

THE ANGLO-AMERICAN REVOLUTION IN TORT CHOICE OF LAW PRINCIPLES: PARADIGM SHIFT OR PANDORA'S BOX?

Alan Reed*

I. INTRODUCTION

*Gallons of ink spill across the law review pages as the conflicts revolution engages a counter-revolution in a rhubarb as esoteric and perplexing as anything American law has ever known.*¹

The landscape of American conflicts law has undergone a fundamental reorientation.² The altered canvas is most vivid in the choice of law arena, particularly in relation to governing principles in tort.³ After decades of experimentation, we are left with dominant greys and innumerable shades: a bewildering chiaroscuro effect that confuses academicians, practitioners and judges.⁴ The prevailing American methodology has recently infected the scepter'd isle. The result is the recognition that the legal system should put certain constructs to rest because their utility is long-gone and their specters confound our thinking. Accordingly, recent and radical changes in the English tort choice of law rules now supplement century-old laws. These alterations in

* Alan Reed graduated from Trinity College, Cambridge University in 1988 with a first class honours degree in law (B.A 1988 and M.A. 1991), and was awarded the Herbert Smith prize for private international law attaining the highest examination grade in that subject. Cambridge University also granted him a full Holland Scholarship to facilitate study in the U.S. and he obtained an LL.M. Masters of Law (comparative law) at the University of Virginia in 1990. On his return to England, he spent two years in practice with Theodore Goddard in London, whilst additionally teaching law at Trinity College, Cambridge. Between 1993-2000, he was a law lecturer at Leeds University. In March 2000 he became a Reader in Law at Sunderland University. In September 2001, he was promoted to Professor of Law with the professorial designated title of Professor of Criminal and Private International Law.

1. J. Skelly Wright, *The Federal Courts And The Nature And Quality Of State Law*, 13 WAYNE L. REV. 317, 334 (1967).

2. Kegel, II HAGUE RECUEIL 9 (1964).

3. See Albert A. Ehrenzweig, *A Counter-Revolution In Conflicts Law? From Beale To Cavers*, 80 HARV. L. REV. 377 (1966) (The phraseology conflicts revolution has been attributed to Ehrenzweig.).

4. *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978) (quoting from *Estin v. Estin*, 334 U.S. 541, 545 (1948)).

English law have occurred both through changes in the common law⁵ and through statutory reform.⁶

After discussing both methods of reform, this Article concludes that the contemporary call for a drastic reappraisal represents an unnecessary obfuscation of prevailing orthodoxy that has operated perfectly satisfactorily since the nineteenth century. The resulting bifurcated model is not an improvement over but, in a number of respects, is worse than its predecessor. The symmetry between this model and the United States experience is so striking that one wonders whether revolutionary upheaval was even necessary. As Juenger states, “[t]he mountains labored mightily only to give birth to a mouse.”⁷

An English law Lord described the process of the choice of law in the field of tort as “one of the most vexed questions in conflict of laws.”⁸ This is especially true in the commercial field, where the place of tort may be either hard to locate or a matter of chance.⁹ When we refer to choice of law, we are

5. *Red Sea Insurance v. Bouygues S.A.*, [1995] A.C. 190 (P.C.) (discussed *infra* at pp. 916-18).

6. Legislative reform occurred through the Private International Law (Miscellaneous Provisions) Act of 1995, which came into effect on May 1, 1996, discussed *infra* at pp. 922-25. See generally Adrian Briggs, *The Halley: Holed, But Still Afloat*, (1994) 111 L.Q.R. 18; Andrew Dickinson, *Further Thoughts On Foreign Torts: Boys v. Chaplin Explained*, (1994) L.M.C.L.Q. 463; Pippa Rogerson, *Choice Of Law In Tort: A Missed Opportunity?*, (1995) 44 I.C.L.Q. 650; C.G.J. Morse, *Torts In Private International Law: A New Statutory Framework*, (1996) 45 I.C.L.Q. 888; P.B. Carter, *The Private International Law (Miscellaneous Provisions) Act 1995*, (1996) 112 L.Q.R. 190; Abba Mayss, *Statutory Reform Of Choice Of Law In Tort: A Bitter Pill Or A Cure For The Ill?* 2 Web J.C.L.I. (1996), available at <http://webjcli.ncl.ac.uk/1996/issue 2/mayss2.html>; Barry J. Rodger, *Ascertaining The Statutory Lex Loci Delicti: Certain Difficulties Under The Private International Law (Miscellaneous Provisions) Act 1995*, (1998) 47 I.C.L.Q. 205; Jonathan Harris, *Choice Of Law In Tort - Blending In With The Landscape Of The Conflict Of Laws*, 61 M.L.R. 33 (1998).

7. Friedrich K. Juenger, *Conflict of Laws: A Critique Of Interest Analysis*, 32 AM. J. COMP. L. 1, 44 (1984).

8. *Boys v. Chaplin*, [1968] 2 Q.B. 1 per Lord Denning (presupposing there is a choice of law rule for all torts).

