

CHOICE OF LAW IN TORTS
*ONE MORE TIME FOR THE ROAD**
Bryan Schwartz**

Introduction

The problem of choice of law in torts has a remarkable history. In the different Anglo-American jurisdictions it has been handled by a variety of judicial techniques ranging from the cut-and-paste method of *stare decisis* to the free-wheeling American "policy" oriented approach. Few areas of law have been so extensively analyzed and so heavily influenced by academic theorists.¹ This article will critically examine the evolution of choice of law doctrine in the United States, England and Canada, and conclude with some recommendations for reform. *Going v. Reid Brothers Motor Sales*,² a recent decision of the Ontario High Court, will be used in order to test and illustrate some of the contentions that will be made here.

I. A Recent Case

The Facts

The defendant in *Going*, Gilbert Fraser, was a resident of Quyon, Quebec. The judgment of Henry J. does not indicate in which province his own vehicle was registered, but on the day of the accident he was driving a car which had been loaned to him by the corporate defendant, Reid Brothers Motor Sales Limited, while his own car was being repaired. The plaintiffs were all residents of Ontario and were in Quebec for a brief visit to a restaurant there. The accident occurred in the province of Quebec when Fraser's car, travelling at least partly on the wrong side of the road, collided with the plaintiffs' car as it came in the opposite direction. While both Fraser and the driver of the plaintiff's car, Skokos, had been drinking on the day of the accident, Henry J. found that the conduct of neither was thereby affected. Fraser's negligence was the cause of the accident, in that:

... Mr. Fraser rounded the curve which veered to his right at an excessive rate of speed and crossed the centre line into the eastbound lane. He failed to return to his own lane, as he should have done, and collided with the plaintiff's vehicle. Not only did he proceed at a rate of speed that was excessive, having regard to the conditions of the weather, but he failed to observe the local rules of the road regarding the posted speed limit, s. 89 of the Quebec Highway Code, R.S.Q. 1977, c. C-24, in that he failed to drive on the right hand side of the road, and s. 83 in that he failed to drive with due care and attention, and [with] regard to other users of the highway. This conduct was the proximate cause of this accident. This was negligence on his part and his negligence caused the accident and the plaintiff's injuries.³

While Skokos had been sued by one of the passengers, Rhonda Bailey, he was found not to be negligent with respect to her or contributorily negligent with respect to himself.

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1. The legal literature includes such memorable titles as B. Currie, "Conflict, Crisis and Confusion in New York" (1963), Duke L.J. 1; A. A. Ehrenzweig, "The Not So 'Proper' Law of a Tort: Pandora's Box" 1968, 17 *Intnat'l and Comp. L.Q.* 1; and M. Baer, "Conflicts of Law — Torts — A Blind Search for a 'Proper' Law" (1970), 48 *C.B.R.* 161. A lengthy bibliography is included in J.G. Costel, *Conflict of Laws, Cases, Notes and Materials* (4th ed. 1978) 13-1 to 13-2. The single article which has contributed most to my own understanding of choice of law in torts is M. Baer, "Two Approaches to Guest Statutes in the Conflict of Laws: Mechanical Jurisprudence Versus Groping for Contacts" (1966-67), 16 *Buffalo L. Rev.* 537.

2. (1982), 35 O.R. (2d) 201, 19 C.C.L.T. 209 (H.C.) (hereinafter referred to as *Going*).

3. 19 C.C.L.T. 209 at 215-216.

The accident occurred only 17 days after Quebec's *Automobile Insurance Act*,⁴ had come into force, creating a no fault insurance scheme. Under s. 3 of the Act a person who sustains bodily injuries in an automobile accident must be compensated by the Board regardless of fault. Under s. 4, a person's rights to indemnity from the board is stipulated to be in lieu of any other remedy, including tort action. But by s. 115, a person could still claim his traditional tort remedies against a defendant in respect of property damage.

The plaintiff Rhonda Bailey recovered from the Quebec regie the sum of \$300 in respect of loss of clothing and \$1,208.67 for lost earnings. She sued for the former only in Ontario, but Henry J. held that even that could not be recovered, because then the plaintiff would be receiving double recovery. Henry J. held that to allow her to do so would be an unacceptably encouraged forum shopping and duplication of litigation. He went on to apply negligence law and awarded Baily \$23,000 for general and special damages.

The plaintiffs Going and Skokos did not resort to the Quebec regie at all. By Ontario law Skokos was awarded about \$35,000, and Going about \$10,000 in general and special damages against the defendants. In calculating their awards Henry J. deducted the amount each was entitled to receive under Schedule E of the Ontario *Insurance Act*. By that Schedule, every insurance policy in Ontario is deemed to include a duty on the part of the insurer to pay certain benefits to any person injured by the insured car, regardless of fault.

The Appropriate Result

Before looking at the case law let us ask what an appropriate result in *Going* might be. The analysis that follows is intended to be in the spirit of the *Second Restatement*,⁵ which will be explained in the next section.

The first thing to do is to consider the action as between the plaintiffs and the Reid Brothers. All the parties were Ontario residents. It seems appropriate for a conflicts system to respect the jurisdiction of political units over their people as well as their territory. If this is so, then Ontario had a solid claim to have its law applied. So did Quebec, based on the location of the accident within its boundaries, and there would have been a problem but for the congruence of Ontario and Quebec governmental policies. Ontario negligence law held that victims of negligence should be fully compensated for their losses by means of tort actions. It also held that automobile owners should be financially responsible for the negligence of people to whom they lend their cars.⁶ Quebec had a statutorily expressed interest in seeing that people injured in automobile accidents were compensated, in that it allowed residents and non-residents alike to obtain compensation from the administrative agency it had set up for this purpose. Thus, so long as no injustice was being done to any defendants, it was compatible with Quebec policies to have plaintiffs receive compensation in an Ontario tort action. Quebec interests were also promoted by the plaintiffs' success in an Ontario action, in that the funds of the Quebec agency did not have to be drawn upon.

4. R.S.Q. 1977, c. A-25.

5. *Infra* n. 30.

6. *Highway Traffic Act*, R.S.O. 1970, c. 202, 2.132(1) (presently R.S.O. 1980, c. 198).

The plaintiffs in *Going* were certainly not aggrieved by the decision to apply Ontario law. They probably thought their chances for full compensation were better under the fault system in force in their own home province. Nor were the Reid Brothers unfairly prejudiced by the application of Ontario law. The policy of their own government was to hold owners financially responsible for the negligence of persons to whom they loaned their cars. One can construct a problematic hypothetical in which an Ontario owner claims he has relied on the existence of a no-fault system in Quebec in deciding not to obtain liability insurance before loaning the car to someone for use only in Quebec. But no question of unfair surprise seems to arise on the facts of *Going*, as the Reid Brothers had in fact obtained liability insurance for the vehicle they eventually loaned to Fraser.⁷ (A statutory condition of Ontario insurance was that it applied to accidents both within and without the boundaries of Ontario.⁸) The Reid Brothers' insurance company, which actually had to sustain the financial burdens of the plaintiffs' award could not have complained that the results were unjust to them. It is very unlikely that they lowered the premiums they charged Reid Brothers on the expectation that an accident involving the vehicle might occur in a jurisdiction which did not impose tort liability. If they did, it was despite the warning given by the Supreme Court of Canada's decision in *McLean v. Pettigrew*.⁹ Henry J. relied upon that decision in holding for the plaintiffs in *Going*.

The merits of the case between the plaintiff and the defendant Fraser should now be examined. Fraser was a resident of a no-fault jurisdiction and was driving in that jurisdiction at the time of the accident. It may be conceded that he could not fairly have contended that he relied on the no-fault system in choosing to drive carelessly. His conduct was still prohibited and punishable as a provincial offence. He thus had fair warning that it was not acceptable. Furthermore, a person cannot, with any moral propriety endanger the life and health of other people simply because he enjoys immunity from civil liability. But Fraser might have fairly maintained that a resident of a province is entitled to rely on the existence of a no-fault system in deciding whether to drive at all in the province and whether to purchase third-party liability insurance. Perhaps Fraser was not actually prejudiced in this way, either because he had bought liability insurance during Quebec's fault system days and it was still in force, or because he was covered by the Reid Brothers liability insurance. In either event, he would still have been subjected to the anxiety and expense of going through civil litigation as a defendant and having to seek indemnity from an insurance company, even though he was a resident of a no-fault province at the time the accident occurred there. In contrast, it does not seem to be clearly unfair to relegate Ontario plaintiffs to the substantial, if not generous, remedies available to them in a no-fault province in which they choose to travel. The result in *Going* disregarded not only the right of a Quebec resident to rely and be protected by Quebec law with respect to conduct in Quebec, but also the

7. As encouragement to obtain insurance, Ontario made it a condition of motor vehicle registration that the owner obtain liability insurance or else either post security or pay an uninsured motor vehicle fund fee; *Motor Vehicle Accident Claims Act*, R.S.O. 1970, c. 281, s. 2 (presently R.S.O. 1980, c. 298).

8. *Insurance Act*, R.S.O. 1970, c. 220, s. 210 (presently R.S.O. 1980 c. 218).

9. *Infra* n. 111. It could be argued, though, that *McLean* should only apply where the defendant himself has committed a punishable act in the place of the accident.

claim of Quebec to have its no-fault law applied to a dispute involving its own resident arising out of an accident on its own highway. Ontario's claim to have its law applied, by contrast, could have been based only on the residence of the plaintiffs. All things being equal, a forum court is entitled to apply forum law; but all other things may be considered equal in *Going* only if the fact that the accident occurred in Quebec is ignored. In fine, the application of Ontario negligence law to the defendant Fraser was inappropriate.

II. The American Approach

Judge Joseph Story's *Commentaries on the Conflicts of Law*¹⁰ was the dominating intellectual influence in the early development of American private international law. The first full length commentary on conflicts ever published in English, it was a work of impressive erudition as well as originality. On each of its topics it provided a comprehensive analysis of the Anglo-American case law accompanied by a comparative study drawing on ancient Roman and continental European laws and commentaries. Story tended to place primary emphasis on territorial sovereignty in choice of law. Thus, he found considerable merit in the view that capacity to contract is governed by the *lex loci contracti* rather than the law of the domicile.¹¹ Such a rule avoided putting the onerous burden on a contracting party of having to learn the law of the other party's domicile, argued Story. Furthermore, it was certain and simple. Similarly, he held that essential validity and interpretation of contracts was to be governed by the *lex loci contracti*. It is not so much that the parties intended to have the local law applied, said Story, as that:

...the law of the place of the contract acts upon it, independently of any volition of the parties, in virtue of the general sovereignty possessed by every nation to regulate all persons, property, and transactions within its own territory. And, in admitting the law of a foreign country to govern in regard to contracts made there, every nation merely recognizes, from a principle of comity, the same right to exist in other nations, which it demands and exercises for itself.¹²

At the beginning of his treatise Story stated a few basic maxims which he believed to be key to the study of conflicts. This is not to suggest that Story's method was the deduction of theorems from basic *a priori* axioms. He was very much a practical jurist, attentive to the subtleties of different fact situations. Still, his basic assumptions had a powerful impact on later developments. The maxims were:

The first and most general maxim or proposition is that...every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every state affect, and bind directly all property, whether real or personal, within its territory; and all persons, who are resident within it, whether natural born subjects, or aliens; and also all contracts made, and acts done within it;¹³

Second,

...no state or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein, whether they are natural born subjects, or others.¹⁴

10. (New York, 1972). For an appreciation see: E. G. Lorenzen, "Story's Commentaries on the Conflict of Laws — One Hundred Years After", in *Selected Articles on the Conflict of Laws* (1947) 181.

11. Story, *Id.*, s. 76, at 74-75. The example is drawn from contract law because Story did not include a chapter on choice of law in tort.

12. *Id.*, s. 261, at 218.

13. *Id.*, s. 18, at 19.

14. *Id.*, s. 20, at 21.

Third,

... whatever force and obligation the laws of one country have in another, depends solely upon the laws, and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent.¹⁵

Story's basic assumptions, then, were simple. A state is entitled to determine the rules which govern an act within its own boundaries. It is up to the forum to decide whether to give effect to the rules enacted by another state. Usually a forum does so, among other reasons, out of that extra-legal respect which one sovereign state owes another, known as "comity".¹⁶

Story's maxims are very close to the "vested rights" theory embodied in the first *American Restatement on Conflicts*.¹⁷ The Reporter for this systemization of the American case law was Joseph Beale, who dedicated it to Story on the centenary of the publication of his first treatise on Conflicts in 1835. Some key sections will indicate Beals's basic assumptions:

§ 1(1) No state can make a law which by its own force is operative in another state; the only law in force in the sovereign state is its own law, but by the law of each state rights or other interests in that state may, in certain cases, depend upon the law in force in some other state or states.¹⁸

§ 378 The law of the place of wrong determines whether a person has sustained a legal injury.¹⁹

§ 384 (1) If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states.

(2) If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state.²⁰

§ 612 No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum.²¹

15. *Id.*, s. 23, at 24.

