Frank Bates

The Reality of Conflicts Reasoning

Choice of Law in Torts

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Preface and Acknowledgements

In this monograph, I have sought to draw attention to a flaw in the reasoning to be found in decisions relating to the Choice of Law in Torts. Of course, Choice of Law in Torts is not the only area of Conflicts activity where such flaws are to be found – during the course of researching and writing this monograph it became apparent, for instance, that characterisation, was another area where the same rationative (or rationalistic) processes are apparent. However, although it has been necessary to touch upon characterisation, more than once, during the course of this work. In addition to helping to expose a flaw in the Conflicts reasoning process, I hope that the discussion of the developments in the various jurisdictions which I have sought to examine will be of value and interest to comparatists, even if only to suggest what might be avoided.

The genesis of the book lay in a staff seminar on the area which I was invited to give at the University of Glamorgan in January 2004. I am grateful to Professor Michael Stuckey for organising that visit and also to the staff of that Law School for making the discussion so stimulating and providing an initial impetus. An expanded version of that seminar, under the title "Choice of Law in Australia Torts: Or the Truth About Conflicts" was published at (2004) 13 *Caribbean Law Review* 1. I have drawn on this article, particularly in the earlier part of the book, and I thank Clifford Hall, the current Editor of that journal, for permitting me to do so. Parts of the book were written during visits to the Faculty of Law of the University of Tasmania and I thank Ms Debby Bowring, the Law Librarian there, and the staff of the Law Library for providing pleasant surroundings and kind and helpful assistance. In addition, in Tasmania, I had useful and happy discussions (as always) on the topic with Ken Mackie.

In Newcastle, the Administrative Staff of the Law School – Hayley Coutman, Vicki Kendros and Debra Willet – assisted with their customary enthusiasm and efficiency in various ways. Emma Blair, once more, typed the manuscript. My wife, Mary Howard, prepared the manuscript for publication as well as the index and various tables. Ted Wright, Dean of the Law School, and Stephen Nicholas, Pro Vice Chancellor for Business and Law, continue to encourage and assist my work and research.

Last, but certainly not least, I must thank the publishers for suggesting that I write the book.

Newcastle (NSW) Frank Bates

May, 2010

"And found no end in wandering mazes lost . . ."

JOHN MILTON, *Paradise Lost Bk II*, line 560

CHAPTER I
Choice of Law In Torts: The Background

There has always been something of the quality of that political chimera of the Nineteenth Century, the *Schleswig – Holstein Question*, about Choice of Law in Torts.[1] There are good reasons, which have been outlined in the most recent edition of Cheshire's *Private International Law*,[2] for such an apparently lamentable state of affairs. First, those writers properly point out that there is a variety of connecting factors which can be raised by the facts of each individual case. These included the place where the tort itself was committed; further, the residence, habitual residence, domicile or nationality of the parties; the place where the parties' relationship was centred. In addition, in the case, for instance, where a wrongful act takes place in one country and the consequent injury in another, there may be a serious definitional problem in determining the place where the tort was committed. A variety of directly tortious issues may also arise – thus, matters relating to capacity, vicarious liability, defences and immunities, damages, limitation of actions, wrongful death actions and others might well arise. Furthermore, there are many different types of tort action which are capable of arising including, not infrequently, negligent driving but also nuisance, defamation, fraudulent misrepresentation, as well as those more recently recognised, such as infringement of intellectual property rights and torts which involve forms of international transport such as aircraft or ships.

Ought, these major writers ask, the same rule to apply regardless of the kind of tort or delict involved? Again, if foreign tort or delict law is to be applied, that might lead to liability being imposed for torts which are unknown to Anglo-Australian jurisprudence, such as invasion of privacy[3] or unfair competition.[4] These are tortious actions which may reflect radically different views and protect radically different interests from those presently recognised in Anglo-Australian law. Finally, the question inevitably arises as to whether, and to what extent, the parties should be permitted to choose the law applicable to any action and what safeguards should be adopted.