9. The English judiciary hoped in the early 1980s there would be an EC Convention to address all general obligations, thereby prompting schematic harmonization. Note that the planners of the 1980 Convention on the Law Applicable to Contractual Obligations initially intended the resulting conventional document would contain provisions for tort law. This intention is reflected in Article 10 of the 1972 Preliminary Draft. However, in 1978, the Committee of Experts decided to limit the conventional discourse to contracts. Consequently, the existing Member States of the EC in 1980 gathered together in Rome and participated in the Convention on the Law Applicable to Contractual Obligations, which came into force in 1991 and which the U.K. effectuated through the Contracts (Applicable Law) Act of 1990. See generally PETER NORTH, *ESSAYS IN PRIVATE INTERNATIONAL LAW* 228 (1993), given effect in the U.K. by the Contracts (Applicable

addressing the requirement of a policy selection process that, in multistate cases, necessitates a selection among forum policies facilitating systemic and functional concerns as well as the primary substantive issue of determining which party should prevail on the merits.¹⁰ In essence, the forum court extrapolates practical, substantive, and systemic values to implicate its law selection. The forum court, operating as a repository of justice, caustically implements values into its decisions.¹¹ The aim of choice of law is to provide an intelligible and principled basis for choosing a substantive rule in tort over the competing rule of another place.¹² It legitimizes the overarching choice and explains why rejection of one law in favor of another is correct. Cardozo encapsulated the intrinsic difficulty of these mental gyrations when he identified choice of law as “one of the most baffling subjects of legal science.”¹³

Anglo-American jurisprudence has, over a span of time, considered the applicability of a variety of legal systems.¹⁴ In broad terms, courts have chosen the *lex fori* (the law of the forum), the *lex loci delicti commissi* (the law of the place where the tort was committed), or an approach that incorporates aspects of both perspectives.¹⁵ Dissatisfaction, however, with such jurisdiction-selecting rules that link widely defined legal categories with a given territory via the

Law) Act 1990. More recently, non-contractual regulations have reappeared on the European agenda. Council Resolution of Oct. 14, 1996, 1996 O.J. (C 319) 1. Accordingly, the Council of the European Union has designated a working party. The Commission will promulgate a draft regulation that incorporates the working party’s recommendations; the U.K must then decide whether to endorse the regulation and participate in ensuing negotiations.

10. See Harold G Maier, *Baseball And Chicken Salad: A Realistic Look At Choice of Law*, 44 VAND. L. REV. 827, 840-41 (1991).

11. See Robert A. Leflar, *Choice-Influencing Considerations In Conflicts Law* 41 N.Y.U. L. REV. 267, 267-78 (1966) [hereinafter *Considerations*].

12. *Id.*

13. Benjamin N. Cardozo, THE PARADOXES OF LEGAL SCIENCE 67 (1928).

14. See generally FRIEDERICH K JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE (1993); GOODRICH, YIELDING PLACE TO NEW: REST VERSUS MOTION IN THE CONFLICT OF LAWS (1950); William A. Reppy, Jr., *Eclecticism In Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645 (1982); James E. Westbrook, *A Survey And Evaluation Of Competing Choice-of-Law Methodologies: The Case For Eclecticism*, 40 MO. L. REV. 407 (1975).

15. In *Sutherland v. Kennington Truck Service, Ltd.* 562 N.W.2d 466, 470 (Mich. 1997), the Supreme Court of Michigan opined:

[o]nly two distinct conflicts of law theories actually exist. One, followed by a distinct minority of states, mandates adherence to the *lex loci delicti* rule. The other, which bears different labels in different states, calls for courts to apply the law of the forum unless important policy considerations dictate otherwise.

mechanism of so-called connecting factors, facilitated the United States revolution in choice of law principles through development of the proper law of tort analysis and spawned government interest analysis.¹⁶ This analysis allowed more thorough reasoning because it required the court to focus on the policies expressed in the rules of substantive law in cases of conflict and to analyse the respective state interests in situations where the policies applied to a factual scenario not confined to that one state.¹⁷ An overview of the main theories contributes to the articulation of the merits and demerits of each.

The law of the forum (*lex fori*) perspective is German in origin and Savigny advocated the theory in 1849.¹⁸ With the exception of a few Commonwealth legal systems, virtually every jurisdiction has abandoned the approach because it operates capriciously and unjustly in multistate actions.¹⁹ Its adherents propound that liability for tort is closely affiliated to the fundamental public policy of the forum such that its law should reign supreme. Drawing parallels to criminal law, to which certain torts have an affinity, *lex fori* proponents argue that no one objects that foreign law is inapposite to the former. However, neither of these rationales for a rigid jurisdiction-selecting rule,²⁰

16. For evaluation of these contrasting perspectives, see Hay, I HAGUE RECUEIL 28 (1991). See also Dirk H. Bliesener, *Fairness Choice of Law: A Critique of the Political Rights-Based Approach to the Conflict of Laws*, 42 AM. J. COMP. L. 687 (1994).

