow the plaintiff in cases such as the one in *Boys* to obtain 'adequate' damages (in the eyes of Lord Pearson, presumably) (406).

<sup>90</sup> 12 NY 2d 477 (1962).

<sup>91</sup> Ibid 481. The court noted that in this case, New York was the home of the driver and passenger, the place where the car was garaged, licenses and insured, and the place where the weekend journey was to start and end. Ontario's sole relationship with the case was the 'purely adventitious circumstance' that the accident occurred there.

<sup>92</sup> Some cases which adopted a proper law approach since *Babcock* include *Long v Pan American World Airways*, 213 NE 2d 796 (NY, 1965); *Miller v Miller*, 237 NE 2d 877 (NY, 1968); *Tooker v Lopez*, 249 NE 2d 394 (NY, 1969); *Neumeier v Kuehner* 286 NE 2d 454 (NY, 1872); *Reich v Purcell*, 432 P 2d 727 (Cal, 1967); *Griffith v United Air Lines*, 203 A 2d 796 (Pa, 1964); *Miller v White*, 693 A 2d 567 (Vt, 1997); *Najarian v National Amusements Inc*, 768 A 2d 1253 (RI, 2001); *Savage Arms Inc v Western Auto Supply Co*, 18 P 3d 49 (Ala, 2001); *Ruffin-Steinback v dePasse*, 267 F 3d 457 (6th cir, 2001) (applying Michigan law); *Sanchez v Brownsville Sports Centre Inc*, 51 SW 3d 643 (Tex, 2001). A related but distinct line of reasoning is that the 'better law' should be applied to resolve the dispute. This is the law that the judge thinks should apply, having regard to notions such as predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum's governmental interests, and application of the better rule of law: R Leflar, L McDougall

Perhaps surprisingly,<sup>94</sup> none of the members of the High Court of Australia applied the proper law approach in deciding which limitation period should apply in *McKain*, or which damages regime should apply in *Stevens*. Similarly, no support for the proper law approach appears in any of the judgments in *Pfeiffer*, *Regie* or *Neilson*.

While certainly a criticism may be made of the proper law approach that it creates uncertainty for the parties,<sup>95</sup> the great benefit it creates is its flexibility, as well as coherence with how contracts conflicts are dealt with.<sup>96</sup> How else can a

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III and R Felix, *American Conflicts Laws* (4<sup>th</sup> ed, 1986) 279, to like effect Zweigert, 'Some Reflections on the Sociological Dimensions of Private International Law, or What is Justice in Conflict of Laws?' (1973) 44 *University of Colorado Law Review* 283, Friedrich Juenger, *Choice of Law and Multistate Justice* (1993) 211, applied in cases such as *Wallis v Mrs Smith's Pie Co*, 550 SW 2d 453 (Ark, 1977) and *Heath v Zellmer*, 151 NW 2d 664 (Wis, 1967). However, some have suggested that a search for the better law is in reality a mask for applying the law of the forum – 'most state court judges have preferred to resolve true conflict cases, whenever possible, by better law analysis or some other techniques of reconciliation. Of course, the reconciliation technique usually justifies the application of the forum's rule': Moffatt Hancock, *Studies in Modern Choice of Law: Torts, Insurance, Land Titles* (1984) 128. I submit that this poses a major risk in terms of analysis – that it is not always in fact genuinely a search for what is the (objectively) better law.

<sup>93</sup> In the absence of an express choice, the 'closest connection' test determines the proper law of the contract in contract conflict cases (*Re United Railways of the Havana and Regla Warehouses Ltd* [1960] Ch 52). This approach is mirrored in relevant international conventions, for example Article 8(3) of the 1986 *Hague Convention on the Law Applicable to Contracts for the International Sale of Goods* specifies choice of law rules in the absence of the parties' choice, but these can be excluded if the contract is manifestly more closely connected with some other law, Article 7 of the 1985 *Hague Convention on the Law Applicable to Trusts and on Their Recognition*, Article 4 of the 1978 *Hague Convention on the Law Applicable to Matrimonial Property Regimes*, and Article 4(1) of the *Rome Convention on the Law Relating to Contracts*, all of which use the phrase 'most closely connected'. I have now discovered that the European Group of Private International Lawyers (EGPIL) has proposed a new convention on choice of law in tort, whereby the law of the country most closely connected with the tort would apply: 'Proposal for a European Convention on the Law Applicable to Non-Contractual Obligations' (1998) 45 *Netherlands International Law Review* 465.