In this context, it is worth noting the comment on choice of law of the United States writers Siegel and Borchers who write[5] that, "While being critical, we must always try to be flexible. While no single approach or technique has unanimous support, those with any measure of success have had some flexibility. Choice of law is no place for a perfectionist (A

perfectionist has been described as a person who takes great pains, and gives them to you)." Although Siegel and Borchers sought to write generally, they were of the view that tort roles offered new approaches towards the issue of choice law the most opportunities.[6]

The reasons for all of these difficulties is apparent from various sources: as Briggs[7] has pointed out, "After its century of tranquil slumber, during which hardly any cases were reported and the law underwent neither development nor degeneration, the rules for choice of law in tort now seem to be in a state of continual revolution."

In turn, there are observable social reasons for the recrudescence described by Briggs and other writers. In the *ipsissimma verba* of McClean and Beevers,[8] "The modern law of torts is largely a creation of the twentieth century, a response to enormous changes in the manufacture and distribution of products and in transport and communications. Globalisation requires a response in terms of the rules of the conflict of laws. Dangerous electrical machinery may cause fatal accidents in countries far removed from its place of manufacture; pharmaceutical products have caused babies to be born without arms or legs thousands of miles from the laboratory where the drugs were made. Foreign business travel and tourism has increased enormously: accidents occur and people are injured or killed far from home. Satellite television programmes and websites can be seen all over the world: private reputations sometimes suffer."[9]

In essence, three different choices of law rules have been suggested, and, indeed, adopted as been the most appropriate to deal with the various issues raised in relation to actions in tort law and the contemporary problems resulting therefrom.

The first, the *lex loci delicti* (the law of the place where the tort was committed) seems most generally to have been adopted in civil law countries. In view, however, of recent developments in Australia and elsewhere, discussion of its application will be saved till later in the monograph.[10] As Collier has described[11] the second possibility, the *lex fori* (the law of the place of litigation) which, like the *lex loci delicti*, is of straightforward application and, ". . . is superficially attractive. Its earliest advocates had in mind that tort is akin to crime and that domestic courts apply only their own law to determine criminal liability. The idea that the lex fori should be applied reflects a feeling that domestic courts cannot be expected to give a remedy when this is not available in wholly domestic cases." "This," Collier continues,[12] "is not thought to be the case, however, in other areas of the law such as contract and it is not an insuperable obstacle to the application of the *lex loci*. Moreover, except for some family law matters, the *lex fori* does not govern substantive issues in the conflict of laws."

The issue was, in 1949, thrown into stark relief by the decision of the Inner House of the Court of Session in the Scots case of *McElroy v McAllister*.[13] That case concerned an action brought by a widow against the driver of a vehicle whose fault, it was alleged, had caused the death of her husband in a road accident which had taken place in England (although only some forty miles from the Scottish border). She claimed, as an individual, a payment of £2000 and the same amount as executrix of her deceased husband's estate. Her case was put, alternatively, that the parties' rights were to be ascertained either by English of Scots law. Under the latter, her claim was for *solatium*[14] and for loss of support. Under English law, her claim as an individual was for damages for pecuniary loss under the *Fatal Accidents Acts* 1864 – 1908 and, as executrix, under the *Law Reform (Miscellaneous Provisions) Act* 1934 for funeral expenses and the loss caused by the death of her husband.

The Court[15] held, first, that Scots Courts would not, in any claim arising lege delicti, recognise any specific right of action (*jus actionis*) which was derived by the *lex loci delicti*, which was England and, since English law did not recognise any right to *solatium*, that claim failed. Second,[16] that the pursuer's claim for loss of support was statute barred by the *Fatal Accidents Acts* in English law.[17] Third,[18] that, as action ability by the law of the *forum* was a *sine qua non*, the pursuer had no title to sue as executrix in the Scots Courts. As the defender had admitted liability in respect of the funeral expenses caused to the deceased's estate, the pursuer succeeded on that court alone.