17. Cavers described the dilemmatic choice between a jurisdiction-selecting or a rule-selecting approach in the following terms: "Should a court in dealing with a claim that a foreign law is applicable to the case before it or to an issue in that case choose between its own and the foreign legal system or, instead, choose between its own rule and the foreign rule?" III HAGUE RECUEIL 75, 122 (1970).

18. SYSTEM DES HEUTIGEN ROEMISCHE RECHTS (1849) Vol. 8, pp. 275 *et seq.*

19. See *infra* pp. 903-05 for the suggestion that Currie's interest analysis is a unilateral *lex fori* preference doctrinal model. Advocates, however, reject this blind conclusion. See Russell J. Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of That Analysis in Products Liability Cases*, 46 OHIO ST. L.J. 493 (1985); Robert A. Sedler, *Reflections On Conflict Of Laws Methodology*, 32 HASTINGS L.J. 1628 (1981); David E. Siedelson, *Resolving Choice Of Law Problems Through Interest Analysis In Personal Injury Actions: A Suggested Order Of Priority Among Competing State Interests And Among Available Techniques For Weighing Those Interests*, 30 DUQ. L. REV., 869 (1992); Louise Weinberg, *On Departing From Forum Law*, 35 MERCER L. REV. 595 (1983); Bruce Posnak, *Choice of Law: Interest Analysis And Its "New Critics"*, 36 AM. J. COMP. L. 681 (1988).

20. Professor Cavers, who coined the term "jurisdiction-selecting rule," explained the rule selects the applicable law without regard to its content or the content of any competing laws. See David E. Cavers, *A Critique of the Choice Of Law Problem*, 47 HARV. L. REV. 173 (1933). Once courts select a government entity, the applicability of its laws incidentally follows. A rigid or mechanical jurisdiction-selecting rule is one that, at least facially, leads inevitably to a particular law's application. Readers should distinguish this rule from one that merely raises a rebuttable presumption of a law's applicability.

unilaterally in favor of the *lex fori*, is very compelling.²¹ Tort law increasingly operates as an instrument of distributive, not retributive, justice, and embodies a compensatory loss-distribution structure. There is also a distinct separateness between criminal and tort law because each has fundamentally different objectives. A strong deductive syllogism operates against a certain *lex fori* theory in that the theory is unduly facilitative of egregious forum shopping. The theory encourages parties to engage in the calculated selection of a forum in order to enjoy the inapposite benefits of a system that is favorable to the claimant. It is arguably inequitable to hold a defendant responsible--provided amenability to jurisdiction is established--for conduct that would not attract liability in the place of commission.²² The words of Cardozo have a particular resonance herein: "we

21. For a recent example of Michigan's adherence to the *lex fori* principle in tort conflicts see *Sutherland v. Kennington Truck Service Ltd.*, 562 N.W.2d 466 (Mich. 1997). The litigation arose out of a paradigm choice-of-law scenario, a road traffic accident. The accident occurred in Michigan, and involved an Ohio claimant and an Ontario defendant. The plaintiff's action was timely under Michigan's three year statute of limitation, but was statutorily barred under Ohio and Ontario laws, which provided for a two-year limitation period. The court concluded that neither Ohio nor Ontario had an interest in applying its respective statute of limitation. Consequently, the defendant did not rebut the *lex fori* presumption and the court determined there was no requirement to evaluate Michigan's interests. *Id.* at 473.

22. For an interesting contrasting perspective, see Weinberg, *supra* note 19, at 623-624 and her hypothetical hard case illustration:

Driving through unfamiliar streets on business, Mr. Jones, the plaintiff, a non-resident rings a random doorbell to ask directions after making his way up a snowy path. On his way back to the road, he observes a sign warning that the path is slippery. Although he makes every effort to avoid an accident, he slips on the unshoveled, unsanded snow on the path and is seriously injured. Under the law of the situs, there is no duty to remove or sand snow on one's property, as long as one has posted a warning; the law of the plaintiff's home state is to the contrary. The plaintiff sues at home and somehow obtains jurisdiction. Since Mrs. Smith, the homeowner defendant, specifically relied on the law of her home state in postponing the task of clearing the walk, and since she had no way of knowing in advance in which state her uninvited visitor resided, it might be thought unsupportable to hold her to duties intended to regulate landowners in that visitor's state. It might be suggested that on these facts the forum could not constitutionally apply its own law. It will surely be thought that the forum should not do so. Yet imposition of liability would not be inappropriate. Although the failure to shovel snow may not be actionable at the situs, it is a failure nevertheless; a homeowner must be aware that the failure creates a condition of some risk, whether or not a warning is posted. That the situs cheerfully places the risk on the injured party is all very well when

are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."²³

The *lex loci delicti* theory (the application of the system of law of the place where the tort was committed) is the prevailing doctrine on the continent of Western Europe today.²⁴ A slightly modified statutory template of this perspective came into English law on May 1, 1996 via the Private International Law (Miscellaneous Provisions) Act of 1995. The *lex loci delicti* was the prevailing doctrine in the United States during the first part of the twentieth century. The theory's vortex is derived from the obligatio vested rights theory.²⁵ This theory promotes the idea that law follows an individual and may be enforced wherever the individual is located. The theoretical underpinnings embody certainty and even-handedness. The theory accords foreign law the same respect as local law, and selects it through reference to objective criteria without any need for recourse to the content of the substantive interests vying for application. United States commentators describe the rigid *lex loci delicti* approach as a jurisdiction-selecting rule.²⁶