16. *Id.*, s. 38, at 37-38 "The true foundation, on which the administration of international law must rest, is that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconveniences, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return." *Id.*, s. 35, at 34.

17. *Restatement of the Law of Conflict of Laws* (1934) (hereinafter referred to as *Restatement*).

18. *Id.*, at 1-2.

19. *Id.*, at 457.

20. *Id.*, at 470.

21. *Id.*, at 731. The reason for the "vested rights" rubric emerges clearly from the following passages from J.H. Beale, "Summary of the Conflict of Laws", in *Perspectives on Conflict of Laws: Choice of Law* (J.A. Martin ed. 1980) 2-11:

§ 1 The topic called 'Conflict of Laws' deals with recognition of foreign created rights.

§ 2 In the legal sense, all rights must be created by some law. A right is artificial, not a mere natural fact; no legal right exists by nature. A right is a political, not a social thing; no legal right can be created by the mere will of parties.

§ 4 When a right has been created by law, this right itself becomes a fact; and its existence may be a factor in an event which the same or some other law makes the condition of a new right. In other words, a right may be changed by the law that created it, or by any other law having power over it.

§ 5 If no law having power to do so has changed a right, the existing right should everywhere be recognized; since to do so is merely to recognize the existence of a fact.

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

§ 48 Though a foreign right must be recognized as existing, it does not follow that it will be given any legal force. Since a right can have no legal force unless it is given force by law (§ 2), and since nothing can have the force of law in a State except the law of that State (§ 11), it follows that no foreign right can be enforced unless the law of the State so provides. This depends upon the law as to the enforcement of foreign rights, that is, upon a principle of the Conflict of Laws. The general principle is, that when a right has once been created by the proper law it will be enforced everywhere, even where it would not originally have been created upon the same facts. And this is true, even if the right is against a citizen of the State in which it is enforced.

It should be noted that the first *Restatement* never explains *why* fora should generally choose to give effect to rights created in other states. One cause of the eventual waning of the first *Restatement's* influence was that it did not provide guidelines for analysis in cases in which it was less than obviously just that the law of the place of the wrong should be applied.

Until the middle of this century, however, the vested rights theory was widely accepted as the theoretical foundation of American choice of law. Holmes J. in *Slater v. Mexican National Railroad Company* held that

But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio* [in other words, a vested right] which, like other obligations, follows the person, and may be enforced wherever the person may be found.²²

Learned Hand J. in *Guinness v. Miller* said that:

When a court takes cognizance of a tort committed elsewhere, it is indeed sometimes said that it enforces the obligation arising under the law where the tort arises However, no court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs.²³

Though it is hard to discern from the present state of the law, the "vested rights" theory has had a substantial role in the development of our own conflicts doctrine. It will be shown that some early English cases, such as *Phillips v. Eyre*,²⁴ are very much sympathetic to the vested rights approach.

One flaw in the vested rights theory is that a transaction may take place in several political units, either simultaneously (eg., a contract made by telephone) or through time (eg., an automobile badly manufactured in Michigan causing an accident in Ontario). Story himself had to make an exception from the general principle that the *lex loci contracti* generally governed contracts. If the intended place of performance was another jurisdiction, he allowed that law to be applied.²⁵ The first *Restatement*, on the other hand, held that the *lex loci contracti* should determine issues related to formation and the law of the place of performance should apply to issues involving performance.²⁶

The first *Restatement* defined the place where the tort occurs as "the state where the last event necessary to make an actor liable for the tort takes place."²⁷ This suggests another problem with the first *Restatement*. The place where the damage finally occurs may have only incidental importance to the

22. (1904), 194 U.S. 120 at 126.

23. (1923), 291 F. 769 at 770.

24. [1871] L.R. 6 Q.B. 1, 40 L.J.Q.B. 28, 22 L.T. 869 (Ex. Ch.). See also: *Chaplin v. Boys*, [1971] A.C. 356, [1969] 3 W.L.R. 322, [1969] 2 All E.R. 1085 (H.L.); aff'g [1968] 2 Q.B. 1, [1968] 2 W.L.R. 328, [1968] 1 All. E.R. 283 (C.A.); aff'g [1967] 3 W.L.R. 266, [1967] 2 All E.R. 665 (Q.B.) (hereinafter referred to as *Boys*). At [1971] A.C. 360: "... Willes J. was not only dealing with the argument concerning extra-territoriality, but was also declaring that in matters of substantive law the court only concerns itself with the place where the wrong is committed."

25. *Supra* n. 10, s. 280 at 233.

26. *Supra* n. 17, s. 332 at 408-09 & s. 358 at 437.

27. *Id.*, s. 377 at 454.

relationship between the parties. Indeed, one of the pivotal cases in the movement away from the "vested rights" theory was based on the unacceptability of applying the "last act" test. In *Kilberg v. Northeast Airlines*²⁸ the plaintiff brought a wrongful death action in New York on account of her husband's death in a plane crash. A New York resident, he had purchased his ticket and departed from a New York Airport. The plane crashed in Massachusetts. That state, unlike New York, limited a common carrier's tortious liability to \$15,000. Chief Judge Desmond of the New York Court of Appeals held that:

Modern conditions make it unjust and anomalous to subject the travelling citizen of this State to the varying laws of other States through and over which they move His plane may meet with disaster in a State he never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an airplane's catastrophic descent may begin in one State and end in another. The place of injury becomes entirely fortuitous. Our courts should if possible provide protection for our own State's people against unfair and anachronistic treatment of the lawsuits which result from these disasters. There is available, we find, a way of accomplishing this conformably to our State's public policy and without doing violence to the accepted pattern of conflict of law rules.²⁹

After a drafting process that took twenty years, the *Second American Restatement on Conflict of Laws*³⁰ finally appeared in 1971. Its departure from Beales's simple, axiomatic system was radical. Section 6 of the *Second Restatement* states:

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
 - (a) the needs of the interstate and international systems,
 - (b) the relevant policies of the forum,
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 - (d) the protection of justified expectations,
 - (e) the basic policies underlying the particular field of law,
 - (f) certainty, predictability and uniformity of result, and
 - (g) ease in the determination and application of the law to be applied.³¹

Section 145 provides a list of connecting factors to consider in light of the policy considerations in s.6:

- (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in §6.

28. (1961), N.Y. (2d) 34; 211 N.Y.S. (2d) 133; 172 N.E. (2d) 526 (N.Y.C.A.).

29. 172 N.E. (2d) 526 at 527-528.

30. *Restatement of the Law, Second, Conflict of Laws* (1971) (hereinafter referred to as *Second Restatement*).

31. *Id.*, at 10.

- (2) Contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:
- (a) the place where the injury occurred,
 - (b) the place where the conduct causing the injury occurred,
 - (c) the 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 centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.³²

Often overlooked is the *Second Restatement's* subsequent list of *prima facie* rules most of which favour the *lex loci delicti*. For example; section 146 provides that:

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in §6 to the occurrence and the parties, in which event the local law of the other state will be applied.³³

Succeeding sections make presumptively applicable the law of the place of injury in an action arising out of damage to a tangible object,³⁴ the place of the publication to defamation actions,³⁵ the place where the invasion of privacy occurred to privacy actions,³⁶ and the place where the conduct complained of principally took place in criminal conversation suits.³⁷ The *Second Restatement* is not as amorphous as it is often portrayed to be.

It should be emphasized that s. 145 calls upon courts to evaluate contacts in the context of the policy and justice factors listed in s.6. It does not call for courts to simply count contacts and apply the law of the state with the highest score. Nor does it envisage the application of the law which gives the *gestalt* impression of being most significantly connected. The court must consider each connecting factor in terms of, *inter alia*, the governmental policies of the competing rules involved and the justified expectations of the parties.

The *Second Restatement* is also based on a "choice of laws" rather than "choice of law" approach.³⁸ Each issue in the tort action is to be determined by the substantive rule of the state with the most significant relationship *to that issue*.

The leading case on the application of the *Second Restatement* approach is *Babcock v. Jackson*.³⁹ A New York guest passenger brought a negligence action against his New York host for injuries sustained in Ontario in the course

32. *Id.*, at 414.

33. *Id.*, at 430.

34. s. 147, at 438.

35. s. 149, at 450.

36. s. 152, at 464.

37. s. 154, at 470.

38. See: R. A. Sedler, "Rules of Choice of Law Versus Choice-Of-Law Rules: Judicial Method in Conflicts Torts Cases" (1976-77), 44 *Tennessee L. Rev.* 975.

39. (1963), 12 N.Y. (2d) 473, 191 N.E. (2d) 279 (N.Y.C.A.) (hereinafter referred to as *Babcock*).

of an intended two day visit there. Ontario at that time still had a complete statutory bar to the bringing of negligence actions by guest passengers. New York did not. In choosing to apply the New York rule Chief Judge Fuld of the New York Court of Appeals cited with approval the *Second Restatement Approach*⁴⁰. Fuld C.J. held that New York had a strong policy requiring hosts to compensate guests they negligently injured. The purpose of the Ontario guest statute (as inferred from an article in the *University of Toronto Law Journal*) was to protect insurance companies from collusive guest-host suits. But Ontario had no valid interest in protecting a New York based company from the fraudulent claims of a New York resident. Furthermore, Chief Judge Fuld concluded, the rights arising from the guest-host relationship should not shift as the automobile moves from state to state. Applying one law would accord with the 'interests of the host in procuring liability insurance adequate under the applicable law, and the interests of his insurer in reasonable calculability of the premium.'⁴¹

Actually, the former Premier of Ontario, Mitchel Hepburn, seems to have brought guest passenger legislation to Ontario as a legal restriction on ingratitude. He introduced the legislation after a hitchhiker to whom he had been kind enough to give a lift sued him for injuries resulting from a minor accident.⁴² But even if some respect be given to Ontario's interest in taking a moral stand against ungratefulness on the part of injured guests, the result in *Babcock* seems to be correct. (Note that it is the same result that the Supreme Court of Canada managed to achieve in *McLean v. Pettigrew*⁴³ by applying the rule in *Phillips v. Eyre*.⁴⁴) The visit being a short one, the expectations of the parties concerning compensation, including their insurance arrangements, could have been expected to have been based on New York law. Furthermore, New York's jurisdiction over its people and territory (where the relationship between the parties began and the insurance arrangements were made) deserved as much deference as Ontario's jurisdiction over its territory, and all things being equal, a forum court is entitled to give effect to the policies of the forum in preference to those of another jurisdiction.

Assuming that there is no intrinsic moral order to the world, it is amazing how frequently there is a rule covering a legal dispute and agreement that it is fair to apply it. There is no reason, *a priori*, to expect that judges and legislators will be able to provide even tolerably well for the infinity of possible interactions by half rational beings in a world which by its nature makes zero sense. One reason for the success of democratic legal systems is their inherent possibility for mutual accommodation between government and the governed. The former attempt to adjust the rules to conform to the conduct and wishes of

40. 191 N.E. (2d) 279 at 281. He also, unfortunately, referred to the "grouping of contacts" or "centre of gravity" approach, which seems to involve the courts in making basically intuitive judgments about which jurisdiction can claim the most impressive pile of contacts. (Professor M. Baer, "Two approaches to Guest Statutes in the Conflict of Laws: Mechanical Jurisprudence Versus Grouping for Contacts" *supra* n. 1 at 551, asks whether judges are supposed to decide how many units of significance — call them "sigs" — to assign to each contact, and award the choice of law to the winner). To add to the confusion, Chief Judge Fuld used, as he would in several subsequent cases, a certain amount of "governmental interest theory" language. The latter, is discussed in Part VI of this article.

41. 191 N.E. (2d) 279 at 285.

42. *Toronto Globe and Mail*, Jan. 6, 1978, at 1, col. 4. Hepburn made the law retroactive.

43. *Infra* n. 111.

44. *Supra* n. 24.

the latter and the latter can plan their conduct and wishes around the positive rules. In conflicts cases, the problem of mutual accommodation is seriously complicated. It is hard for people to master and plan their conduct around the internal rules of several different legal systems. It is harder still for people to do so in light of the different choice of law rules prevailing in those legal systems. All this makes it difficult for courts to know what the conflicts system can properly expect of people. In several of the conflicts cases decided by the New York Court of Appeals after *Babcock* it is difficult to say whether the result was appropriate. The facts of some of these cases make it much harder than in *Babcock* to assess their rough justice. But at least the Court attempted to deal openly with the complex issues of policy and fairness rather than ignore them or hide them by treating *lex loci delicti* as an absolutely invariable rule.