There are *dicta* in *McElroy v McAllister* which emphasise the problematic inter relationship of the *lex fori* and the *lex loci delicti*: thus, Lord Russell considered[19] it to be both unreasonable and contrary to natural justice that, ". . . the right of the pursuer to obtain damages in Scotland should be more ample than that afforded by the *lex loci delicti*." Lord Justice-Clark (Thomson) commented[20] that, "Actionability under the *lex loci delicti* seems to me to be in principle a *sine qua non*. Otherwise a quite unjustifiable emphasis is given to the *lex fori*." Anton summed up[21] the Scots position, as represented by *Mc Elroy,* as being that an action based on a delict committed outside Scotland would fail unless the pursuer was able to show that the specific right of action which was sought to be invoked would fail unless the pursuer could show that it was available both under Scots law and by the *lex loci delicti*. At the same time, Lord Keith, who dissented on two of the claims, remarked[22] that *McElroy* was a typical instance of injustice wrought by a double rule.[23]

Academic commentary on *McElroy* fell into two directions, one of a more fundamental nature than the other. First, Gow, in more traditional mode, expressed the view[24] that the

basis for Lord Keith's dissent on the issue as to the pursuer's being subject to the substantive law of both England and Scotland *prima facie*, ". . . arouses sympathy but a closer reading merely serves to confirm the old saying that hard cases make bad law." He also suggests that scarcely anyone would deny that the court reached a proper decision in rejecting the claim based on *solatium* because no such right was known in English law and the wrong was committed in England. At the same time, it is submitted that the decision must be viewed in its totality and that totality presents a context which, as Collier suggests,[25] is not merely unfair but leaning towards the absurd.

In the end, Gow, despite those earlier comments, suggests[26] that injustice might, indeed, have been suffered by the pursuer, despite the Lord President's assertion[27] that she had suffered no hardship, which itself offered, ". . . cold comfort to an injured party who may encounter untold difficulties of jurisdiction under a foreign jurisprudence." Thus, he suggested that a decision more in conformity with natural justice would have been reached had three principles been applied, namely: first, that the act must not be justifiable by the *lex fori;* second, that the wrong must have been of such a character that it would have been actionable by the *lex loci delicti*, and; third, that the remedy sought must be the same, or substantially so, both by the *lex fori* and the *lex loci delicti.* Had that been the case, the pursuer would have received damages as executrix under the *Law Reform (Miscellaneous Provisions) Act* 1934.[28]

Anton makes[29] the admirable point that Gow's suggestion would create a better balance between the respective interests of the two systems, it does share with the law as it existed, the disadvantage that it appears to presuppose that single *lex loci delicti.* Today, as McClean and Beevers suggested,[30] a defendant/defender's conduct may be factually connected with a number of different countries. In such cases, Anton continues, any conclusion that, for legal purposes, the tort/delict must be considered to have taken place in one such jurisdiction rather than another has an air of artificiality. Thus, the choice of one, rather than another, if it is not to be perceived as being arbitrary, must surely be based on the notion that the facts in issue are significantly connected with one rather than any other.

In his dissent, Lord Keith referred[31] to the view which Cheshire had earlier expressed[32] that, "A liability recognised in the place of the wrong should be enforced unless to do so would be utterly repugnant to the distinctive policy of the forum." Just as the *lex loci* test might have an air of artificiality, so very well might Cheshire's in the senses that *utter repugnance* might not be apparent, just as might not any *distinctive policy.*

These questions (and doubtless others) caused Morris to argue[33] that, ". . . we ought to have a conflict rule broad and flexible enough to take care of exceptional situations as well as the more normal ones, or else we must formulate an entirely new rule to cope with the exceptional situations. Otherwise the results will begin to offend our common sense." Morris then posited a dramatic hypothetical situation: "An American co-educational school establishes for its students a summer vacation camp in the lake and forest country of northern Quebec. The camp is entirely self-contained and self-supporting and there is no other human being within 50 miles. One of the girls is seduced by one of the boys so that she becomes pregnant; another is bitten by a dog kept in the camp by another boy. Neither incident would have happened but for the negligence of the camp's organizers, who are instructors in the school. The girls, the boys and the organizers are all residents of State X, an American state, where also the school is located."