<sup>94</sup> Given that at least Mason CJ in *Breavington v Godleman* (1988) 169 CLR 41, 76 expressed his support for such a position, as did Toohey J (162-3).

<sup>95</sup> For example, Friedrich Juenger in *Choice of Law and Multistate Justice* (above n 92) claims the proper law approach 'undercuts decisional harmony, softening the conflict of laws by substituting non-rules for fixed precepts' (129). Reese in 'American Trends in Private International Law: Academic and Judicial Manipulation of Choice of Law Rules in Tort Cases' (1980) 33 *Vanderbilt Law Review* 717, 734 claims the principal weakness of the approach is the relatively little guidance it affords, and Foster is similarly critical 'Some Defects in the English Rules of Conflict of Laws' (1935) *British Year Book of International Law* 84, 92. Most recently in *Neilson*, Gummow and Hayne JJ state that 'what have come to be known as 'flexible exceptions' to choice of law rules are necessarily uncertain. That is the inevitable consequence of their flexibility' ([93]).

<sup>96</sup> As Elizabeth James notes, discussing the *Pfeiffer* decision, 'it is unfortunate that the outcome of the case may have been different had it been framed in contract' (*John Pfeiffer Pty Ltd v Rogerson: The Certainty of Federal Choice of Law Rules for Intranational Torts: Limitations, Implications and a Few Complications*' (2001) 23 *Sydney Law Review* 145, 163).

coherent system of conflict of laws deal with the situation where the law of the place of the wrong is merely fortuitous?<sup>97</sup> As Mason CJ noted in *Breavington*:

The mechanical application of the (law of the place of the wrong) cannot do justice to the infinite variety of cases in which persons come together in a foreign jurisdiction from different legal backgrounds ... the qualified or flexible application of the law of the place of the wrong copes with the incidents of tort law in the modern age of travel when the place of the accident may be fortuitous ... and the parties may have no substantial connection with the law of that place or with that place at all.<sup>98</sup>

In such cases, the place of the wrong may have no interest in applying its own compensation rules. This was certainly the case in *Boys*, where all of the connecting factors were to England, and the place where the accident occurred was merely fortuitous. It was the case in *Babcock*, where all of the connecting factors were to New York, and the place where the accident occurred was merely fortuitous. It was surely the case in *Pfeiffer*, where all of the connecting factors were to the Australian Capital Territory,<sup>99</sup> with the place of the accident (New South Wales) merely fortuitous.<sup>100</sup>

## VI FORMULATING A PREFERRED CHOICE OF LAW RULE

### A *Easy Cases/False Conflicts where the Place of the Wrong has no Interest in the Outcome*

Ironically, it is the so-called 'easy' cases, where the place of the wrong has no interest in the outcome of the litigation, which show up the High Court's determination to admit no exception to the application of the law of the place of the wrong, as being (with respect) inadequate.<sup>101</sup>

<sup>97</sup> It is interesting but perhaps not surprising that of all the States in the United States that have abandoned the law of the place of the wrong as the invariable choice of law (currently 42), most of them (76%) did so in cases where the plaintiff and defendant had a common domicile that differed from the place of the wrong. Ninety-eight percent of these cases (all but one) then applied the law of the place of the common domicile, rather than the law of the place of the wrong: Symeon Symeonides, 'Choice of Law in the American Courts' (2003) 51 *American Journal of Comparative Law* 1, 5-6. Korn, above n 14, 788-9 concludes that the application of the law of the common domicile in loss distribution conflicts is the 'only unqualified success of the American conflicts revolution and probably ... its most enduring contribution'. Refer similarly to *Collins v Trius Inc*, 663 A 2d 570 (Me, 1995).

<sup>98</sup> *Breavington v Godleman* (1988) 169 CLR 41, 76.

<sup>99</sup> The defendant carried on business in the Territory and employed the plaintiff there. The defendant paid workers' compensation premiums in the Territory. The plaintiff lived there and was employed by the defendant there.