Professor Joseph Beale of the Harvard Law School, whose work formed the keystone of the American Law Institute's First Restatement of the Conflict of Laws in 1934, advocated the deontological reasoning of the *lex loci delicti* theory.²⁷ Other adherents suggest that the theory allows for the application of the same law wherever parties pursue a particular legal action. Essentially, the theory's application accords with the legitimate expectations of the respective

the injured party is one of the situs' own residents. It seems a bit high-handed when the injured party is a non-resident, particularly when the costs of the injury will have to be borne in another state. As between an innocent injured party and an insured or otherwise suable party amenable to jurisdiction, whose act or omission caused the injury, widely shared policies favoring risk spreading, compensation, and deterrence, coupled with considerations of the foregoing kind, suggest that the risk of accident should not fall on the injured party, and that most courts would share that view.

See also O'Connor v. Lee-Hy Paving Corp., 579 F.2d. 194 (2d Cir. 1978). This case is discussed by Weinberg, *supra* note 19, at 624-625.

23. Loucks v. Standard Oil Co. of New York, 120 N.E. 198, 201 (N.Y. 1918).

24. For recent application in New Mexico, see *infra* at pp. 918-20. (a case involving the issue of which law governed the distribution of the proceeds of a wrongful-death claim) and for adoption in South Carolina, see Lister v. Nations Bank, 494 S.E.2d. 449 (S.C. App. 1997) (involving a road traffic accident and insurance claim).

25. *See generally* Perry Dane, *Vested Rights, "Vestedness" And Choice of Law*, 96 YALE L.J. 1191, 1194-95 (1987); Lea Brilmayer, *Rights, Fairness And Choice Of Law*, 98 YALE L.J. 1277, 1281-85 (1989).

26. Cavers, *supra* note 20.

27. JOSEPH A. BEALE, *History And Doctrines Of The Conflict Of Laws, in A TREATISE ON THE CONFLICT OF LAWS*, vol. 3 1879 (1935).

litigants; each individual should alter her conduct to comply with the law of the country in which she acts. The ancient adage, “When in Rome do as the Romans do” becomes, under Bealian deontological reasoning, “When in Rome see that your insurance policy covers the risks against which Romans insure.”²⁸ Proponents of the *lex loci delicti* theory stress that its fulfillment of Utopian jurisprudential policy concerns avoids egregious forum shopping and leads to certain, uniform, and predictable results.

As the next section argues, the significant academic attack mounted on Bealian conceptualism revealed these perceived ideals to be, on occasion, a matter of sheer sophistry. The uniform adoption of the vicinage of the tort system of law has prevailing difficulties beyond the calculated circumvention of the choice of law issue through processes of characterization, renvoi and public policy.²⁹ In cases involving economic torts such as negligent misrepresentation, inducement of breach of contract, intellectual property infringement, international torts

28. Kahn Freund, (1968) II RECUEIL DES COURS 44. The doctrine is devolved from ideas of territorial sovereignty. Freund asserts the law of the place where events occur is the only law that can attribute legal consequences to them. In *Phillips v. Eyre*, [1870] L.R. 6 Q.B. 1, 28, Justice Willes stated 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.” Similarly, in *Slater v. Mexican National RR*, 194 U.S. 120, 126 (1904), Justice Holmes opined that the *lex loci delicti* governed liability for tort:

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*, which, like other obligations follows the person and may be enforced wherever the person may be found. But as the only source of this obligation is the law of the place of the act, it follows that the law determines not merely the existence of the obligation, but equally determines its extent. (Internal citations omitted.)