Morris asks whether it makes sense to say that the question whether the girls or their parents can sue the boys or their parents or the camp organizers in State X *must*[34] be governed by the law of Quebec, solely because the incidents occurred there? Morris answered that, to him, it did not. Likewise, Anton asked[35] whether, if a Scottish seaman was accidentally injured on board a Scottish ship, it should be relevant to the seaman's remedy if the mishap took place a few yards inside the territorial waters of San Domingo rather than a few yards outside.

Gow is less than drawn[36] to the theory of the proper law of the tort urged by Morris in an earlier commentary,[37] on *McElroy v McAllister*. After having noted that it had therein been urged that there should be nothing preventing an English court from applying English law to a tort committed in Scotland by one Englishman against another. "With respect," he writes,[38] "it is submitted that such reasoning would land in absurdity. How is the proper law of the tort to be determined? Why in the case figured should English law be applied? – because the parties are English? What then will be the proper law of a tort committed in Eire by a Frenchman against a Portuguese and the action against the wrongdoer is raised in the court of a country other than Eire."

Morris answers that criticism by turning the argument back on Gow, when he writes[39] that Gow had not explained why the difficulty of determining the proper law of a tort should be any greater than that of determining the proper law of a contract. Indeed he went on, the difficulty would appear to be rather less, as the factors to be taken into consideration were likely to be less various. Further, in many, perhaps most, cases, there would be no need to

look beyond the *lex loci delicti*. The present writer must, thus, be forgiven for himself inquiring as to in what cases it would be so necessary. To put it another way, Morris has introduced an additional imponderable in an ongoing and uncertain area.

Morris further noted other issues which militate against too rigid an application of the *lex loci delicti* notion: first, it does not apply to all torts. Thus, it is seldom applied to the tort of conversion.[40] Again, the problem of vicarious liability[41] cannot be solved by a mechanism application, but only by a more sophisticated inquiry into problems of causation and foresee ability coupled with a balancing of the interests of the states whose law is involved. Morris also considers[42] that the approach which he advocates would enable the problems to be broken down into smaller groups and so facilitate a more adequate analysis of the social factors involved. "The questions," he suggests, "that may arise in the field of torts are, no doubt, less various than those which arise in the field of contracts. But they are less various than those that arise in the field of contracts. But they are numerous enough to suggest doubts as to whether the application of a single formula – the law of the place of wrong – can possibility produce socially adequate results." On that issue, Morris concludes his argument[43] by submitting that the proper law of the tort theory is not open to one objection which has been raised to the proper law of the contract theory – that is, that it is productive of grave uncertainty in commercial matters. In Morris's *ipsissimma verba*:[44] "A shipping company or an insurance company may legitimately need to know what law will govern its contracts before it makes them. But a tort is not a consensual transaction. Tort liability is nearly always unexpected. A motorist does not legitimately need to know what law will determine his liability to pay damages if he runs down a pedestrian. His social duty is not to run the pedestrian down. . ."

For good or ill, as McClean and Beevers have noted,[45] society today is very much more complex now than in the 1951 when Morris made what, then, would have been a trenchant point. As will be seen, the potential tortfeasor's responsibility for foresight is greater now than half a century, and more, ago. Hence, Morris, in seeking to devise a rule for the resolution of an issue which is not going to disappear of its own volition may, once more, have added a further imponderable. Morris was, himself, aware of contextual contemporanity when he wrote[46] at the conclusion of his earlier article that he hoped that *McElroy v McAllister* would find its way to the House of Lords and, ". . . that the House would", ". . . take the opportunity to restate the English conflict of laws rules for tort liability in the light of modern conditions."