*Dym v. Gordon*⁴⁵ is worth looking at because of the similarity of its facts to those in *Boys*. A New York domiciled guest sued his New York domiciled host in New York for injuries sustained in a crash in Colorado. The two were temporarily resident in Boulder to take summer courses at the University of Colorado. Another car, driven by a Kansas resident, was also involved in the accident. At issue was whether Colorado's guest passenger statute applied. It conditioned guests' recovery on showing "wanton and wilful disregard of safety" on the part of the host. Burke J. held in a majority opinion that it did. He distinguished *Babcock* on the basis that the parties in *Dym* had a more than an "*in transitu*" relationship with the *lex loci delicti*. According to Burke J.:

Of compelling importance in this case is the fact that here the parties had come to rest in the State of Colorado and had thus chosen to live their daily lives under the protective arm of Colorado law. Having accepted the benefits of that law for such a prolonged period, it is spurious to maintain that Colorado has no interest in a relationship which was formed there.⁴⁶

He also held that there were three public policies behind Colorado's statute. One, to protect Colorado and insurers against fraudulent claims, would not have been prejudiced by the application of New York law. But the policy of Colorado in preventing ungratefulness by guests would have been frustrated, as would its interest in not having a guest's successful action deplete the funds available to other plaintiffs involved in a crash. Unfortunately, Burke J. did not explain how he knew what Colorado's legislative purposes were. His conclusion was that since the accident took place in Colorado and the parties were more than temporarily resident there, Colorado had a better claim than New York to have its law applied.

Chief Judge Fuld, who had written the majority opinion in *Babcock*, wrote a dissenting opinion.⁴⁷ For him, this case was no different than *Babcock*. In both cases, New York guest sues a New York host for injuries sustained in another state in a New York registered and insured car. The only demonstrated purpose of the State of Colorado (discoverable in Colorado judicial opinions) was the protection of Colorado insurers from fraudulent claims. Even if the rationale of the Colorado statute was to preserve the host's assets from being

45. (1965), 16 N.Y. (2d) 120, 209 N.E. (2d) 792 (N.Y.C.A.) (hereinafter referred to as *Dym*).

46. 209 N.E. (2d) 792 at 795.

47. *Id.*, at 797.

depleted to the prejudice of a third party, Colorado had no legitimate concern where the third party was a non-resident. It should be noticed that this part of Chief Judge Fuld's, reasoning simply assumes that states have only "selfish" legislative aims. Why couldn't Colorado want to ensure that law suits arising out of accidents within its borders are settled in a just manner, regardless of where the parties come from?⁴⁸ But on the whole Chief Judge Fuld's views seem to be preferable. New York had a strong claim, as the residence of both parties and the place where the defendant registered his car and made his insurance arrangements, to have its compensation law apply. The only private party clearly emerging from the majority opinion was the defendant's insurance company. And dubiously so, since it probably had based its premiums on the New York ordinary negligence rule.

The facts of *Tooker v. Lopez*,⁴⁹ were very similar to those of *Dym*, with the exception that the accident occurred in Michigan, not Colorado, and did not involve a third party. This time the New York Court of Appeal allowed the plaintiff to recover. Keating J. pointed out in his majority judgment⁵⁰ that the "gross negligence" standard of Michigan, made no sense in terms of preserving hosts' assets for the benefits of third parties. If that were the legislative aim, why allow guests to recover in even gross negligence cases? (Or, one might add, why not let guests recover as long as no third party is involved?) The only plausible purpose of the Michigan statute was to protect Michigan insurers and owners from fraudulent claims. That had no application in a case involving a New York owned and insured car. *Dym* was wrongly decided, concluded Justice Keating. Breital J. (with whom two of the nine New York judges concurred) held in his dissenting judgment⁵¹ that since the guest host relationship was formed in Michigan and the accident occurred there, Michigan law should be applied.

Chief Judge Fuld wrote an opinion⁵² concurring with Keating J. in which he formulated a set of guidelines for guest passenger cases. He did so in the belief that *Babcock* and its progeny, having uncovered the basic values and policies in guest-passenger area, it was time to restore some predictability to the law. The principles were as follows:

1. When the guest passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.
2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not — in the absence of special circumstances — be permitted to interpose the law of his state as a defence.
3. In other situations, where the passenger and driver are domiciled in different states, the rule is necessarily less categorical.⁵³

48. See Part IV of this article for further discussion of this point.

49. (1969), 24 N.Y. (2d) 569, 249 N.E. (2d) 394 (N.Y.C.A.) (hereinafter referred to as *Tooker*).

50. 249 N.E. (2d) 394 at 395.

51. *Id.*, at 408.

52. *Id.*, at 403.

53. *Id.*, at 404.

In *Neumeier v. Kuehner*⁵⁴ a New York resident drove his New York registered and insured car to Ontario and picked up an Ontario resident. He and his guest passenger planned to go on a joint trip which would take place entirely within Ontario. Both were killed instantly when a Canadian National Railway train struck the car at a railway crossing. The widow of the Ontario resident brought a wrongful death action in New York against both the C.N.R. and the estate of the New York resident. The Ontario guest passenger statute had been modified since *Babcock* and now allowed guests to recover — but only if they could prove gross negligence. Some of the usual *Babcock* arguments for the application of New York law could be raised with respect to *Neumeier*. The defendant and his insurer could have been expected to have based their claims on New York law, and New York had some claim to have its law with respect to accident compensation apply to its own defendant. (Note that the other Ontario defendant, C.N.R., would not have been prejudiced by the application of New York law. On the contrary, it might have obtained an otherwise unavailable partner in civil liability from whom it could seek contribution). Chief Judge Fuld ruled that the Ontario gross negligence standard applied, not New York's ordinary negligence rule. His principal argument, was simply that the location of the accident and residence of the plaintiff gave Ontario a superior right to have its policies enforced.⁵⁵

Judge Breitel wrote a concurring judgment in which he emphasized that the *lex loci delicti* was still the *prima facie* rule:

What the *Babcock* case... taught and what modern day commentators largely agree is that the *lex loci delictus* is unsoundly applied if it is done indiscriminately and without exception. It is still true, however, that the *lex loci delicti* is the normal rule, as indeed Chief Judge Fuld noted in the *Tooker* case... to be rejected only when it is evident that the situs of the accident is the least of the several factors or influences to which the accident may be attributed... Certain it is that States are not concerned only with their own citizens or residents, they are concerned with events that occur within their territory, and are also concerned with the 'stranger within the gates'⁵⁶

Bergan J. in dissent argued that the only difference between the instant case and *Babcock* was that the plaintiff in *Babcock* was a New York resident. But a distinction based on where a person "happens to live" is "inadmissible."⁵⁷ With respect, where a person lives is often a crucial matter in a conflicts case. It bears on the right of a political unit to have its law applied to him and on his right to build his expectations upon that law.⁵⁸

This article's own recommendations⁵⁹ for legal developments in Canada are close to the approach of Chief Judge Fuld, in *Tooker*. It will be urged that

54. (1972), 31 N.Y. (2d) 121, 286 N.E. (2d) 454 (N.Y.C.A.) (hereinafter referred to as *Neumeier*).

55. 286 N.E. (2d) 454 at 455.

56. *Id.*, at 459-460.

57. *Id.*, at 460.

58. While this comment has focused on New York's pioneering case law, it should be recognized that many American jurisdictions have followed New York's lead in using the *Second Restatement* approach rather than invariably applying the *lex loci delicti*. See 16 Am. Jur. (2d) s. 103 N. 4 for citations from twelve States and the District of Columbia. Some State Courts, however, have expressly rejected the new approach. "Confusion over the application of the new approach has become confounded. 'Centre of gravity', 'grouping of contacts', 'interests' and 'concerns' have become catchwords and so interpreted as to reflect the innate beliefs of each member of the court. These decisions lack a precise consistency. The results depend on what the court believes the public policy of a state should be": *First Nat'l Bank in Albuquerque v. Benson* (1976), 89 N.M. 481, 553 P. (2d) 1288 (C.A.); *cert. den* 90 N.M. 7, 558 P. (2d) 619. For a list of decisions from eighteen states which have applied the old rule, see: Am. Jur. (2d) s. 98 at N. 54 & 55. In some of these cases the court did not explicitly consider whether the new approach should be followed.

59. In Part VII.

Second Restatement analysis be used to not just decide individual cases but to formulate *prima facie* rules. It should be noticed that rule A is similar to Chief Judge Fuld's third principle. Although academic commentators and English judges⁶⁰ have often not noticed it, both the *Second Restatement* and the New York Court of Appeals have continued to give *lex loci delicti* a leading role as a *prima facie* rule. In most cases, it is the political unit in which the wrong occurs that has the greatest claim to regulate the consequences. In most cases, it is that law upon which people should and do in fact base their expectations. That the *lex loci delicti* should govern is a simple, easily understood principle. It steers forum courts away from a chauvinistic or facile reliance on their own laws and encourages different fora to achieve uniform results.

Rule B recommended by this article is similar to the first principle formulated by Chief Judge Fuld in *Tooker*. The argument made here earlier for not applying Ontario law to Fraser in *Going* is compatible with his second principle. The main difference between the *Tooker* rules and the ones recommended here is that the latter are more simple and general. That is because there have been far fewer Canadian choice of law cases than there are American, and they have all been decided on doctrinal grounds, rather than *Second Restatement* analysis. Thus we lack the judicial experience needed to formulate highly detailed rules on the basis of *Second Restatement* analysis.

III. The Anglo-Canadian Case

The Law Before *Boys v. Chaplin*

The only way to understand the Anglo-Canadian case law is to follow its evolution. Its present state cannot be explained on the basis of any sound conflicts theory. The judges responsible for its grismold development have often proceeded by arbitrarily selecting passages from previous judgments, rather than reflecting upon the normative basis of choice of law. One aspect of the history that will be stressed is that if it had not been for *The Halley*⁶¹, Anglo-Canadian law might very well have adopted the same approach as the early American cases — namely, using *lex loci delicti* as the rule and the “vested rights theory” as the theoretical explanation.

*Mostyn v. Fabrigas*⁶² was one of the earliest English cases on choice of law in tort. A native of Minorca sued the governor for having him assaulted, falsely imprisoned and the banished to Carthagenia in Spain. The defendant pleaded that he could not be sued in an English court because the cause of action arose outside the realm. He further contended that he could not be held accountable in an English court for actions in his official capacity of Governor. Lord Mansfield held that even “if [an action] did not lie against any other man, it shall most emphatically lie against the governor.”⁶³ The Governor, was not liable to the local courts of Minorca because “no questions concerning the seignory can be tried within the seignory itself.”⁶⁴ The issue of whether the

60. See the discussion of *Boys v. Chaplin* *infra*.

61. *Infra* n. 68.

62. (1774). 1 Cowp. 160, 98 E.R. 1021.

63. 98 E.R. 1021 at 1028.

64. *Ibid.*

governor exceeded the authority granted him by the King's patent could be tried, if at all, only in a King's Court in England. And it would be "a monstrous position, as that a governor, acting by virtue of letters patent under the Great Seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect His Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained."⁶⁵ Because of the constitutional considerations involved, *Mostyn v. Fabrigas* is of limited value as a choice of law case. The principal issue was that of English law — whether the Governor exceeded the authority granted him by the king. One passage in Lord Mansfield's judgment, however, suggests a substantial role for foreign law in other cases:

"And in *Way versus Yally*, 6 Mod. 195, Justice Powell says, that an action of false imprisonment has been brought here against a Governor of Jamaica, for an imprisonment there, and the laws of the country were given in evidence. The Governor of Jamaica in that case never thought that he was not amenable. He defended himself, and possibly shewed, by the laws of the country, an Act of the Assembly which justified that imprisonment, and the court received it as they ought to do. *For whatever is a justification in the place where the thing is done, ought to be a justification where the cause is tried.*"⁶⁶ [emphasis added]

The strange evolution of conflicts doctrine in England is the result of the intertwining of the *lex forum* theory stated in *The Halley*⁶⁷ case with the vested rights theory adopted in *Phillips v. Eyre*.

In *The Halley*⁶⁸ case an admiralty action was brought in England against the owners of an English ship which had collided with a Norwegian ship in a Belgian harbour. By Belgian law the English ship had been required to take on a Belgian pilot. Under Belgian law, in force at the time of the collision, an owner of a ship was liable for damages caused by the negligence of a licensed pilot to whom he was legally required to entrust the navigation of the ship. Under England's *Merchant Shipping Act* of 1854 by contrast, in those districts where a local pilot was required to be taken on board, an owner could not be held liable for the pilot's negligence. The English Court of Appeal held that the Norwegian shipowners had no cause of action in England against the English shipowners. It rejected the argument of the plaintiffs that the *lex loci delicti* should be applied by the English courts. The Court concluded:

It is true that in many cases the Courts of *England* inquire into and act upon the law of Foreign countries, as in the case of a contract entered into in a Foreign country, where, by express reference, or by necessary implication, the Foreign law is incorporated with the contract, and proof and consideration of the Foreign law therefore becomes necessary to the construction of the contract itself. And as in the case of a collision on an ordinary road in a Foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English Court admits the proof of the Foreign law as part of the circumstances attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is, in their Lordships' opinion, alike contrary to principle and to authority to hold, that an English Court of Justice will enforce a Foreign Municipal law, and will give

65. *Id.*, at 1029.

66. *Ibid.* Another early, but inconclusive English case is *Scott v. Seymour* (1862), 1 H. & C. 219, 158 E.R. 865 (Ex. D.).

67. *Infra* n. 68.