29. As discussed in the following section, lawyers and judges who were dissatisfied with the result predicated on rigid territorial choice of law principles sought to displace them through a variety of escape device techniques. The court employed characterization techniques to reclassify “tort issues” as sounding in procedure. See *Kilberg v. Northeast Airlines*, 172 N.E.2d 526 (N.Y. 1961). For characterization techniques used to reclassify “tort issues” in contract, see *Hudson v. Continental Business System*, 317 S.W.2d 584 (Tex. App. 1958), For family law, see *Haumschild v. Continental Casualty Co.*, 95 N.W.2d 814 (Wis. 1959). For administration of estates see *Grant v. McAuliffe*, 264 P.2d 944 (Cal. 1953). Courts also sought last-resort refuge in renvoi and public policy to preclude judicial application of the forum’s choice of law rule. See *Mertz v. Mertz*, 3 N.E.2d. 597 (N.Y. 1936). There is, as Part Four of this Article suggests, an element of symmetry here with the English tendency to resort to such re-characterization devices through legal practitioners to subvert the impact of the Private International Law (Miscellaneous Provisions) Act 1995.

involving the Internet, or cases involving multistate defamation, the precise *locus* may be wholly ambiguous. Consider, by way of illustration, the tort of negligent misrepresentation. The defendant may activate a negligent misstatement in country A, receipt occurs in country B, transmission by the parent company claimant to a subsidiary organization in country C, and subsequent action predicated on effectuation of harm to the plaintiff in country D. Substantive economic torts are more sophisticated and diverse than the paradigm road traffic accident around which much analysis on *locus* is focused.³⁰ Additionally, there may be a certain fortuitousness of the location of the tort that is socially, legally, and geographically insulated from the parties' overall state contracts.³¹ This is true of transport accidents involving aircraft where the harm ensues in a country where none of the parties contemplated that the journey would end. The simple application of the *lex loci delicti* system, without examination of the domicile and residence of the claimant or defendant--regardless of the issues involved or branch of tort law--and without attempt to examine the true factual vortex may lead to inequitable and indefensible outcomes.³² Professor Morris addressed these concerns in a seminal 1951 article that identified the proper law of the tort.³³ This groundbreaking work formed a basis for Currie's³⁴ outstanding contribution as the father³⁵ of government interest analysis.

This Article explores government interest analysis in detail in the next section as part of the American revolution in choice of law analysis. Suffice to say at this juncture that a cornerstone of the perspective is that a single mechanical formula does not produce satisfactory results when applied to all kinds of torts and to all kinds of issues. As the previous discussion illustrates, the spatial reach of local law and whether a state has a legitimate interest in the application of its own law to a specific case are predicated upon the underlying policy (legislative intent) behind the law and the effectuality of applying that policy or interest to the facts at hand. It will be immediately apparent that the pre-eminent jurisprudential policy concern here is flexibility; governmental interest analysis allows for the segregation of different issues to facilitate a more adequate

30. This paradigm applies to both United States and English tort choice of law experience. It is relevant to United States interest-analysis examination of host-guest statutes, and both the English and Scottish Law Commissions Reports, which presaged Part III of the Private International Law (Miscellaneous Provisions) Act 1995, which used this common situation as the foundation for their conclusions. See *Private International Law: Choice of Law in Tort and Delict*, Law Com. No. 193 (1990).

31. See, e.g., *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975).

32. See *McElroy v. McAllister*, 1949 S.C. 110 (1948).

33. See J.H.C. Morris, *The Proper Law Of A Tort*, 64 HARV. L. REV. 881 (1951).

34. See BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963) [hereinafter *SELECTED ESSAYS*]; Brainerd Currie *Notes on Methods and Objectives in The Conflict of Laws*, DUKE L.J. 171 (1959) [hereinafter *Notes on Methods*].

35. *Bernhard v. Harrah's Club*, 546 P.2d. 719, 722 (Cal. 1976).

extrapolation of relevant social factors. The American Law Institute's Second Restatement of the Conflict of Laws, 1968, adopted part of this analysis.³⁶ It was laid out therein that "the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has *the most significant relationship* to the occurrence and the parties."³⁷

The attraction here is a broadly defined theory that allows flexible results and avoids outcomes that would offend our common sense. Academicians and judges alike were immediately attracted to the sophisticated analysis of interests, policies, and the multiplicity of issues.³⁸ In comparison, many derided the old vested rights approach as expressing "in crass symbols, the most complex syntheses of phenomena," and "not merely obscurant but socially dangerous," and a disingenuous or elliptical tautology that leads us nowhere.³⁹ Subsequent detractors of government interest analysis have enunciated that the sacrificial lambs became the perceived advantages of certainty, predictability, and uniformity of results that many believe follow from the application of a rigid jurisdiction-selection rule under a *lex loci delicti* governing system.⁴⁰

In essence, the previous elaboration of governing theories implicitly articulates the themes that have animated United States conflicts law. The discussion proposes four canons for consideration on our legal topographical map: multilateralism, unilateralism, substantivism, and party expectations.⁴¹ The following brief explanation provides a summary of each canon.

First, the aim of multilateralism is the repetitive choice of law outcomes, irrespective of the locality of decision-making.⁴² Second, the primordial tenet of a multilateralist rule is that the tort law of the place of injury should govern. Thus, the goal of multilateralist thought is a uniformly defined conflict that is conducive

36. P.M. NORTH & J.J. FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 23-25 (13th ed. 1999); see generally DAVID MCCLEAN MORRIS: THE CONFLICT OF LAWS (5th ed. 2000); C.M.V. CLARKSON & JONATHAN HILL, JAFFEY: CONFLICT OF LAWS (1997).