<sup>100</sup> Surely, it was also the case in *Union Shipping New Zealand Ltd v Morgan* (2002) 54 NSWLR 690, where the plaintiff and defendant were both resident in New Zealand, and the plaintiff was employed there. The defendant contributed to a workers' compensation scheme in that country. The accident through which the plaintiff was injured occurred there, but New South Wales had no other connection with the parties.

<sup>101</sup> In advocating reform to the New Zealand rules continuing to favour double actionability, Schoeman agrees that the primary rule should be to apply the law of the place of the wrong, subject to a flexible exception: Elsabe Schoeman, 'Tort Choice of Law in New

As described above, *Chaplin*, *Babcock*, and *Pfeiffer* are all cases where the place of the wrong had no (or next to no) interest in the outcome of the litigation.<sup>102</sup> The House of Lords was satisfied that Maltese law had no interest in the loss distribution question between two British nationals involved in an accident in Malta. The New York Court of Appeals was satisfied that Ontario had no interest in the loss distribution question between two New York residents involved in an accident in Canada. This influenced the English and American courts in declining to apply the law of the place of the wrong, for good reason. It is hard to justify applying the law of a country to a situation when the reasons why that law was introduced in the first place are not relevant to the situation at hand. Yet that is what the High Court's approach require that we do.

The recent example of *Neilson v Overseas Projects Corporation of Victoria Ltd*<sup>103</sup> provides a further example. The case involved the appellant's husband being engaged by an Australian company (OPC) to deliver training in China. The Australian company provided accommodation for the appellant and her husband. There was no guard rail on stairs in the accommodation premises provided by OPC. The appellant suffered injuries when she fell down the stairs during the night. None of the judges in the case doubted that Chinese law, as the place where the accident occurred, should determine questions of compensation.

Why? Again, one might ask what possible interest does China have in this litigation? Chinese law admitted as much by allowing, where a tort case involving two nationals from another country occurred in China, the matter to be heard by the law of that other country.<sup>104</sup> What further evidence could be needed to show that China is likely to have no interest in the question of loss distribution involving two nationals. Indeed, Callinan J went close to recognizing this in that case:

In most respects, this one is not a hard case. The proceedings have ... been instituted in Australia ... The parties are all here ... Their presence in China was temporary. The issue of liability was a simple one of negligence according to Australian common law. No one has argued that the Supreme Court of Western Australia was an inappropriate forum. All of those should incline the Australian court, if it may, to the application of Australian law.<sup>105</sup>

In another 'easy case', the court, with respect, got it right. In *Hightower v Kansas City Southern Railway Co*,<sup>106</sup> there was a collision between a car and a train in Arkansas. The car was driven by an Oklahoma resident and an Oklahoma-based train operated by an Oklahoma-resident company. Under Arkansas law, if the plaintiff were at least 50% responsible for the accident, he would be denied any recovery. Under Oklahoma law, no such limit applied, and provided the defendant

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Zealand: Recommendations for Reform' (2004) *New Zealand Law Review* 537, 558.

<sup>102</sup> Further, in the case of *Regie*, two High Court judges found that on the application of forum non conveniens rules, New South Wales, the forum court, had insufficient interest in the case to warrant jurisdiction (Kirby J at 550-1 and Callinan J at 559).

<sup>103</sup> [2005] HCA 54.

<sup>104</sup> Article 146 of the *General Principles of Civil Law of the People's Republic of China*.

<sup>105</sup> [2005] HCA 54, [257]. To be fair, these comments were made in the context of a renvoi question, but the reasoning is consistent with the argument that in 'easy cases' where there is no true conflict and both parties reside other than in the place of the wrong, the law of that place should be displaced.

<sup>106</sup> 70 P 3d 835 (Okla, 2003).

bore some responsibility for the accident, it would be obliged to compensate the plaintiff (at least partially) for his loss. The court found that although the place of the wrong was Arkansas, Oklahoma law should apply to questions of loss distribution, because that State was closely connected with the events – both plaintiff and defendant were resident there, and the car and train trips had begun in Oklahoma and were to end there. In other words, Arkansas had no interest in the allocation of loss between the parties.<sup>107</sup>

I agree – rather than clothe the issue of quantum of damages available as being either substantive or procedural,<sup>108</sup> the court applied the law of the place of the wrong to compensation issues as a general rule, subject to an exception where the place of the wrong has no interest or no significant interest in the distribution of loss. The above was an easy case where the place of the wrong, Arkansas, clearly had no interest in the distribution of loss.<sup>109</sup> This is a fairly simple application of interest analysis.