68. (1867-69) L.R. 2 P.C. 193, 16 E.R. 514; rev'g (1867-69) L.R. 2 A. & E. 3.

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.⁶⁹

Selwyn, J.'s statement implies that the state of foreign law can be no more than a fact, to which English substantive law is applied to determine whether the plaintiff is entitled to recovery. Suppose then (hypothetical #1) that in 1868, when English law still favors driving on the left side of the road, a Norwegian wagon driver sues an English wagon driver on account of road accident which occurred in Belgium. It turns out that the English driver was driving on the left side of the road even though in Belgium everyone was required by law to drive on the right side of the road. Clearly, the Belgian rules of the road can be taken into account by the English court in deciding whether the English driver was negligent under English standards of negligence. But Selwyn's test seems to lead to results which are unfair. Suppose, (hypothetical #2) that in 1978 Manitoba has a pure no-fault insurance scheme for automobile accidents. An automobile accident occurs in Belgium which, we shall assume, continues to allow recovery for negligence in automobile accidents. A Norwegian driver has been injured by the negligence (by both Belgian and Manitoban standards) of a Manitoba driver. Under Selwyn, J.'s test, it seems that the Norwegian driver cannot successfully bring an action in Manitoba against the Manitoban driver because Manitoba no longer allows negligence actions in the case of automobile accidents. Yet the Manitoba driver was liable under the law where the accident occurred, had the opportunity to purchase liability insurance, and the Norwegian driver may have been assuming he would be compensated according to Belgian law for injuries he incurred when he was driving there. Furthermore, there is nothing fundamentally offensive to the Manitoba sense of justice in allowing people to recover on account of negligence — for Manitoba still allows such actions in cases not involving automobiles.

Selwyn, J.'s statement is on the right track insofar as it suggests that foreign law can be no more than a fact. But it is not the substantive law of the forum which should operate on the fact, but the sense of justice of the forum. A forum court never allows a plaintiff to recover just because the law and sense of justice of another jurisdiction says he should. Instead, the forum court says that because of the legal state of affairs in another part of the world, it seems fair to the forum Court that the plaintiff should recover. The philosophical structure is like that associated with the moral problem of an individual's duty to obey the positive law. It makes no moral sense to say that a person must obey the positive law because the positive law says he should. The question is, rather, what moral effect should a person give to the *fact* that the positive law says what it says. The answer in some cases might be that he ought to respect the law as an institution of a democratic and tolerably just society. Similarly, in the realm of epistemology, a person is always his own sovereign, no matter how learned be his counsellors. When a person says, "I believe that the moon is a mean distance of 238,857 miles from earth because N.A.S.A. scientist believe that the moon is 238,857 miles from the earth" he is still relying on his own judgment that N.A.S.A. scientists are reliable sources of astronomical information.

On the facts of *The Halley*, it probably would have been consistent with the English sense of legal justice (even if not its own internal law) to apply Belgian internal law. Shipowners should be prepared to abide by the laws of the places to which they send their ships. Norwegian and English shipowners could have taken out third party liability insurance to cover claims against them arising out of the negligence of compulsory pilots. The Norwegian owners might have been relying on the Belgian rule to the extent of not buying first party damage insurance for losses occurring in Belgium. On its merits, the Belgian rule was not obviously absurd. It may have been devised, for example, to obviate the necessity of making a precise determination of whether the pilot was solely responsible for the negligent navigation of a ship, or whether part of the fault lay in the design or maintenance of the ship. Thus a fair argument could be made that there was no "public policy" objection to allowing the Norwegian owners to recover against the owners of *The Halley*.

Yet there is strong textual evidence in Selwyn J.'s judgment to support the view that he really did consider it fundamentally unfair to apply the Belgian rule. Consider the following passages:

As Mr. Justice Story has observed in his Conflict of Laws, p. 32, 'it is difficult to conceive upon what ground a claim can be rested to give to any Municipal laws an extra-territorial effect, when those laws are prejudicial to the rights of other Nations or to those of their subjects.' And even in the case of a Foreign judgement, which is usually conclusive *inter partes*, it is observed in the same work, at s. 618a, that the Courts of *England* may disregard such judgement *inter partes* if it appears on the record to be manifestly contrary to public justice, or to be based on domestic legislation not recognized in *England* or other Foreign countries, or is founded upon a misapprehension of what is the law of *England*⁷⁰

One final point about *The Halley*. The first passage quoted from it gives some suggestion that the fact that the foreign conduct would have been actionable had it taken place in England may be *sufficient* grounds to allow recovery on account of it in an English action. But the judgment taken as a whole seems to decide merely that it is a *necessary* condition for recovery in England that conduct would have been actionable had it occurred in England. In most cases it would be intolerable if behaviour which is perfectly lawful and socially acceptable where done could be the subject of successful civil action in England. There is no conclusive evidence in *The Halley* that the Court of Appeal thought otherwise.

In *Phillips v. Eyre*⁷¹ the plaintiff claimed that the defendant, while a Governor of Jamaica, had been responsible for having him assaulted and wrongfully imprisoned. The incident took place during a rebellion. Afterwards, the island legislature passed legislation whereby the good faith act of any person to suppress the rebellion was "declared lawful and confirmed." The defendant pleaded the Act as a defence to the plaintiff's action, and the plaintiff moved to have it struck out.

Much of the discussion in *Phillips v. Eyre* is concerned with the English public law issue of whether the Crown could, and in Jamaica's case, had, vested in a colonial legislature the power to pass such bills of indemnity. Willes J. expresses the view that there may be times when officials and citizens

70. *Ibid.*

71. *Supra* n. 24.

of an English colony must act promptly to quell rebellions; that sometimes they will lack legal authorization to take the measures they do; that it is reasonable that a legislature should be able to ratify the conduct of officials in such circumstances; and that an English court should not defeat the purpose of the legislation by allowing issues to be litigated before it which by the terms of the legislation could not be litigated where the act occurred. It was not really necessary for Willes J. to say much about general principles of choice of law in order to dispose of *Phillips v. Eyre*. It could have been handled almost entirely in terms of English constitutional law, since Jamaica was a colony of England, not an independent sovereign state. It certainly was not necessary for Willes J. to set out the general circumstances in which a foreign tort is actionable in England. Nonetheless, he summarized the effect of the previous cases like this:

As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England;...Secondly, the act must not have been justifiable by the law of the place where it was done.⁷²

For this branch of his rule, Willes J. cited *The Halley*. The meaning of the word "justifiable" in the second branch, may be gathered from the cases Willes J. cited in support of it. In *Blad v. Bamfield*⁷³ a British ship was seized by a Danish subject, Peter Blad, on account of its infringing upon the exclusive trading rights granted Blad in the Danish colony of Iceland by the King of Denmark. The seizure was confirmed by the King of Denmark and two thirds of the proceeds went to him. Lord Nottingham held that an English court should no more subject Blad to liability in the circumstances than should a Danish court consider a case against English officials who seized a Danish ship for illegally trading in the Barbados. In *Dorbree v. Napier*,⁷⁴ an Englishman who served as an admiral in the Portuguese Navy was sued by the owners of an English vessel seized by Portugal for breaking a blockade along its coast. Napier's participation in the Portuguese Navy was illegal under the *Foreign Enlistment Act*.⁷⁵ Tindal C.J. began his judgment⁷⁶ by observing that the condemnation of the Portuguese Prize Court of the English ship for attempting to break blockade could not be objected to. Whether Tindal C.J.'s judgment would have been different if the Portuguese seizure had been contrary to public international law is another question; recent American⁷⁷ and British⁷⁸ decisions have suggested that forum courts should not recognize the legal acts by a foreign state if they are contrary to public international law. In any event, Tindal C.J. went on to hold that it would be unfair for the plaintiff to recoup an otherwise unrecoverable loss merely because the public servant who carried out the seizure was under a disability under the law of his own country. He

72. L.R. 6, Q.B. 1 at 28-29.

73. (1674), 3 Swans. 604, 36 E.R. 992 (Ch.).

74. (1836), 2 Bing. (N.C.) 781, 132 E.R. 301 (C.P.) (hereinafter referred to as *Napier*).

75. 59 Geo. 3, c. 69, s. 2.

76. 132 E.R. 301 at 306.

77. See *Banco Nat'l de Cuba v. Sabbatino* (1964), 376 U.S. 398, especially the powerful dissent by White J. at 439. While on the facts the act of state doctrine prevailed, Harlan J. said at 430, n. 34:

There are, of course, areas of international law in which consensus as to standards is greater and which do not represent a battleground for conflicting ideologies. This decision in no way intimates that the courts of this country are broadly foreclosed from considering questions of international law.

See also *Alfred Dunhill of London v. Republic of Cuba* (1976), 425 U.S. 682, opinion of White J. at 684.

78. *Oppenheimer v. Cattermole*, [1976] A.C. 249; [1975] 2 W.L.R. 347 (H.L.).

concluded that it would be unfair to a defendant like Napier to supplement whatever criminal penalty would be inflicted upon him for violating the *Foreign Enlistment Act* with an "incalculable" amount of civil damages.⁷⁹ Inasmuch as *Phillips v. Eyre* was later taken as definitively moving English choice of law to emphasize the *lex fori* over the *lex loci delicti*, it is ironic that Willes J. employed the vested rights theory to dispose of the objection that the Jamaican Act could not have the extraterritorial effect of destroying an English cause of action. He noted that:

B13.

This objection is founded upon a misconception of the true character of a civil or legal obligation and the corresponding right of action. The obligation is the principal to which a right of action in whatever court is only an accessory, and such accessory, according to the maxim of law, follows the principle, and must stand or fall therewith. "Quae accessorium locum obtinent extingunturcum principales res peremptae sunt." A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto. The terms of the contract or the character of the subject matter may shew that the parties intended their bargain to be governed by some other law; but primâ facie, it falls under the law of the place where it was made. And in like manner the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law. Therefore, an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question, elsewhere unless by force of some distinct exceptional legislation, superadding a liability other than and besides that incident to the act itself. In this respect no sound distinction can be suggested between the civil liability in respect of a contract governed by the law of the place and a wrong.⁸⁰

Immediately after stating his "rule" for the conflicts case, Willes J. again relied heavily on the "vested rights" approach:

As to foreign laws affecting the liability of parties in respect of bygone transactions, the law is clear that, if the foreign law touches only the remedy or procedure for enforcing the obligation, as in the case of an ordinary statute of limitations, such law is no bar to an action in this country; but if the foreign law extinguishes the right it is a bar in this country equally as if the extinguishment had been by a release of the party, or an act of our own legislature. This distinction is well illustrated on the one hand by *Huber v. Steiner*, where the French law of five years' prescription was held by the Court of Common Pleas to be no answer in this country to an action upon a French promissory note, because that law dealt only with procedure, and the time and manner of suit (*tempus et modum actionis instituendae*), and did not affect to destroy the obligation of the contract (*valorem contractus*); and on the other hand by *Potter v. Brown*, where the drawer of a bill at Baltimore upon England was held discharged from his liability for the non-acceptance of the bill here by a certificate in bankruptcy, under the law of the United States of America, the Court of Queen's Bench adopting the general rule laid down by Lord Mansfield in *Ballantine v. Golding*, and ever since recognized that "what is a discharge of a debt in the country where it is contracted is a discharge of it everywhere." So that where an obligation by contract to pay a debt or damages is discharged and avoided by the law of the place where it was made, the accessory right of action in every court open to the creditor unquestionably falls to the ground. And by strict parity of reasoning, where an obligation, *ex delicto*, to pay damages is discharged and avoided by the law of the country where it was made, the accessory right of action is in like manner discharged and avoided. Cases may possibly arise in which distinct and independent rights or liabilities or defences are created by positive and specific laws of this country in respect of foreign transactions; but there is no such law (unless it be the Governors Act already discussed and disposed of) applicable to the present case.⁸¹

79. 132 E.R. 301 at 307.

80. *Supra* n. 72, at 28.

81. *Id.*, at 29-30.

Yet in *Machado v. Fontes*⁸² the English court of Appeal made the law of the forum the dominating factor in English choice of law. The facts of *Machado v. Fontes* are not fully set out in the judgment, but it appears that one Brazilian resident was suing another. The defendant attempted to plead as a defence that there was no civil liability for defamation in Brazil, only a criminal remedy. "Applying" the *Phillips v. Eyre* "rule" the Court held that since the libel would have been civilly actionable in England, and since the action was not justifiable (since criminally punishable) in the place where committed, the plaintiff could recover in an action in an English court. It may be conceded that the fact that an action is criminally punishable in the place where committed means that the defendant has been legally warned against going ahead with it. But a defendant might still be unfairly prejudiced because of his reliance on the civil non-actionability of his conduct by the law of the place where he commits it. For example, he might not have purchased liability insurance or he might have committed an act with the expectation that the strict standard of proof or the availability of a jury in a criminal trial would improve his chances of escaping legal reprisal. Or he might have been prepared to accept the criminal penalties involved, but not the civil ones. (Recall that in the *Napier* case Tindal, C.J. thought it would be unfair to add a large amount of civil damages to whatever criminal penalties could be imposed upon the defendant for breaking the English enlistment law). Furthermore, why should the plaintiff in *Machado v. Fontes* have been able to win a remedy otherwise unavailable simply because he was lucky enough to find the defendant within the jurisdiction of an English court? There may be some cases where the local law is so unjust that a forum court ought to allow recovery for an action that was lawful where committed. There is no doubt the *Machado v. Fontes* was such a case. The Brazilian law apparently permitted criminal proceedings to take place in which the injurious and false nature of the defendant's statements about the plaintiff could be proved, and the plaintiff's reputation thereby vindicated.