37. RESTATEMENT (SECOND) OF THE CONFLICTS OF LAWS § 145 (1968); see *infra*, pp. 889-902.

38. See Friedrich K. Juenger, *Conflict Of Laws: A Critique Of Interest Analysis*, 32 AM. J. COMP. L. 1, 45-48 (1984).

39. See Hessel E. Yntema, *The Hornbook Method And The Conflict Of Laws* 37 YALE L.J. 468, 476-477 (1928); see also Walter W. Cook, *The Logical And Legal Bases Of The Conflict Of Law*, 33 YALE L.J. 457, 484-488 (1924).

40. *Boys v. Chaplin*, [1971] A.C. 356 per Lord Hodson, at 377-378; per Lord Wilberforce, at 391; per Lord Upjohn in the Court of Appeal [1968] 2 Q.B. 1, 32.

41. See generally Gene R. Shreve, *Choice Of Law And The Forgiving Constitution*, 71 IND. L.J. 271, 281-287 (1996).

42. See Arthur Taylor Von Mehren, *Recent Trends In Choice Of Law Methodology* 60 CORNELL L. REV. 927, 971 (1975) (stating "[T]he selecting process can be - and is - viewed as providing the required choice of law."). I propose the reader view this perspective as a choice of jurisdiction rather than a choice of law approach.

for administration in multiple and diverse jurisdictions. This theme was dominant during the nineteenth century and for the first half of the twentieth century. Joseph Beale's 1834 publication of his inherently multilateralist Commentaries on the Conflict of Laws was extremely influential in the United States and abroad.⁴³ The multilateralist movement gathered apace through Beale's leadership exactly one hundred years later in the First Restatement of the Conflict of Laws. However, the conflicts revolution started in earnest shortly after the mid-century when it consequentially displaced multilateralism for contract and tort choice of law to such a significant degree that multilateralism (of the First Restatement variety) now enjoys full acceptance in only a limited number of jurisdictions. The injection of unilateralist thought has softened the multilateralist approach, while the ongoing search for a putatively better law has strengthened the link between multilateralism and Leflar's ideals (substantivism).⁴⁴

Third, unilateralism purveys an ethos, *ad hoc* in nature, that is anathema to the desiderata of uniformity and certainty in outcome. To a unilateralist, the fundamental inquiry relates to the spatial reach of rules; she considers whether the case at hand is apposite for that particular law to be supererogatory.⁴⁵ Professor Brainerd Currie is credited with the development of unilateralism.⁴⁶ Currie delineated cases where only one sovereign was interested in having its law applied (he termed these 'false' conflicts) from those where both sovereigns were interested (dubbed 'true' conflicts). Currently, some states link unilateralist policies of interest analysis with substantivism. This combination introduces the idea that the quest to apply the optimal available substantive law should guide judges in the decision-making process; the quiescent and sentient search for an innate justice in the chosen law. The limited number of American states that follow the fifth and last of Professor Robert Leflar's "Choice-Influencing Considerations," the "Application of the Better Rule of Law," continue to adhere to substantivism.⁴⁷

43. See Juenger, *supra* note 38, at 2-3.

44. See Leflar, *supra* note 11. For a study of other substantive perspectives on selecting laws see Patrick J. Borchers, *Conflicts Pragmatism* 56 ALB. L. REV. 883, 900-902 (1993).

45. See generally, Friedrich K. Juenger, *American Conflicts Scholarship And The New Law Merchant*, 28 VAND. J. TRANSNAT'L L. 487 (1995); Arthur Taylor Van Mehren, *Choice of Law And The Problem Of Justice*, 41 LAW & CONTEMP. PROBS. 27 (1977); Gene R. Shreve, *Teaching Conflicts, Improving The Odds*, 90 MICH. L. REV. 1672 (1992); Aaron D. Twerski, *Enlightened Territorialism and Professor Cavers - The Pennsylvania Method*, 9 DUQ. L. REV. 373 (1971) [hereinafter *Enlightened Territorialism*].

46. Currie, *SELECTED ESSAYS*, *supra* note 34.

47. Leflar, *supra* note 11, at 295-304; see also, Lea Brilmayer, *CONFLICT OF LAWS* 16-17 (2nd ed. 1995); Friedrich K. Juenger, *A Page of History*, 35 MERCER L. REV. 419, 427 (1983).