However, ‘easy cases’ are not always decided in this manner, particularly where the forum is also the place of the wrong. An example is *Jackson v Chandler*,<sup>110</sup> about a three-car accident in Arizona involving all Californian residents. The plaintiff commenced legal action more than one year after the accident. Under Arizona law, this was acceptable as a two-year limitation period

<sup>107</sup> Similarly, in *Miller v White*, 702 A 2d 392 (Vt, 1997) the plaintiff and defendant both lived in that State, and were involved in an accident in Quebec. That province provided only a limited statutory remedy. The Court, applying interest analysis, applied the law of Vermont to resolve the question of loss distribution. Would the High Court, following its judgments in *Pfeiffer* and *Regie*, have done the same? One might suspect the current court would apply the law of the place of the wrong, Quebec. Louise Weinberg, writing of the *Miller* decision, agrees with the outcome (apply Vermont law) but complains of the tortured analysis the court had to embark on under the *Second Restatement* ‘to solve a problem that the veriest rookie could have seen did not exist’: ‘A Structural Revision of the Conflicts Restatement’ (2000) 75 *Indiana Law Journal* 475, 478.

<sup>108</sup> In *Stevens*, quantification was held to be a matter of procedure and governed by the law of the forum.

<sup>109</sup> As Justice Holman said of interest analysis ‘it may well be that determining what interests or policies are behind the laws of a particular state is far from an exact science and is something about which there can be legitimate disagreement; but on the other hand, it is the kind of an exercise, for better or for worse, which courts do every day and, therefore, feel secure in doing’ (*Erwin v Thomas*, 264 Ore 454, 468 (1973)). Similarly, when Australian courts consider the meaning of legislation, they are directed towards the object of the law, at least in the event of ambiguity (s 15AA and s 15AB *Acts Interpretation Act 1901* (Cth)). In making his case for a *Third Restatement*, Symeon Symeonides suggests that in relation to loss distribution issues, the law of the state of the parties’ common domicile should apply, rather than the law of the place of the wrong: Symeonides, ‘The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)’ (2001) 75 *Indiana Law Journal* 437, 450.

Similar results occurred in cases such as *Crowell v Clay Hyder Trucking Lines Inc*, 700 So 2d 120 (1997) (Florida District Court of Appeal) where Florida residents were involved in an accident in Georgia. The court found Florida vehicle owners’ liability applied; in *Esser v McIntyre*, 661 NE 2d 1138 (Ill, 1996) where Illinois vacationers were involved in an accident in Mexico. Illinois law applied to permit recovery; *Veasley v CRST International Inc*, 553 NW 2d 896 (Iowa, 1996), where an Iowa plaintiff was injured in Arizona while a passenger in a truck registered in Iowa and owned by a Iowa-registered defendant. The court applied Iowa vehicle owners’ liability; and in *Cribb v Augustyn*, 696 A 2d 285 (RI, 1997), where both parties were from Rhode Island and the accident occurred in New Hampshire; the Rhode Island limitations period applied.

<sup>110</sup> 61 P 3d 17 (Ariz, 2003).

applied. Under California law, the action was statute-barred as a one-year limitation period applied.

The Supreme Court of Arizona found that Arizona had a substantial connection with the occurrence, since the wrongful conduct, accident and the injury all occurred in that State. The court found that State had an interest in 'regulating conduct within the State, deterring wrongful conduct in the state and providing a forum to adjudicate claims arising from such conduct ... is more than slight'. This justified the court in applying the *Restatement (Second)*, so that the statute of limitations applicable was that of the forum state.<sup>111</sup> Unquestionably Arizona is one possible forum to hear the matter, but as is obvious, questions of jurisdiction are separate from questions about choice of law. One might question what interest Arizona has in deciding on the allocation of responsibility between Californian residents, while recognizing that Arizona has the right to decide what kinds of conduct are wrongful within its borders.<sup>112</sup>

In conclusion, I suggest that in these so-called easy cases, where the plaintiff and defendant are from the same country, a different country from the place where the wrong occurred, the law of the parties' residence should be applied to questions of loss distribution. This is justified on the basis of interest analysis – the place of the wrong has no interest in allocating loss between the parties and the object of the loss allocation law of that country would not be furthered by its application in such as case.