There has been a continuing controversy on whether the "rule" in *Phillips v. Eyre* sets out two prerequisites to the plaintiff's success (leaving the choice of law issue open) or whether it in effect requires the application of the *lex fori*.⁸³ The former interpretation is plausible, since all the cases Willes J. was referring to in formulating his "rule" merely had to find one objection (that the conduct was not actionable in England — *The Halley*) or the other (the conduct was justifiable by the law of the place where it was committed — *Blad v. Bamfield*) to the plaintiff's action in order to dispose of it. None of them had to state a positive choice of law rule. Nor did Willes J. himself in *Phillips v. Eyre*. The Court in *Machado v. Fontes*, however, interpreted *Phillips v. Eyre* as making forum law applicable once the two conditions are met. Lopes L.J. said:

It follows that directly the right of action in this country is established the the ordinary incidents follow, and the remedy is the same as in any ordinary action brought for a libel published in this country.⁸⁴

82. (1897). 66 L.J.Q.B. 542. (C.A.).

83. See Spence, "Conflict of Laws in Automobile Negligence Cases" (1949), 27 C.B.R. 661 where he argues that Willes J. recognized the *lex loci delicti* rule as the choice of law principle, and means his two branched rule as merely a jurisdiction hurdle the plaintiff had to clear.

84. *Supra* n. 82, at 543.

Rigby L.J. held that:

It does not matter what the remedy in the foreign country is.... we start, then with this — that the act is one which is *prima facie* actionable here, and the only thing for us to see is whether there is any peremptory bar to our jurisdiction, in that we are dealing with an act which is authorized or excused in the country where it was committed. We cannot see that, and the appeal must be allowed.⁸⁵

The principle that forum law only should be applied once the *Phillips v. Eyre* tests were satisfied was taken for granted by the Supreme Court of Canada in *McLean v. Pettigrew*.⁸⁶ It was held⁸⁷ or assumed⁸⁸ by a majority of the English House of Lords in *Boys* to be the effect of the prior case law.

In *The M. Moxham*⁸⁹ an English company sued an English shipowner for damage caused to the company's pier in Spain by the English ship. The plaintiffs moved to strike out the defendants' plea that the damage was caused by the negligence of the master and sailors of the ship, for which there was no vicarious liability in the owners under Spanish law. The plea was struck out at first instance, but sustained in the English Court of Appeal on the basis of the second branch of the "rule" in *Phillips v. Eyre*. It might be noted that the case is somewhat analagous to *Babcock, McLean, and Story v. Stratford Building*⁹⁰ in that both plaintiff and defendant are from the forum, and the plaintiff seeks the benefit of a wider basis of liability than is available under the *lex loci delicti*. *The M. Moxham* was different from these, however, in that there was no prior relationship between plaintiff and defendant, and the defendant's "presence" in the *lex loci delicti* in the form of owning real property, involved fixed interest under Spanish internal law. Thus the defendant in *The M. Moxham* had greater justification to rely on the *lex loci delicti* and the plaintiff less right to expect their mutual relationship to be governed by the law of their home law district.

Carr v. Fracis,⁹¹ was much like the series of cases culminating in the second branch of the rule in *Phillips v. Eyre*. The defendant British naval officer, under the authority of a proclamation of the Sultan of Muscat, seized ammunition on board another British ship in Muscat territorial waters. The defendant's actions were thus not just wrong civilly and not wrong criminally; they were expressly authorized by the local sovereign. One of the Law Lords, The Earl of Halsbury, L.C., did not even bother with *Phillips v. Eyre* itself, preferring instead to cite *Napier* as a precedent. The other Law Lords did refer to *Phillips v. Eyre* but only Lord McNaghten expressly adopted its "rule" as an exact formula.

*Story v. Stratford Mill Building*⁹² is one of the first cases to deal with workmen's compensation statutes. An Ontario workman employed by an

85. *Id.*, at 544.

86. Discussed *infra* at n. 111, in *N. Alta Rwy. v. K. & W. Trucking*, [1975] 2 W.W.R. 763, (1974), 62 D.L.R. (3d) 378 (Alta. S.C.) the court, without acknowledging *McLean v. Pettigrew*, held that the *lex loci delicti* should be applied once the *Phillips v. Eyre* test was met.

87. [1971] A.C. 356 at 387 B to E *per* Lord Wilberforce and at 398 C *per* Lord Pearson. *Boys v. Chaplin* is analyzed in Part IV of this article.

88. *Id.*, at 383. Lord Hodson took a contrary view at 379 G and Lord Guest did not clearly decide the point.

89. (1876), 1 P.D. 107 (C.A.).

90. See *infra* n. 92.

91. [1902] A.C. 176, (1901) L.J.K.B. 361 (H.L.).

92. (1913), 18 D.L.R. 309, 30 O.L.R. 271 (C.A.) (hereinafter referred to as *Story*).

Ontario construction company was injured while working on a project in Quebec. The injuries had been caused by the negligence of the employer's superintendent. Quebec had a scheme whereby an employee could bring an action for compensation against his employer on account of accident injuries regardless of fault, but only to the extent provided for by a stipulated set of formulae. The employee in *Story* brought a common law action in Ontario. The Ontario Court of Appeal upheld the Ontario trial court's application of Ontario law, which resulted in the plaintiff's achieving a higher recovery than would have been available in Quebec. Riddell J. said that "[w]ere the matter *res integra*, it might not unreasonably be held that the plaintiff, by suing in another jurisdiction, cannot put himself in a better position than if he had sued in the country *delicti commissi*."⁹³ But he held himself bound by among other cases, *Machado v. Fontes* to hold in favour of the plaintiff. It is not clear on what basis Riddell J. held *Machado* to be a decisive authority in favour of the plaintiff. It might be said that the defendant's actions were "not justifiable" in Quebec simply because a civil remedy was available against him. But liability to a strict responsibility action would be held insufficient to satisfy the "not justifiable test" in *McMillan v. Canadian Northern Railway Co.*⁹⁴ It appears that Riddell J. thought that the defendant's actions were "not justifiable" because he believed *respondeat superior* to be a principle of Quebec law, so that in the absence of the Workmen's Compensation statute, the defendant would have been vicariously liable for the superintendent's negligence. But in *Canadian Pacific Railway v. Parent*,⁹⁵ the Privy Council would dismiss out of hand any suggestion that the defendant's conduct was "not justifiable" because, but for a contractual waiver of liability by the plaintiff, the defendant would have been vicariously liable for the negligence of its employee. The only way to reconcile *Story* with the Privy Council cases that followed it would be on the basis that in *Story* the plaintiff's injury was *both* actionable as a strict liability matter *and* the result of civil negligence by an employee of a kind which would ordinarily be attributed to his employer. But why choose such an interpretation of *Phillips v. Eyre*?

Riddell J. in *Story* did anticipate the Privy Council decisions that followed in providing no analysis of the policy and justice factors involved — except for expressing the brief reservation, quoted above, about whether a plaintiff should be able to improve his position by bringing his action in a different jurisdiction than that of the injury. A leading American case, *Wilson v. Fault*⁹⁶ held in favour of the application of the *lex loci delicti* in an employee injury case for the following reasons:

Choice of law in the situation presented here should not be governed by wholly fortuitous circumstances such as where the injury occurred, or where the contract of employment was executed, or where the parties resided or maintained their places of business, or any combination of these "contacts". Rather, it should be founded on broader considerations of

93. 30 O.L.R. 271 at 285.

94. Discussed *infra* n. 105.

95. Discussed *infra* n. 98.

96. (1958), 27 N.J. 105; 141 A. (2d) 768. See also: G. Shapira, "New Zealand Accident Compensation and the Foreign Plaintiff: Some Conflict of Laws Problems" (1980), 12 Ottawa L.R. 413 at 421-23 for a discussion of American Workmen's Compensation Cases.

basic compensation policy which the conflicting laws call into play, with a view toward achieving a certainty of result and effecting fairness between the parties within the framework of that policy. The injured workman has a prompt and practical compensation remedy in any state having a legitimate interest in his welfare. The person who provides that compensation in an interested state has a definitive liability which is predictable with some degree of accuracy and is granted an immunity from an employee's suit for damages which does not disappear whenever his enterprise chances to cross state lines and the suit is brought in another state.⁹⁷

It might be argued in response that if *lex loci delicti* is an appropriate general rule for almost all workmen's compensation cases, a *Babcock* type of exception could be made to it without sacrificing too much in the way of certainty. Depending on its facts, perhaps *Story* can be justified in this way; all the parties were from Ontario, and depending on the length of the stay in Quebec and on whether any Quebec workers were employed on the project, both employer and employee may have based their expectations regarding accident compensation, including the making of any insurance arrangements, on the law of their ordinary residence and working place. And Ontario may have had a legitimate claim, as the residence and ordinary working place of the parties, and the place where their economic relationship was formed, to have its assessment of what counts as just compensation govern.

Canadian Pacific Railway v. Parent,⁹⁸ involved a wrongful death action by a Quebec widow. A Quebec statute provided that plaintiffs could recover damages caused them by the wrongful death of a spouse or an ascendant or descendant relative. Earlier Privy Council cases held that a contractual waiver of the defendant railway's responsibility by the deceased person had no effect on the independent right of action granted by the Quebec statute. The deceased, a Quebec domiciliary had been employed by the Gordon Ironside and Fares Company, Limited to bring cattle by the C.P.R. from Winnipeg to Hochelaga, Quebec. According to the travel pass he obtained from C.P.R. he could travel at reduced fare in order to look after the cattle, but could not hold C.P.R. fully responsible for negligence. The fatal accident occurred in Ontario. The Privy Council applied the second branch of *Phillips v. Eyre* "rule" and found that C.P.R. was not liable. In Ontario (and Manitoba as well), unlike Quebec, a widow's fatal accident claim was subject to any defences the railway had against the deceased person himself. Under Ontario law, therefore, the C.P.R. was not liable for civil negligence;⁹⁹ and since any negligence that occurred was that of the C.P.R.'s servants, the C.P.R., itself was not liable for criminal negligence. If the contract to carry the cattle had been made in Quebec, the *Parent* would be very much like *Babcock*, *McLean* and *Story*. Granted, the plaintiff's right of action in Quebec was statutory, and there is a presumption that provincial statutes have no extraterritorial effect. But the presumption is not irrebuttable. The Quebec statute could have been construed as applying when a Quebec resident was killed in another province in the course of an economic relationship with another Quebec resident which commenced in Quebec. In *Parent*, however, the relationship between the

97. 141 A. (2d) 768 at 778-79.

98. [1917] A.C. 195 (P.C.) (hereinafter referred to as *Parent*).

99. *Id.*, at 205: "The most that can be suggested is that, on the maxim respondeat superior, they might have been civilly responsible for the acts of their servants."

parties began in Manitoba. Thus the C.P.R. would have been justified in accepting Parent as a passenger under the assumption that it would have the protection of the rule in the common law provinces — at least as long as any accident involving Parent took place in one of them. Viscount Haldane did in fact find that the Quebec statute had no extraterritorial effect. He also held that there could be no common law action for wrongful death, quite apart from the statute, because there was no civil liability according to the law of the place where the accident occurred. This latter conclusion was required, according to Viscount Haldane, “on the general principles which are applied in Canada and this country under the title of private international law.”¹⁰⁰ It was not necessary, concluded Haldane, to determine “whether all the language used by the English Court of Appeal in the judgments in *Machado v. Fontes* was sufficiently precise.”¹⁰¹ Viscount Haldane’s distrust of mechanically applying the language from a prior case is a welcome relief from much of the early English case law.¹⁰² But his decision would have been the more useful had it spelled out the content of the “general principles” which dictated his result.

*Walpole v. Canadian Northern Railway Company*¹⁰³ was an action arising out of the accidental death of a railway worker in British Columbia because of the negligence of a fellow worker. That province had by statute replaced tort compensation for employment related injuries with a workmen’s compensation scheme. The widow moved to Saskatchewan and brought an action against the employer under the Saskatchewan *Fatal Accidents Act*. The Privy Council dismissed it. It held that by the terms of the Saskatchewan Act, the widow could obtain the remedy the husband could have obtained had he not died. But the husband would have had no tort claim because of the fellow servant rule. Furthermore, the Privy Council said, by the second branch of the rule in *Phillips v. Eyre*, no action could be brought for the foreign tort in Saskatchewan. According to Viscount Cave:

It is unnecessary for the purposes of this appeal to consider the precise meaning of the term ‘justifiable’ as used by Willes J.; but, at all events, it must have reference to legal justification, and an act or neglect which is neither actionable nor punishable cannot be said to be otherwise than justifiable within the meaning of the rule.¹⁰⁴

Since the only claim was against the Workmen’s Compensation Board, not the defendant, a British Columbia plaintiff suing a British Columbia defendant on account of a British Columbia accident should not have been able to obtain a better remedy than any other British Columbia resident by suing in another province. The defendant in such circumstances should not be subjected to massive liability for which it had no warning (and thus no reason to obtain insurance). But Viscount Cave justified his result not by discussing these considerations but by simply announcing the meaning which he chose to assign to a particular word in the *Phillips v. Eyre* formula.