But, as has already been noted,[47] such an opportunity did present itself to the House of Lords, but, given the amount of academic commentary the decision in *Boys v Chaplin*[48] had generated,[49] the present writer approaches it with no little trepidation. Yet the case is a necessary component of the continuing, if somewhat dislocated, story. In *Boys v Chaplin*, both the appellant and respondent were British service personnel who had been temporarily posted to Malta. As a result of the appellant's negligence, the respondent was injured in a road accident. As a serviceman, the respondent continued to receive full pay until, as a result of his injuries, he was discharged, but was able to obtain paid work in civilian life. He brought an action for damages against the respondent in England. Under Maltese law, there was a right of action for the recovery of pecuniary loss, but not in respect of compensation for pain and suffering. The issue was, hence, whether the damages recoverable by the respondent should damages for pain and suffering or exclude them under Maltese law. The House of Lords held that the *lex fori* – that is, English law – was the appropriate law to govern the damages which should be recoverable. However, as McClean and Beevers, *inter alia*, note[50] it is not easy to identify the *ratio decidendi* and it is, likewise, difficult to find any proposition that commended the support of the majority. Accordingly, it becomes, howsoever regrettably, necessary to comment on the approaches demonstrated by the individual members of the House of Lords.

The judgments in the House of Lords which have been, seemingly, regarded as the nearest to a statement of the desirable law[51] were those of Lords Wilberforce and Hodson. The former took the view[52] that the basic rule with regard to foreign torts should be restated. That, of course, begged the question of what the basic rule itself might be. In that context, his Lordship had stated[53] that, "To insist on the choice of the law of the place where the wrong was committed has an attraction and leads to certainty but in modern conditions of speedy and frequent travel between countries the place of the wrong may be and often is determined by accidental circumstances, as in this case where the parties were but temporarily carrying out their service in Malta. Furthermore, difficult and inconvenience is involved in many cases in ascertaining the details of the relevant foreign law." In making that comment, Lord Hodson noted that he was seeking, albeit flexibly, to apply the principle which had been propounded in the decision in *Phillips v Eyre*.[54]

Phillips v Eyre, in both context and application, is central to the present discussion and will be considered, in detail, separately.[55]

Lord Wilberforce stated,[56] in the context of Lord Hodson's comments that he himself would restate the basic rule of English law with regard to foreign torts as requiring action ability as a tort according to English law, subject to the condition that civil liability in respect of the relevant claim exists as between the actual parties under the law of the foreign country where the act was done."

With especial significance for the purposes of the instant discussion, Lord Wilberforce continued by saying that it was, thus, necessary to consider a matter which was, both for him, and for this commentator, at the very crux of the issue raised in *Boys v Chaplin*, which was whether some qualification to that rule was required in particular cases. In that regard, Lord Wilberforce emphasised that there were two conflicting pressures. The first of these was in favour of certainty and flexibility in the law, whereas the second was in favour of flexibility in the interest of individual justice.

Lord Wilberforce noted[57] that developments in the United States had reflected that tension. These developments, again, are central to the thrust of this discussion and will be discussed later in this monograph,[58] both in the context of Lord Wilberforce's judgment and more generally.[59]

Having made those general comments, and examining some United States decisions, Lord Wilberforce stated[60] that, "There must remain great virtue in a general will-understood rule covering the majority of cases provided it can be made flexible enough to take account of the varying interests and considerations of policy which may arise when one or more foreign elements are present." It followed that some indication was necessary as to when the rule ought to be applied and when departure might be justified. In so deciding, Lord Wilberforce considered, it was necessary to identify the policy of the rule, to inquire into what situations, with what contracts it was intended to apply. Then, to decide whether its application in the circumstances of any instant case would serve interest which the rule was devised to meet.[61] Such an approach, his Lordship went on, appeared in the context of the instant case where damages in respect of personal injury were excluded or limited, to be both necessary and inevitable. At the same time, "No purely mechanical rule can properly do justice to the great variety of cases," Lord Wilberforce said,[62] "where persons come together in a foreign jurisdiction for different purposes with differing pre-existing relationships from the background of different legal systems. It will not be invoked in every case or even, probably in many cases. The general rule must apply unless clear and satisfactory grounds are shown why it should be deported from and what solution, derived from what other rule, should be preferred.

. . Even within these limits this procedure may in some instances require a more searching analysis than is needed under the general rule. But unless this is done, or at least possible, we must come back to a system which is purely and simply mechanical."