The fourth significant theme is the protection of party expectations.⁴⁸ This policy ideal has long been important as a basic element of a fair legal order. Often its import is at a subliminal level, as statements about the parties' reasonable expectations mask the normative judgments a court believes the parties ought to expect.⁴⁹ Where parties actually and reasonably rely on a law, the equitable nature of party expectations promotes giving one the benefit and holding the other to the burden of the law.⁵⁰

It is evident that the Anglo-American choice of law playing field is replete with underlying and competing canons. Governments recalibrate policies as supremacy fluctuates over rules versus approaches, positivism versus realism, mechanical jurisdiction-selection versus consequential interest analysis and multilateralism versus unilateralism.⁵¹ Within these shifting battlegrounds, alternative jurisprudential policy considerations have come to the forefront. The following sections of this Article, which consider and evaluate the Anglo-American revolution in tort choice of law, seek to reflect on optimal desiderata

48. Weintraub, *supra* note 19, has submitted that this factor is less significant in tort than in contract cases. Litigants rarely anticipate the imposition of liability when they commit unintentional torts and fail to give advance consideration to the legal consequences of their conduct. *But see* Max Rheinstein, *The Place Of Wrong: A Study In The Method Of Case Law*, 19 TULANE L. REV. 4 (1944); Twerski, *Enlightened Territorialism*, *supra* note 45.

49. *See, e.g.*, *Intercontinental Hotels Corp. v. Golden*, 203 N.E.2d 210, 254 (N.Y. 1964); *Bernkrant v. Fowler*, 360 P.2d 906, 910 (Cal. 1971) (where Nevada residents enter into an agreement, the agreement is subject to the Nevada statute of limitations, even after one of the parties to the agreement moves to California.); *People v. One 1953 Ford Victoria*, 311 P.2d 480 (Cal. 1957).

50. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(d) and Comment (1971); Moffatt Hancock, *Choice of Law Policies In Multiple Contract Cases*, 5 U. TORONTO L.J. 133, 135, 137-40 (1943); Terry S. Kogan, *Toward A Jurisprudence Of Choice Of Law: The Priority Of Fairness Over Comity*, 62 N.Y.U. L. REV. 651 (1987); Gary J. Simson, *Plotting The Next Revolution In Choice Of Law: A Proposed Approach*, 24 CORNELL INT'L L.J. 279, 291-94 (1991); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 338-40 (1990).

51. *See* Aaron Twerski, *Neumeier v. Kuehner: Where Are The Emperor's Clothes?*, 1 HOFSTRA L. REV. 104, 105 (1973) [hereinafter *Emperor's Clothes*] where he states:

it will be necessary to read the signals the leading courts have been giving us the past few years as to the direction they wish to go in choice-of-law and attempt to formulate a principled, predictive choice of law methodology based on the decisional path they have been forging. The choice cannot be between *ad hoc* decision-making and unprincipled rules. We cannot abandon this most challenging area of the law to either the romanticists or the technicians.

between certainty, uniformity, concern with precedent (*stare decisis*), simplicity and ease of application, and flexibility.⁵² Certainty and uniformity arguably prevent undue *ad hoc* judicial discretion in cases where neither litigants nor their advisors can find a secure foothold. A concern with precedent and a desire to restrict change arises here, based on the fear that an identifiable authority would need to alter existing law. The approach would facilitate the legal practitioner's task of advising her client, and it has the virtues of pragmatism and simplicity, although it may lead to outcomes that could shock the conscience.⁵³ Alternatively, a totally flexible approach (interest analysis) might prevent these offensive results, but at the risk of losing uniformity and certainty.⁵⁴ Presumptively, there is also an added cost factor for the aggrieved litigants.

The following four sections of this Article explore tort choice of law principles within an introductory kaleidoscope of jurisprudential themes. Part I sequentially considers the American reorientation within a historical context, and distills shifting alternative policy desiderata. This Article submits that the revolution has only increased obfuscation in an area characterized more by mud than by crystal.

Part II puts interest analysis ideology on trial and finds it guilty as charged. It also briefly examines government interest analysis as a panacea for the ills of English choice of law difficulties. The section ultimately rejects the proposition as unworkable by itself for multistate litigation.

In Part III, there is a comparative extirpation of extant choice of law provisions at a European and Commonwealth level. The section examines recent and significant developments in Australian and Canadian conflicts law that relate to tort choice of law. These jurisdictions have adopted important policy shifts toward multilateralism and rigid jurisdictional rule selection, and the section explores reasons for this apostastic change in mindset. This section also draws parallels to the recent English revolutions in common law and statutory legislation. The section sets these developments in their historical contexts and outlines the vacillating policy desiderata.

Part IV submits that many of the English reforms are ill conceived, suffer from confused legislative drafting, and are unnecessary. A paradox arises here with the possibility of similar replication of the escapes from Bealian conceptualism of *renvoi*, characterization and public policy.⁵⁵ The section presents epigrammatic scenarios that mirror the solipsistic development of earlier American tautological devices to counteract the rigors of the First Restatement.

52. See generally, J.J. Fawcett, *Policy Considerations In Tort Choice Of Law*, 47 M.L.R. 650 (1984).

53. *McElroy*, 1949 S.C. 110. In *McElroy*, the rigid application of double actionability, with no appraisal of the true factual vortex of the dispute, egregiously precluded all valid claims except for solatium damages. *McElroy*, 1949 S.C. 110.