100. *Id.*, at 205.

101. *Ibid.*

102. Viscount Haldane’s views on precedent are forcefully presented in *Kreglinger v. New Patagonia Meat and Cold Storage Co.*, [1914] A.C. 25 (H.L.) at 35-36.

103. [1923] A.C. 113 (P.C.) (hereinafter referred to as *Walpole*).

104. *Id.*, at 119.

On the same day that it gave judgment in *Walpole*, the Privy Council also delivered *McMillan v. Canadian Northern Railway Co.*¹⁰⁵ In the latter case the plaintiff, while a resident in Ontario, was injured because of the negligence of a fellow railway worker. Under the Ontario *Workmen's Compensation Act*, an employee of a railway could recover compensation from his employer whether his injuries were caused by negligence or not. Recovery was set by a statutory scale, with disputes, entitlement, and quantum to be settled by the Workmen's Compensation Board. Under Ontario common law, the employee would have had no right to recovery because of the fellow servant rule. The plaintiff moved to Saskatchewan, where the fellow servant rule had been abolished in Saskatchewan by statute and brought a negligence action. But the Privy Council held the second branch of the rule in *Phillips v. Eyre* to be a decisive objection to the plaintiff's claim. The defendant's conduct was "justifiable" in Ontario, said Viscount Cave, because it was not itself negligent as a civil or criminal matter. Once again, Viscount Cave stated an interpretation of the word "justifiable" in the *Phillips v. Eyre* rule without an explanation of the context in which that word was first originally used, or what considerations of policy and justice favoured this particular interpretation. The defendant's act — which may be characterized, if you wish, as assigning the plaintiff to work on the railroad on the day of the accident — was not negligent, but it was actionable. Why not then interpret the "not justifiable" so as to include "actionable" and so allow recovery? A plausible answer for *McMillan* would be that to do so would, as in the *Walpole* case, allow the plaintiff a more generous recovery than other persons in his position simply because of his choice of forum. Again, it would subject the defendant to greater liability than he could justifiably anticipate and plan for.

In *O'Connor v. Wray*,¹⁰⁶ the Supreme Court of Canada held that the "rule" in *Phillips v. Eyre* was a rule of Quebec conflicts of law, not just that of the common law provinces. The defendant was the owner of a Quebec vehicle who loaned his car to his business manager for the express purpose of enabling him to make a social visit in Ontario. While in the Ottawa area the manager, intoxicated, drove his car recklessly at an illegally excessive speed. As a result, he struck and killed the wife of one of the plaintiffs and severely injured the other plaintiff. They brought an action against the defendant in Quebec. The trial judge determined that the defendant had not been negligent in loaning the car to the manager, inasmuch as the latter's prior reputation had been for sobriety and prudence. Thus the only basis on which the plaintiffs could recover was the vicarious owner's liability which, they claimed, was established by both the Ontario *Highway Traffic Act* and the *Quebec Motor Vehicle Act*.

Newcombe J. doubted whether the defendant's connection with Ontario was close enough to permit the application of its law to him. This skepticism was expressed not in terms of Canadian constitutional texts or cases,¹⁰⁷ but on the basis of conflicts of law doctrines, such as the principle expressed in *Sirdar*

105. [1923] A.C. 113 (P.C.) (hereinafter referred to as *McMillan*).

106. [1930] S.C.R. 231. [1930] 2 D.L.R. 899 (hereinafter referred to as *O'Connor*).

107. See: *Interprovincial Co-ops Ltd. v. The Queen*, [1976] 1 S.C.R. 477.

*Gurdial Singh v. Rajah of Faridkote*¹⁰⁸ that jurisdiction over a defendant is primarily based on his presence within the territory of the forum. There is some irony to a judgment which expresses such puritanism about provincial boundaries while at the same time adopting the rule in *Phillips v. Eyre*, with its limited regard for the *lex loci delicti*. Newcombe J. also held that the Ontario statute did not actually impose vicarious liability on even local owners. And even if it did, the Quebec statute did not; so the first branch of the rule in *Phillips v. Eyre* was a complete defence to the action. Smith J., with whom Lamont J. concurred, held that the Ontario statute did purport to impose liability on Ontario owners. Otherwise, he agreed with the major points made by his colleague Newcombe.

The Quebec owner in *O'Conner* could have avoided Ontario liability simply by not loaning his car. Since he chose to allow the vehicle to be driven in Ontario, he had every reason to expect to bear the same civil consequences for the driver's misconduct as an Ontario owner. The *Phillips v. Eyre* test worked unfairly in making Quebec's vicarious liability rule decisive against the plaintiff. [A more appropriate use of Quebec law would have been as an indicator of whether vicarious liability is considered just by the forum's legislature.] The existence of such liability in Quebec would have scotched any "public policy" argument against applying an Ontario vicarious liability law. But the absence of such liability in Quebec did not prove that the Quebec legislature considered such a rule to be fundamentally unfair.

Chief Justice Anglin, the fifth judge in *O'Connor*, held that both the Ontario and Quebec statutes imposed vicarious liability. Accordingly, he would have allowed recovery on the basis of the rule in *Phillips v. Eyre*.

In *Canadian National Steamships v. Watson*,¹⁰⁹ the plaintiff was injured by the negligence of a fellow crew member on a Vancouver registered ship. At the time of the accident the ship was on the high seas. The case report does not specifically say whether the plaintiff was a Quebec resident, but he had signed on board in Montreal and brought his action there. Section 256 of the *Merchant Shipping Act of 1894*¹¹⁰ provided that in the absence of any express provision in the Act itself, any matter arising on board a ship on which there was a conflict of law to be "governed by the law of the port at which the ship is registered." The Supreme Court of Canada construed this provision as meaning that no more or less importance would be given to the tort law of British Columbia than if the tort had occurred there. The defendant argued that the common law of England was applicable, and under it, the fellow servant rule meant that the defendant was not subject to civil liability. Duff C.J.C. and Cannon J., in their concurring judgments, both held that British Columbia law was to be treated as *lex loci delicti* and since it had not been proved to be any different than the law of Quebec — which contained no fellow servant defence — the second branch of the *Phillips v. Eyre* test was met as well as the first. Assuming the British Columbia rule to be no different than the Quebec one, it is impossible to cavil with the result in *Watson*. But the mechanical reliance of the rule in *Phillips v.*

108. [1894] A.C. 670 (P.C.).

109. [1939] S.C.R. 11, [1939] 1 D.L.R. 273 (hereinafter referred to as *Watson*).

110. 1894 (Imp.), c. 60, s. 265.

Eyre was highly questionable. There would seem to be strong arguments of convenience and equal treatment for having all crew members governed by the same law. In cases involving crews drawn from different jurisdictions, it is questionable whether even a *Babcock* type of exception would have been appropriate to the application of the law of the place of registration. The approach actually taken by the Supreme Court in *Watson*, that is, to allow only restricted scope to s. 256 and accept without qualification the rule in *Phillips v. Eyre*, was liable to make a crew member's right to compensation depend largely on his choice of forum.

In *McLean*,¹¹¹ the plaintiff was injured while riding as a gratuitous passenger in the defendant's car in the course of a short visit to Ontario from their common domicile of Quebec. The plaintiff brought her action in the latter, which unlike Ontario, did not have a guest passenger statute. The situation was probably close to that in *Babcock* ("probably" because the case report does not reveal where the car was registered or insured,) and the same result was reached. The Court did so following *Machado v. Fontes*; both in its treatment of the rule in *Phillips v. Eyre* as a quasi-statute and its interpretation of the term "not justifiable". The defendant was found by the Quebec trial court to have violated the Ontario *Highway Traffic Act* by driving without "due care or caution", and so to have been liable to criminal, if not civil liability. This, even though the defendant had been tried and acquitted of this offence in a Magistrate's Court in Ontario. While the result in *McLean* may have been appropriate, its effect was to firmly establish the worst of English choice of law approaches in Canadian jurisprudence.¹¹²

An early appearance of the *American Restatement* approach in the Canadian case law is the judgment of Kirke Smith J. in *Gronlund v. Hansen*.¹¹³ The action was by a widow for the wrongful death of her husband in an accident on board a Vancouver registered ship while it was on the high seas. At trial Kirke Smith held in favour of the plaintiffs on the basis that the conventional approach indicated the application of British Columbia law. But he "fortified"¹¹⁴ his conclusion by the "proper law of tort" doctrine which had been adopted by Denning L.J. in the Court of Appeal decision of *Boys v. Chaplin*. Since the deceased and the plaintiff were British Columbia residents and the ship Vancouver registered, there was really no competition for the role of most closely connected law. The Court of Appeal¹¹⁵ upheld the judgment of

111. [1945] S.C.R. 62, [1945] 2 D.L.R. 65 (hereinafter referred to as *McLean*).

112. The result in *Brown v. Poland and Emerson Motors*, [1952] 6 W.W.R. 368 (Alta. S.C.) was the absurd consequence of the rigorously logical application of *McLean*. The plaintiff and defendant driver (who had been driving in the course of his employment with the corporate defendant) had an automobile accident in Montana. The law of that State recognized contributory negligence as a complete bar to recovery of damages. The plaintiff brought an action against the defendants in Alberta, which had a comparative negligence statute. They counterclaimed. H.J. MacDonald J. found that both drivers had been negligent, but that only the defendant had violated the traffic laws — by failing to stay within his lane. He dismissed the defendant's counterclaim because the plaintiff's conduct, being neither civilly actionable nor criminally punishable, was "not justifiable". But he allowed the plaintiff's claim because the defendant driver had broken the penal laws of Montana, and so acted "not justifiably". He was therefore able to apply the Alberta internal law and award the plaintiff 50% of the defendant's damages. Thus the plaintiff ended up better off than if either only Alberta law by itself (whereby he would have been liable for 50% of the defendant's damages) or Montana law by itself (whereby he would have won nothing and lost nothing) had been applied. The defendant was in the same way worse off. Perhaps MacDonald J's decision was not entirely logical. There was no reason to hold the corporate defendant liable absent a finding that it was vicariously liable under Montana law for its employee's criminal acts.

113. (1968), 65 W.W.R. 485 (B.C.S.C.).

114. *Id.*, at 490.

115. (1969), 68 W.W.R. 329 (B.C.C.A.).

Kirke Smith J. but made no mention of the *Second Restatement*. If the *lex loci delicti* were considered to be the high seas, the Court of Appeal held that then maritime law applied, and that, in the absence of evidence to the contrary, was assumed to be the same as the law of British Columbia. Thus there was no conflict of laws at all. In any event, general maritime law actually did make the defendant liable. The two branches of the rule in *Phillips v. Eyre* were therefore satisfied.

IV. *Boys v. Chaplin*

In *Boys v. Chaplin*¹¹⁶ the House of Lords finally had a chance to reconsider the choice of law doctrine. Both litigants were English residents, and both were temporarily stationed with the English armed forces in Malta when the defendant's negligent driving resulted in injuries to the plaintiff. Under Maltese law, the plaintiff was limited to what were, in effect, special damages. That would have been about £53. Unsurprisingly, the plaintiff chose to sue in England, the substantive law of which permitted the recovery of general damages — in his case, assessed by an English Court as £2,250.

Judgment was given for the plaintiff for both general and specific damages at trial. Milmo J. applied *Phillips v. Eyre*. Since the defendant's conduct was actionable in Malta (albeit not rewardingly so) and would have been actionable had it occurred in England, English substantive law was applied.

On appeal to the Court of Appeal, Lord Denning held that the test for liability, including whether a particular head of damage is recoverable, should be the "proper law"¹¹⁷ of the tort. It is not clear whether he meant an impressionistic test of the law with the most contacts, or the detailed examination of policy and justice considerations contemplated by the *Second Restatement*. He held the "proper law" to be that of England on the basis of an analyzed list of contacts — residence of parties, residence of insurers, place of medical treatment and recovery. Lord Upjohn relied upon *Phillips v. Eyre* to hold English substantive law to be applicable.

Lord Diplock's judgment in the Court of Appeal is the only one of the nine delivered in *Boys* which holds that Maltese law should be applied. He held that the first branch of *Phillips v. Eyre* was a rule of jurisdiction rather than choice of law. Overruling *Machado v. Fontes*, he determined that the *lex loci delicti* should be applied. Willes J. was quoted in his assertion that "the civil liability arising out of a wrong derives its birth from the law of the place and its character is determined by that law."¹¹⁸ As had been suggested above, Lord Diplock's interpretation of *Phillips v. Eyre* is in both respects not without foundation.¹¹⁹ Lord Diplock argued that even under the *Second Restatement* approach, (which he rejected) only one factor favoured the application of English law — the domicile of the parties. Lord Diplock admitted that he "should like to award (the plaintiff) compensation at the defendant's insurance

116. *Supra* n. 24.