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<sup>111</sup> With respect, this decision wrongly assumes that issues of conduct regulation and loss distribution must be governed by the same law. This is clearly not the case (*Babcock v Jackson*, 191 NE 2d 279, 285 (1963)). The reason is the 'considerations offering the most protection for applying the law of the place of the wrong are protection of the reasonable expectation interests of parties who relied on it to guide their primary conduct and the place of the wrong's interest in the admonitory effect of its application on similar primary activity there in the future. These considerations, though patently important to conflicts involving the conduct-regulating rules of tort law, are only minimally ... relevant to those involving rules of the loss-distribution kind': Korn, above n 14, 800. *Nierman v Hyatt Corp*, 798 NE 2d 329 (2003) is one example where questions of conduct regulation were dealt with under different law than questions of loss distribution. The matter involved a tort action filed by a Massachusetts plaintiff injured in the defendant's Texas hotel. The court determined that Texan law should apply to conduct regulation, but that Massachusetts law should apply to loss distribution, and specifically which statute of limitations law should be applied to the dispute.

<sup>112</sup> Another case which may be criticized on these grounds is *Raskin v Allison*, 57 P 3d 30 (Kan, 2002). There the Kansas Court of Appeals heard a dispute arising from a boating accident that occurred in Mexico. The plaintiff and defendant were both Kansas residents holidaying in Mexico. The dispute was limited to the amount of recoverable damages, with Mexican law restricting damages to medical and rehabilitation expenses and limiting claims for loss of earnings to the minimum wage. Kansas law did not impose such limitations. While one might have thought that Kansas law might have been applied to the question of loss distribution on the basis that Mexico has no interest in the issue, in fact the court applied the law of the place of the wrong, Mexico. (Kansas is one of the few states that continues to apply the law of the place of the wrong without exception to both the issue of conduct regulation and loss distribution).

### B *Difficult Cases Involving Parties from Different Jurisdictions*<sup>113</sup>

One might hesitate before considering whether an exception should be made justifying a departure from the law of the place of the wrong where the parties involved in the (international) litigation are from different jurisdictions.<sup>114</sup> In this kind of situation, one approach is to apply interest analysis, or a weighing up of the contacts between the issues in dispute and the other jurisdiction/s, to see whether the matter has a closer connection with a place other than the place of the wrong.<sup>115</sup> This may or may not include an analysis of the reasons for the introduction of the various laws, and whether their purpose would be advanced by their application in the current dispute.

Examples include *Jett v Coletta*,<sup>116</sup> where medical services were rendered in New Jersey to a patient living in Idaho. Except for the plaintiff, all other parties involved were New Jersey residents. Idaho, but not New Jersey, limited non-economic loss claims to \$400 000. The court applied the law of New Jersey to the issue of compensation, reasoning that Idaho's interest was to limit recovery for non-economic damages to keep down insurance premiums in that State. That interest would not be affected by a decision here to compensate the plaintiff based on the more liberal New Jersey provisions. Idaho had no interest in controlling liability insurance premiums in New Jersey for New Jersey defendants.<sup>117</sup>

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<sup>113</sup> I discuss the issue only in the context of international torts, conceding that most of the cases discussed are interstate conflicts, but using the cases to illustrate the suggested relevant principles.

<sup>114</sup> Or, more specifically, jurisdictions where there are substantive differences in the law (to counter the argument that *Neilson* was such a case – the author maintains it is not since, although the plaintiff and defendant are from different states (jurisdictions) in Australia, the relevant law is the relevant law of negligence, does not differ between states.

<sup>115</sup> This is the approach taken by the *Private International Law (Miscellaneous Provisions Act) 1995* (UK) and the American Law Institute, above n 12.

<sup>116</sup> WL 22171862 (DN J, 2003).