Lord Wilberforce's description of the appropriate process is clear and provides a useful starting point. However, inevitably and necessarily gives rise to further questions – namely, what ought, first, the general rule to be. After all, as has already been observed,[63] more than one general approach to the issue is possible and *Boys v Chaplin* has itself suggested that the existing approach is based, with whatever justification,[64] on an amalgam. Further, in what factual and/or policy circumstances should departure from the rule be effected. In seeking to answer those questions, analysis of prior case law may not be adequate or sufficient and recourse, because of the policy issues which are of immediate relevance, must be had to the commentaries on the theory of choice of law process.

The complexity of *Boys v Chaplin* does not end with the views which had been articulated by Lord Hodson and Lord Wilberforce on the general issue. The other members of the House of Lords also expressed opinions on both the global issue and the consequent issue of damages.

First, Lord Guest stated[65] that he proposed to decide the question on a very narrow ground, which had arisen from the decision in *Phillips v Eyre.*[66] Lord Guest was, nonetheless, content to accept the proposition that *to justify an action in England for a tort committed abroad the conduct must be actionable by English law and by the laws of the country in which the conduct occurred.*[67] Both of those conditions had been satisfied in the present case in that the appellant's negligent driving was actionable by both English and Maltese law. Lord Guest also noted that that process of reasoning was consistent with that in *McElroy v McAllister,*[68] which was rightly decided, in his Lordship's view.

Lord Donovan was *content*[69] with the principle which had been enunciated in *Phillips v Eyre* and would leave it alone. More particularly, Lord Donovan did not consider that the notion of the *proper law of the tort*, as earlier mentioned,[70] ought, ". . . with all its uncertainties," to be adopted. "There is," he said,[71] "no need here for such a doctrine – at least while we remain a United Kingdom. Nor would I take the first step towards it in the name of flexibility."

Those were the views expressed on the global issue: however, the specific issue of damages cannot be disentangled legitimately from that major question. Lord Wilberforce commented[72] that, although *prima facie* Maltese law was applicable to the case, the matters

of recovery of damages for pain and suffering must needs be separated from the remainder of the case and related to the parties themselves and their circumstances and *tested in relation to the policy* of the local rule *and of its application to these parties so circumstanced.*[73] Of particular importance, Lord Wilberforce continued by saying that Maltese law could not, ". . . simply be rejected on grounds of public policy, or some general conception of justice. For it is quite one thing to say or presume that domestic rule is a just rule, but quite another, in a case where a foreign element is involved, to rejected a foreign rule on any such general ground. Thus, the foreign rule had to be evaluated in its application.

In carrying out that evaluation, Lord Wilberforce stated[74] that, "The rule limiting the availability of damages in the creation of the law of Malta, a place where both plaintiff and defendant were temporarily stationed. Nothing 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. No argument has been suggested why an English court, if free to do so, should renounce its own rule."

Lord Wilberforce concluded his argument by stating[75] that it might be that the matter could be decided (in his own phrase, "quasi-mechanically") by the hitherto accepted distinction between substance and procedure (that is, between *solatium* as a *jus actionis* and as an ingredient in general damages).[76] But, in the end, the choice which had to be made between regarding damages for pain and suffering as a separate cause of action, and so covered by the *lex locus delicti*, or treating them as merely part of general damages as so covered by the *lex fori*, was, in this case especially, finely balanced.

The reason why Lord Wilberforce chose the latter was a *dictum* to be found in the United States case of *Kilberg Admin v Northeast Airlines.*[77] There, Desmond CJ had said that, "it is open to us. . . particularly in view of our own strong public policy as to death action damages, to treat the measure of damages . . . as being a procedural or remedial question controlled by our own stated policies." In that broad context, Lord Wilberforce considered[78] that, "There certainly seems to be some artifice in regarding a man's right to recover damages for pain and suffering as a matter of procedure. To do so, at any rate goes well beyond the principle which I entirely accept that, matters of assessment or quantification, including no doubt the manner in which provision is made for future or prospective losses, are for the lex fori to determine."

The *Kilberg* case on which Lord Wilberforce seemed to place, at least, some reliance, has not been wholly welcomed in its country of origin. *Kilberg* involved the crash of an