117. The term "proper law of tort" seems to have originated with J.H.C. Morris, "The Proper Law of a Tort" (1951), 64 Harv. L. Rev. 881.

118. [1968] 2 Q.B. 1 at 37-38.

119. On whether *Phillips v. Eyre* is a rule of jurisdiction or choice of law, see *supra* n. 83. On importance of vested rights language in *Phillips v. Eyre* see *supra* n. 80 & 81.

company's expense''. But the fact that the defendant was insured at all "must surely be irrelevant"¹²⁰ — and it made no difference whether the insurance contract, made in Malta, was with an English Company.

It is true that the case for the application of forum law is weaker in *Boys* than *Babcock*. The parties had no relationship before the accident. It is not like *Babcock*, where the plaintiff might have started the trip in the expectation that the defendant's liability towards him would be determined by the law of the common residence. The first contact between the parties in *Boys* was a car crash in Malta. *Boys* is also more problematic in that both parties' stay in Malta was for more than a brief pleasure trip. Thus both parties might have been expected in some circumstances to make their insurance arrangements in light of the local law. Perhaps the defendant purchased and registered his car in Malta and obtained a policy with only limited liability coverage because he knew that under Maltese law general damages are not recoverable. One would want to know more about the insurance law and practice of both Malta and England at the time of the accident, and what the parties did about them, before deciding whether the majority result in *Boys* was fair to all concerned, including the insurance company. Several sound reasons may be adduced in support of the traditional English principle voiced by Diplock L.J., that in determining the defendant's tortious liability the existence of any liability insurance is irrelevant. A plaintiff should not receive a windfall merely because of a defendant's foresight in buying insurance. A defendant's conduct should not be judicially condemned as tortious unless it is. And the insurance company should not be burdened with the plaintiff's losses unless the contingency on which it based its premiums has actually occurred. But an understanding of insurance arrangements is in many cases necessary if a court is to properly recognize the governmental policies at stake and protect the justified expectations of the litigants. Courts can and should respect the reservations just cited without treating the whole issue of insurance as taboo.

On appeal to the House of Lords¹²¹ the plaintiff in *Boys* was again allowed general damages, but on the basis presented five different lines of reasoning, not all of which were clearly drawn.

Lord Hodson construed the *Phillips v. Eyre* rule as not "concerned with choice of law but only whether the courts of this country should entertain the action."¹²² *Machado v. Fontes* was wrong, he held, in interpreting "justifiability" in the second branch of the rule as including criminal, as opposed to civil wrongfulness. The problem for *Boys*, however, was that while Chaplin's act was actionable in the *lex loci delicti*, it was so only to the extent of special damages. The heads of damage allowable being a matter of substantive rather than procedural law (the latter in conflicts cases is always determined by the forum), ordinarily *Boys* could not recover general damages. Lord Hodson stated that "the respondent would fail if that which I have described as the general rule of principle were applied."¹²³ Where it is against public policy to

120. *Supra* n. 118, at 44-45.

121. *Supra* n. 24.

122. *Supra* n. 87, at 375.

123. *Id.*, at 379.

permit or exclude a claim, however, Lord Hodson would permit an exception to his general rule. The *Second Restatement* test of the law with the greatest issue raised would, concluded Lord Hodson, be an appropriate guideline. In the instant case, the (Maltese) place of the accident was "overshadowed" in importance by the (English) identity and circumstances of the parties.¹²⁴ Reading Lord Hodson's judgment as a whole, it seems that the general rule is that the plaintiff must first clear the jurisdictional test of showing the defendant's act to be subject to some civil liability in both the forum and the *locus delicti*. The Court then applies the substantive law of the *locus delicti* and the procedural law of the forum.

Lord Guest seems to have followed Lord Hodson in finding double actionability to be the jurisdictional test and the *lex loci delicti* to be the applicable law on substantive tort issues, and *lex fori* the applicable law on procedural issues. He differed from Lord Hodson, however, in finding the recoverability of general damages to be a procedural issue. Perhaps for this reason he did not discuss whether exceptions ought to be made on the basis of *Second Restatement* analysis.¹²⁵

Lord Donovan was content to retain the rule in *Phillips v. Eyre*. (He seemed to assume it to be choice of law principle). The *Second Restatement* test was too uncertain. The double actionability plus the *Second Restatement* exception test was too uncertain. In Lord Donovan's view, about all that had to be said about *Machado v. Fontes* was that it was a case of blatant forum shopping, which the courts in the future would not permit. In reply to Lord Donovan, it is submitted that even if the rule of *Phillips v. Eyre* produced certainty, it would be unsatisfactory because of its insensitivity to other choice of law goals. These include recognizing the rights of other states to implement their governmental policies with respect to transactions within their own territories or involving their own people, protecting expectations which people may have placed on a system of law other than that of the forum, and achieving uniform results for similarly situated litigants regardless of where they bring their action. But the survey of the Anglo-Canadian law in this article should have shown, if nothing else, that the rule in *Phillips v. Eyre* is susceptible to a wide variety of different interpretations. Some examples are:

— The rule may be one of choice of law in favour of the forum, or merely a set of preconditions to the plaintiff's success;

The "not justifiable" term may or may not work against defendant:

— Whose acts are criminally punishable but not civilly actionable (see eg. *Machado v. Fontes*, *McLean*, *Lavan v. Danyluk*);

— Whose own acts are civilly actionable on a strict liability basis, but neither negligent nor willfully injurious (see eg. *Story v. McMillan*);

— whose acts would ordinarily be considered negligent by civil standards, but which for some reason are not actionable (see eg. *Lavan v. Danyluk*, *Brown v. Poland and Emerson Motors*);

— who is vicariously liable in criminal law;

124. *Id.*, at 380.

125. *Id.*, at 380-383.

- who is vicariously liable as a civil matter for the conduct of another person;
- who ordinarily would be vicariously liable for the civil negligence of another person, but who for some reason has a good defence to a civil action (*see eg. Parent*);
- whose acts are actionable in some respect but not other (*see eg. Boys, Going* (damage to property actionable under Quebec no-fault scheme));
- whose civil liability is statutorily limited to a certain amount (*see eg. Story*).

It has been said that it is sometimes more important that the law be settled than that it be settled correctly. Insofar as it is based on the rule in *Phillips v. Eyre*, choice of law doctrine is neither.

Lord Wilberforce's judgment clearly and explicitly found *Phillips v. Eyre* to be a choice of law rule in favour of the forum. It then embarks on a consideration of its merits. After all, "it bears a parochial appearance...it rests on no secure doctrinal principle...outside the world of the English-speaking common law it is hardly to be found."¹²⁶ The *lex loci delicti* rule is widely accepted; and "if a simple universal test is needed, it is perhaps the most logical, the one with most doctrinal appeal."¹²⁷ One of its disadvantages, according to Lord Wilberforce, is that it requires proof of foreign law. True, but so does the double actionability test which Lord Wilberforce goes on to adopt himself. And as he himself points out, plaintiffs will be assisted by the presumption that foreign law is identical to forum law. Another disadvantage listed by Lord Wilberforce, is that the location of a foreign tort is often difficult to determine. Or if it is clear, the parties presence there may be temporary, accidental, even unintended. Thus even the American courts have abandoned the application of the *lex loci delicti* "as a universal solvent."¹²⁸ But as the earlier review of the American case has shown, the *lex loci delicti* approach has not been abandoned altogether. Chief Judge Fuld of the New York Court of Appeals, who was a pioneer in using *Second Restatement* analysis, stated in *Tooker* a number of *prima facie* rules for accident cases, one of which was that ordinarily the *lex loci delicti* applies.¹²⁹ Since Lord Wilberforce later holds that his own double actionability test must be subject to some exceptions, one cannot be impressed by his observation that American courts no longer consider the application of the *lex loci delicti* as *invariably* satisfactory.

Lord Wilberforce's judgment goes on to hold that the plaintiff must establish substantive liability under both the *lex loci delicti* and the *lex fori*. The effect is to give the plaintiff the worst of both worlds. Thus he may be denied recovery just because the forum law — which may have very little else to do with the case — is less generous than the law of the *lex loci delicti*. Hypothetical #2 in the earlier discussion of *The Halley* is germane here.

While there is "great virtue in a general well understood rule"¹³⁰ covering the majority of normal cases, concluded Lord Wilberforce, there is also a need

126. *Id.*, at 387.

127. *Ibid.*

128. *Id.*, at 388.

129. 249 N.E. (2d) 394 at 404.

130. *Supra* n. 87, at 391.

for some flexibility. This should be based on the common denominator of the American cases — “through segregation of the relevant issue and consideration whether, in relation to that issue, the relevant foreign rule ought, as a matter of policy or as Westlake said of science, to be applied.”¹³¹ Lord Wilberforce’s apparent preference for policy analysis, rather than impressionistic “grouping of contacts” is welcome. But his own application of the technique in *Boys* is confined to announcing that “[n]othing suggests that the Maltese state has any interest in applying this rule to persons resident outside it, or in denying the application of the English rule to these parties.”¹³²

Lord Pearson’s judgment holds that the *Phillips v. Eyre* formula is a choice of law rule giving English law “the dominant role.” Three alternatives to the existing rule are considered. First, apply *lex loci delicti*. This rule is being abandoned in the United States, says Lord Pearson, so it would be strange for the English courts to adopt it. Second alternative, double actionability. But that gives the plaintiff the worst of both worlds, says Lord Pearson, and sometimes leads to unjust results. Third alternative, the *Second Restatement*. But that is lacking in certainty. In all, concludes Lord Pearson, the *Phillips v. Eyre* rule should be retained as the general rule. It is certain, easy to apply, and permits English courts to apply their own ideas of justice. Some exceptions may have to be made, however, and in deciding on them the *Second Restatement* may supply useful guidance. In reply to Lord Pearson, it is submitted that the two *prima facie* rules recommended by this article (apply the *lex loci delicti* in ordinary cases and the law of the common residence in *Babcock* cases) would bring more certainty and ease of application to choice of law than would the retention as a *prima facie* rule of the ambiguous *Phillips v. Eyre* formula. As has already been pointed out in reply to Lord Wilberforce, the New York Court of Appeal, the pioneer in the United States with respect to *Second Restatement* analysis, has not abandoned the *lex loci delicti* rule altogether, but only demoted it to a *prima facie* rule. Finally, as argued earlier in connection with *The Halley*, while it is true that English courts must apply their own ideas of justice in conflicts cases, they do not necessarily do so by applying English internal law.

V. Canadian Cases after *Boys v. Chaplin*

In *Lavan v. Danyluk and Danyluk*¹³³ a car being driven by British Columbia residents broke down on a Washington state highway. One of its British Columbia passengers was pushing the vehicle towards a gas station when he was struck by another British Columbia registered car driven by another British Columbia resident. Kirke Smith J. found that the plaintiff was guilty of contributory negligence, and would have reduced the plaintiff’s recovery by one-third had British Columbia law been applicable. In his opinion, the “proper law” of the tort was British Columbia, but he held that he could not apply this approach since it was accepted by only one judge (Lord Hodson) in *Boys*. He also held that he could not apply British Columbia law on the basis of *McLean*, for while the plaintiff had been illegally speeding at the time of the

131. *Ibid.*

132. *Id.*, at 392.

133. (1970), 75 W.W.R. 500 (B.C.S.C.).

accident, a majority of judges in *Boys* had favoured a test requiring double civil actionability. The punishability of the plaintiff's conduct was no longer sufficient to satisfy the second branch of *Phillips v. Eyre*.

In reality there were plenty of legal resources which Kirke Smith J. could have used to justify the result he would have subjectively preferred. He could have decided that *McLean*, as the last Supreme Court of Canada decision, had priority over the decision of the British House of Lords in *Boys*. Under *McLean*, of course, the plaintiff would have recovered, since the defendant's conduct was criminally punishable. Alternatively, Kirke Smith J. could have taken advantage of the fact that two judges in *Boys*, Lords Donovan and Pearson, supported the *McLean* interpretation of *Phillips v. Eyre*, and two others, Lords Wilberforce and Hodson, emphasized that their own "double actionability" tests were subject to exceptions based on the *Second Restatement*.