<sup>117</sup> Similarly, in *Tooker v Lopez*, 249 NE 2d 394 (1969), where two students, resident in New York, were killed in an accident occurring in the state of Michigan. The car belonged to the driver's father, and was registered and insured in New York. Michigan had a guest statute, barring claims by a passenger against their driver; New York allowed such a claim if negligence were shown. The court found the law of the place of the wrong, Michigan, should not be applied to the case, since that state had no interest in the application of its guest statute. New York law applied to the question of compensation, justified by the residence of the parties and the location of the relevant insurance company. Again in *Reich v Purcell*, 432 P 2d 727 (1967), the case involved an accident occurring in Missouri, between an Ohio resident and a California-based defendant. Missouri law capped damages at \$25 000. The court declined to enforce the cap, reasoning that Missouri had no interest in loss distribution questions arising from the accident.

In the slightly different context of an aircraft accident occurring in Colorado, the court applied the law of the place of the plaintiff's domicile in determining compensation issues (Pennsylvania), rather than the law of the place of the accident (Colorado) or the defendant's domicile (United Airlines conducted business in most of the United States, but was based in Chicago, Illinois). Colorado law would have excluded recovery for potential earnings by the plaintiff after death, and would have awarded only the costs of the deceased's burial. The court justified not applying Colorado compensation law on the basis it was designed to protect Colorado defendants from large verdicts – this policy would not be infringed in this case by applying the law of Pennsylvania to compensation issues: *Griffith v United Air Lines*, 203 A 2d 796 (1964).

In the different context of whether punitive damages should be ordered against the defendant, the same issue of which law should apply to loss distribution questions was raised in *Fanselow v Rice*.<sup>118</sup> There two Colorado residents were injured in an accident occurring in Nebraska. The defendant drove the other car, a Texas resident who moved to Oregon after the accident, and his employer, a Minnesota-based corporation. Nebraska prohibited punitive damages, while the other states allowed it. The court found the law of the place of the wrong should be displaced, on the ground of interest analysis. The purpose of the punitive damages was to punish defendants and deter them and others from future wrongdoing, while the purpose of a rule prohibiting punitive damages was to protect defendants from excessive financial liability and to encourage entrepreneurial activity through lowering the cost of doing business in the State. The place of the accident, Nebraska, had no interest in this issue – the defendant’s only connection with that state was that the accident occurred there. It would not infringe the policy behind Nebraska’s prohibition on punitive damages to allow those damages to be claimed here.<sup>119</sup>

Of course, it is much easier to apply interest analysis in the context of a tort connected only with one country. It would be much easier for the court of one State to determine the policy of the law of another State. It is much more difficult to ask the court in one country to determine and apply the policy reasons for the introduction of a law in another country, which may have very different legal processes and influences.

#### VII CAN FORUM BIAS BE REMOVED FROM CONFLICT OF LAWS TORT PRINCIPLES?

I remain hesitant about applying this proper law/interest analysis approach to questions involving split domicile. The history of cases involving conflict of laws tort questions has shown a remarkable favoritism for the law of the forum. This is seen in various contexts:

- (a) the old decision in *The Halley* and its subsequent adoption in *Phillips v Eyre*, with repercussions for courts throughout the Commonwealth (as discussed) until its final eventual rejection in all of them (discussed), requiring actionability according to the law of the forum, and applying the law of the forum to be applied as the substantive law;
- (b) the distinction between substance and procedure being twisted in such a way to give an overly broad interpretation to matters of procedure, again giving the forum law an artificially strong influence over the dispute; and

<sup>118</sup> 213 F Supp 2d 1077 (D Neb, 2002).

<sup>119</sup> Another example of a punitive damages case is *Re Aircraft Accident at Little Rock, Arkansas* 232 F Supp 2d 852 9 (ED Ark, 2002), although in that case the court found the place of the wrong had a strong interest in the enforcement of its law which did not impose any limits on punitive damages claims. Regarding punitive damages, Symeonides’ proposed *Third Restatement* advocates that such damages be available if any two of the following contacts are situated in a state or states that impose such a remedy: (a) place of conduct; (b) place of injury; and (c) the tortfeasor’s domicile: Symeon Symeonides, above n 85, 450.

- (c) even today, according to some judges, in the application of the forum non conveniens test to favour the forum hearing the matter.<sup>120</sup>

Given that I have in the past supported, and continue to support, very strong prominence being given to the law of the place of the wrong, I cannot support any approach which might be abused by forum courts to give effect to forum law. History has certainly shown us that forum courts have often been very tempted to find a way to apply forum law, and so I conclude that adopting a proper law/interest analysis approach in the split-domicile cases would create an unacceptable risk of this happening in future.<sup>121</sup> Accordingly, I conclude that in cases of split-domicile, the law of the place of the wrong should be applied,<sup>122</sup> unless public policy considerations (in the narrow way earlier discussed) suggest its displacement.