This section will conclude with a review of the reasons for judgment of Henry J. in *Going*. His judgment recognized that there were difficult issues of justice and policy involved. It asks "[w]hat is the justice and practicality in [this] case?"¹³⁴ and answers that on the one hand, applying Quebec law would deny the plaintiffs the benefit of Ontario law; but on the other, applying Ontario law denies the defendants the protection of the Quebec statute and encourages "forum shopping."¹³⁵ But Henry J. does not go into an elaborate *Second Restatement* analysis on the grounds that as a trial judge, he is "constrained ... to follow the present state of Canadian law."¹³⁶ Thus he ends up basing his judgment on a brief examination of the Anglo-American precedents. *McLean* is still good law, he holds, despite *Boys*. For Henry J. the plaintiffs clear the second branch of the *Phillips v. Eyre* rule, because the defendant Fraser's conduct was a provincial offence, and so not justifiable where performed. Yes, but why are Reid Brothers liable? They didn't do anything that was "not justifiable" under Quebec law.¹³⁷

Thus it would have been entirely possible for Henry J. to have interpreted the case law as leaving Fraser liable and Reid Brothers not. Which, according to the justice and policy analysis of *Going*, earlier in this article, would have been the exact opposite of the right result.¹³⁸ This possibility is addressed here as further evidence that the traditional Anglo-American approach to choice of law is neither clear nor biased towards just results. There are many ways of interpreting the rule in *Phillips v. Eyre*. Arbitrarily choosing one of them is as inherently likely to produce a result in a particular case as consulting a ouija board.

Henry J. in *Going* notes that even if he were to follow the "double actionability" test of *Boys*, his result might be the same. The argument would be that s. 108 of *The Quebec Automobile Act* allowed plaintiffs to pursue their

134. 19 C.C.L.T. 209 at 244.

135. *Ibid.*

136. *Ibid.*

137. Unless Reid Brothers were vicariously liable for the property damage caused by Fraser. *But see: O'Connor, supra* n. 106, on whether one province can extend owner's vicarious liability to residents of another province.

138. *Supra* Part I.

ordinary tort remedies for damage to property, notwithstanding the existence of the fault system in respect of personal injuries, so that Fraser's conduct was thus "actionable" in Quebec, and the plaintiffs could have recovered fully under Ontario law. But a close reading of the judgments in *Boys* which favoured "double actionability" does not seem to support the whole of the result in *Going*. Lord Hodson, it will be recalled, seemed to hold that once it is determined that there is double actionability, the next step is to apply the substantive *lex loci delicti*. He would have allowed only those heads of damages permitted by Maltese law, had it not been for exceptional circumstances. Under Lord Hodson's "double actionability" test, then, the plaintiffs in *Going prima facie* should have lost. Lord Guest, like Lord Hodson, favoured a double civil actionability as the jurisdictional test and *lex loci delicti* as the law to be applied to substantive issues. But he viewed the recoverability of general damages in *Boys* as a procedural issue for forum law and so did not have to consider whether exceptions could be made to his approach on the basis of the *Second Restatement*. It could be argued in *Going* that whether damages can be recovered for personal injuries as well as property damage is similarly a "procedural issue." But the argument seems to push the idea of what is merely "procedural" beyond plausible limits, and the implication of Lord Guest's judgment is, at least *prima facie*, that the plaintiffs in *Going* should lose. Lord Wilberforce's "double actionability" test, required that any head of damage the plaintiff is claiming be recoverable under both the *lex fori* and the *lex loci delicti*. By this standard, the plaintiffs in *Going* would again have had no *prima facie* right to recover damages for personal injuries. There remains the question of whether the plaintiffs in *Going* could have brought themselves within the *Second Restatement* exception which Lords Hodson and Wilberforce would have allowed to their *prima facie* test. The answer to that question was expressed in Part I of this article. The plaintiffs should have recovered from Reid Brothers but not Fraser.

Given the state of the Anglo-Canadian precedents and the limited freedom of action of a trial judge, it is understandable that Henry J. was not able to produce a judgment that was totally appropriate in the result and thoroughly persuasive in its justification. There is good reason to share his hope that "the future course of Canadian law in the light of developments in the United Kingdom, and in the United States, may be reviewed in the appellate courts or in the course of legislation."¹³⁹

VI. A Note on Governmental Interests Theory

Some basic disagreement must be expressed with one of the points made by Professor Rafferty in his prompt and useful case comment on *Going*.¹⁴⁰ He argues that there was a genuine conflict of interests between Ontario and Quebec in *Going* in that "Ontario had an interest in seeing that its residents were adequately compensated in the light of its common law tort system"¹⁴¹ whereas "Quebec had an interest in protecting its own resident from tortious liability, especially in view of the fact that this Quebec defendant might not

139. *Supra* n. 134.

140. "Tort Liability and the Conflict of Laws" (1982) 19 C.C.L.T. 247.

141. *Id.*, at 257.

even have been insured against liability.’’¹⁴² He asserts “[t]he proper law approach works best either where there is no conflict in policy among the interested states or where only one state’s policy would be rationally advanced by the application of that state’s law.’’¹⁴³ His conclusion is that “The ‘true conflict’ has normally been resolved in the United States by an application of the law of the forum and such a conclusion has the support of two recent commentators. On this basis, the result reached by Henry J. can be justified.’’¹⁴⁴

Since both of the academic commentators cited by Professor Rafferty refer with approval to the work of Professor Brainerd Currie,¹⁴⁵ the pioneer of the “governmental interest theory”, it would seem fair to respond to Professor Rafferty by examining Currie’s writings. In this way the ensuing criticism of “governmental interest analysis” will have a well articulated target.

In his comment on *Babcock*¹⁴⁶, Professor Currie offered the following substitute for the *Second Restatement*:

§ 1. When a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies. In making these determinations the court should employ the ordinary processes of construction and interpretation.

§ 2. If the court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested state.

§ 3. If the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict.

§ 4. If, upon reconsideration, the court finds that a conflict between the legitimate interests of the two states is unavoidable, it should apply the law of the forum.

§ 5. If the forum is disinterested, but an unavoidable conflict exists between the laws of the two other states, and the court cannot with justice decline to adjudicate the case, it should apply the law of the forum — until someone comes along with a better idea.

§ 6. The conflict of interest between states will result in different dispositions of the same problem, depending on where the action is brought. If with respect to a particular problem this appears seriously to infringe a strong national interest in uniformity of decision, the court should not attempt to improvise a solution sacrificing the legitimate interest of its own state, but should leave to Congress, exercising its powers under the full faith and credit clause, the determination of which interest shall be required to yield.¹⁴⁷

The “governmental interests” of a State may be given a narrow interpretation, and understood as essentially confined to promoting the interests of certain classes of its residents. Currie used this sort of interpretation in his earlier articles, as have many of the judges and theorists who have been

142. *Ibid.*

143. *Id.*, at 255.

144. *Id.*, at 257.

145. Shapira, *supra* n. 96; P.E. Nygh, *Conflict of Laws in Australia* (3rd ed. 1976) 947.

146. (1963), 63 *Columbia L. Rev.* 1233.

147. *Id.*, at 1242-43.

influenced by him.¹⁴⁸ (Notice that the only governmental interest of Ontario acknowledged by Professor Rafferty is ensuring that its own residents are properly compensated for their injuries).

But Currie himself has characterized his earlier work as a thought experiment in which he assumed the most "egocentric" state in order to see what the consequences of doing so would be.¹⁴⁹ "He has recognized that a state may be more enlightened in its interests, even altruistic."¹⁵⁰ Thus a forum may have a governmental interest in securing predictability and uniformity of results and promoting mutual respect among sister units of a federal state for each other's legislative jurisdiction. A forum may even be said to have a governmental interest in doing justice to the litigants.

It is submitted that the narrow interpretation of governmental interests is objectionable in its insensitivity to the demands of justice to foreign litigants and the right of other states to legislate with respect to their own people and territories. Canada does not have in its constitution a "full faith and credit" clause, but it may have an institutional substitute; the Supreme Court of Canada, as final Court of Appeal for each and all of the provinces may choose to use that position in conflicts cases to make sure that provinces do not lightly disregard the jurisdiction of other provinces.¹⁵¹

Now Currie has supported his prescriptions largely on the assertion that a forum Court, as an agency of the forum, has no right to apply the law of another state in any case in which it conflicts with a genuine governmental interest of the forum. But if the forum is an "enlightened", or even "altruistic" one, the conflict may disappear. Notice the phrases "circumstances in which it is reasonable...to assert an interest" in § 1 of his proposal, and "moderate and restrained interpretation" in § 3 of Currie's proposal. The question is, how does the court decide how "enlightened" or "altruistic" the forum is? What determines what "moderate and restrained interpretation" of a forum's governmental interests amounts to?

When a forum legislature has specifically provided conflicts rules, a forum court must, subject to the limitations of a federal constitution, obey them. But most choice of law cases are litigated largely because the legislature has not devised a choice of law rule. Either it has established only substantive rules, or it has left both the development of both substantive and conflicts rules to the courts. Often no amount of looking at the statutory or common law substantive rules of the forum is going to be sufficient to determine whether a forum should apply those substantive law when foreign elements are involved in a case. Rather, the courts themselves must creatively determine whether the forum's "interests" should be interpreted in such a way as to require deference

148. B. Currie, "The Verdict Of Quiescent Years: Mr. Hill and the Conflict of Laws" (1960-61), 28 U. Chi. L. Rev. 258 at 286: "In the very first article of the series I proposed to inquire how 'a quite selfish state, concerned only with promoting its own interest; a state ... blind to consequences, and interested only in short-run 'gains' would approach a problem in the conflict of laws.'"

149. *Ibid.*

150. *Ibid.*

151. See: M.T. Hertz, "The Constitution and the conflict of Laws: Approaches in Canadian and American Law" (1977), U. Toronto L.J. 1.

to the substantive rules of another state in the particular factual circumstances.¹⁵²

If Courts are going to define the forum's governmental interests as including such enlightened concerns as protecting the justified expectations of the parties and promoting uniformity of results — and it is believed that they should — then they may as well drop the “governmental interests” framework altogether, and use *Second Restatement* analysis instead. By doing so, they can proceed in a more systematic and direct way than is possible if all sorts of factors have to be introduced as aspects of the forum's “interests”. They can avoid the excessive bias in favour of forum law and forum litigants suggested by the term “governmental interest” itself. They can see their task as determining, in the light of the factors listed in the *Second Restatement*, whether the forum's sense of legal justice requires the application of forum internal law or that of another state.

Conclusions

1. The traditional techniques of choice of law in torts “applying” the rule in *Phillips v. Eyre*, should be abandoned. The rule doesn't make much sense to begin with. It puts too much emphasis on the *lex fori* and not enough on the *lex loci delicti*. While just results have been reached in most cases, it is not acceptable for Canadian judges to reach them by the out of context invocation of short passages from a long judgment given more than a century ago.

2. The *American Restatement* approach could provide useful guidance to disposition of choice of law cases. It should not be used as the inspiration for arriving at an intuitive *gestalt* judgment about which jurisdiction has the most significant contacts. Rather, it should be used to provide a list of policy factors which must be considered in deciding whether a particular substantive rule ought to be applied in a particular case.

3. It will still be useful for judges to state *prima facie* rules to provide some structure to choice of law. These should not be announced as invariable strictures, but as guidelines. There is no need to state a set of rules about the law of torts as a whole. A decision about choice of law in automobile cases can and should be made separately from a decision about choice of law in antitrust cases.

4. Two *prima facie* rules might be as follows:

- (A) Choice of law in automobile accident cases is *prima facie* governed by the law of the place of the accident.
- (B) Notwithstanding (A) where all the persons driving or injured in the accident are habitually resident and all the cars involved are registered in the same state, its law shall govern even if the accident did not occur within its territory.

152. Currie has said of his own approach that in “approaching the problem of defining domestic policies and interests the court must take into account ‘legislative facts’ which it is not ideally equipped to assemble, and that its appraisal of those facts requires reasoning and judgment of the legislative type.” *Supra* n. 148, at 275.

In giving *rationale* for these proposals earlier in this article, it was observed that they are close to the rules articulated by Chief Judge Fuld in *Tooker*.¹⁵³ It may be added here that rule A resembles rule 3 of the Conflict of Laws (Traffic Accidents) Act proposed by the Conference of Commissioners on Uniformity of Legislation in Canada, and rule B is similar to their rule 4.¹⁵⁴ It should be observed that rule B would account for the results in many of the cases canvassed here — *Babcock*, *Tooker*, *McLean*, and probably *Boys* — and would condemn such dubious cases as *Dym* and *Lavan v. Danuyluk*.

5. Where *Second Restatement* analysis reveals compelling reasons for doing so, further exceptions should be made to rule A. In *Going* itself it would not have been fundamentally unfair to have applied rule A across the board, relegating the plaintiffs to the remedies afforded them by the *Quebec Automobile Insurance Act*. But all the reasons which justify rule B apply with undiminished force to that part of *Going* involving the plaintiffs and the Reid Brothers, and Henry J.'s decision is, to that extent, consistent with the recommendations of this article. His holding of the defendant Fraser liable, however, is not.

153. For a more in-depth critique of Currie, see: A. Hill, "Governmental Interest and the Conflict of Laws — A reply to Professor Currie" (1959-60), 27 U. Chi. L. Rev. 463 and M. Baer, "Two Approaches to Guest Statutes in the Conflict of Laws: Mechanical Jurisprudence Versus Groping for Contacts" *supra* n. 1.

154. *Ibid.*