Even if a proper law approach were taken here, there remains debate about how this is to occur. Should the court take a centre of gravity approach, counting the contacts between the events involved in the dispute and other jurisdictions?<sup>123</sup> Or should it take a more qualitative approach, focusing not on the number but on the strength of the contacts between the events and different jurisdictions?<sup>124</sup> This is an issue on which minds have differed.

<sup>120</sup> In *Regie*, where Kirby and Callinan JJ (dissenting) thought that the matter was not sufficiently related to the forum, New South Wales, and criticized the majority view to the contrary – ‘what weighs most heavily in the scales for the respondent is either natural sympathy for his predicament or a return to the chauvinistic attitudes of *Phillips v Eyre* as it was interpreted. Each of those considerations is legally illegitimate. This Court should not give way to them. In this age, such parochialism has no place in the law of inconvenient forum ... this court should not succumb to a new provincialism in the guise of exercising the discretion to stay proceedings commenced in an inappropriate forum’ (550-1). Kirby and Callinan JJ claimed that the majority had in effect ignored the Supreme Court Rules by applying the common law test for forum non conveniens to the matter, rather than the test in the rules. It may be no coincidence that the common law test made it harder to get a stay based on forum non conveniens by requiring that the applicant show the forum chosen was ‘clearly inappropriate’. The Supreme Court Rules required only that the applicant make out that there was a more appropriate forum.

<sup>121</sup> Critics of interest analysis often point to its forum bias – see for example Lea Brilmayer, ‘Interest Analysis and the Myth of Legislative Intent’ (1980) 78 *Michigan Law Review* 392, 398; G J Simson, ‘State Autonomy in Choice of Law: A Suggested Approach’ (1978) 52 *Southern California Law Review* 61. This criticism is hard to rebut – the leading exponent of interest analysis, Brainerd Currie, himself claimed that where more than one state has an interest in the application of its own law, the law of the forum should prevail: ‘Comments on *Babcock v Jackson*, A Recent Development in the Conflict of Laws’ (1963) *Columbia Law Review* 1233. Harold Korn notes that ‘the temptation to yield to these biases (a bias favouring forum law) is ... never stronger than in [a] split-domicile true conflict pattern’: above n 68, 911.

<sup>122</sup> Harold Korn reaches a similar conclusion: ‘I propose to show that when the parties are domiciled in different states with different laws, most cases should return to a rule of *lex loci delicti*, which is precisely what the new learning (in other words, a proper law approach) will not allow them to do’: above n 68, 777.

<sup>123</sup> Consistent with a proper law of the contract approach, and the approach adopted by the Privy Council in *Red Sea Insurance Co v Bouygues SA* [1995] 1 AC 190.

<sup>124</sup> Seemingly more consistent with Lord Wilberforce in *Chaplin*, who advocated considering the content of the law of the place of the wrong, including in what situations the rule was intended to apply, and whether its application in the current case would serve a purpose it was designed to meet (391), the approach of the New York Court of Appeals in *Babcock v Jackson*, 12 NY 2d 477 (1962); (1963) 2 Lloyd’s Rep 286, the American Law Institute, above n 24, s 6 and s 145, and s 12 of the *Private International Law (Miscellaneous Provisions) Act 1995* (UK). This dilemma is raised by Elsa

Together, these difficulties persuade me that the rules should be applied as follows:

- (a) in domestic torts cases, the law of the place of the wrong should be applied to issues of both conduct regulation and loss distribution, without exception;
- (b) in international torts cases, the law of the place of the wrong should be applied to conduct regulation issues, unless the court is justified in refusing to apply that law for reasons of public policy;
- (c) in international torts cases, the law of the place of the wrong should be applied to loss distribution issues, unless either the public policy exception applies, or both parties are residents of a different country. In that case, the law of that country should apply to compensation questions.

The High Court, having taken many steps in recent years to reform the difficult area of choice of law rules in tort, may not be minded to take these further steps, in which case I submit that Commonwealth legislation should be introduced to effect these changes.