54. See *infra* pp. 896-901.

55. For a discussion regarding reclassification of tort issues, see *supra* note 29.

Ultimately, the aim of the concluding section, in similar vein to Tribonian's slave, is to clean up the detritus from fallen idols and to tidy up important topics for future revisitation.

II. THE AMERICAN REVOLUTION

A. Bealian Deontological Reasoning and the First Restatement

Beale's theory of vested rights rested upon a set of territorial assumptions about the proper geographical scope of a state's authority. Each state was said to have exclusive authority over its own territory, and was thought to be utterly without power to property or events in other states . . . [T]he answer provided by the First Restatement was that the forum did not really enforce the first state's laws, as such, but only recognised the rights that were created by those laws. If certain relevant activities occurred in the first state, then rights would rest under its laws and these rights would acquire an extra-territorial effect – a claim for recognition in the courts of another state - that the laws themselves would not have.⁵⁶

Until the mid-twentieth century, the general tort choice of law rule was that the law of the place where the tort was committed was applicable throughout the United States.⁵⁷ This beguiling simplicity ended with the advent of the American revolution in choice of law.⁵⁸ By the end of the century, states had adopted a variety of approaches, including: government interest analysis; the Second Restatement of the Conflict of Laws; Leflar's choice influencing considerations; a comparative impairment approach; and, in some cases, states affect a combination of two or more of these policy choices.⁵⁹ A veritable Hobson's choice applies for the lawyer, judge, and litigant who must choose between a potpourri of competing themes and policy indicators. The historical framework behind this fundamentally altered landscape presents an illuminating insight into the major theoretical developments of private international law over the last few decades.

56. Brilmayer, *Rights, Fairness and Choice of Law*, *supra* note 25, at 1281.

57. *See generally* GOODRICH, *supra* note 14.

58. NORTH & FAWCETT, *supra* note 36, at 606-07.

59. *See generally* Symeon C. Symeonides, *Choice Of Law In The American Courts In 1997*, 46 AM. J. COMP. L. 233 (1998).

All courts in the United States purported to follow the First Restatement for several generations after its inception in 1934.⁶⁰ The First Restatement's multilateralist approach promulgated and prescribed a connection aspect for each area of substantive law. In tort, for instance, the critical determinant was the place of injury. Joseph Beale, the reporter for the First Restatement of Conflicts, adopted the vested rights theory⁶¹ of choice of law and believed that the only law applicable to a transaction was that of the place of the liability-creating event.⁶² In principle, then, the state in which the final formation of a legal relationship occurred had legislative jurisdiction to attach legal consequences to that relationship.⁶³ Pragmatism embodies this approach. To some, the resulting system was one of mechanical jurisprudence that promoted rigid and uniform jurisdiction-selecting rules to govern choice of law issues, the place of injury for tort and the place of contracting for contract.⁶⁴ In jurisprudential policy terms, proponents advanced the interests of certainty, ease of application, simplicity for legal advisors, and the systemic discouragement of forum shopping as the Utopian prescription.⁶⁵

Critics of Beale's structured conceptual edifice quickly emerged from the woodwork. Their main contention was that a set of blind jurisdiction-selection rules, without recourse to any deductive syllogism or outcome efficacy, was inapposite to a legitimate resolution of multistate transaction disputes. On occasion, the courts used a judicial sleight of hand to avoid the frustrations of uniform multilateralist principles and their consequential and unpalatable results via the mechanism of characterization, renvoi, and public policy escape devices.⁶⁶ Cook, an influential early opponent of Bealian deontological reasoning, suggested

60. Posnak, *supra* note 19, at 682.

61. JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935); *see also*, JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC (7th ed. 1872); *see generally*, Harold L. Korn, *The Choice Of Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 802-20 (1983).

62. *See* Brilmayer, *supra* note 25; Patrick J. Borchers, *Conflicts Pragmatism*, 56 ALB. L. REV. 883 (1993).

63. *J. Loucks v. Standard Oil Co.*, 120 N.E. 198, 201 (N.Y. 1918). Note that Cardozo describes the vested rights doctrine in the following cogent manner:

A foreign statute is not law in this state, but it gives rise to an obligation, which, if transitory, 'follows the person and may be enforced wherever the person may be found' . . . 'No law can exist as such except the law of the land; but . . . it is a principle of every civilized law that vested rights shall be protected' . . . The plaintiff owns something, and we help him to get it. *Id.*

64. Borchers, *supra* note 62, at 896-98.

65. *Id.*; *see also* Juenger, *supra* note 38, at 2.

66. *See* discussion *supra* note 29.

that the conception of American conflicts law as uniform, mechanical, and certain in application ignores how American courts actually function.⁶⁷ He also attacked the related notions that choice of law was a matter of clarifying largely self-evident, immutable premises, and that courts must and do adhere to the major premises in arriving at their conclusions. Lorenzen⁶⁸ and Yntema,⁶⁹ legal realists and Cook's followers, asserted that Beale's system was entirely predicated on fictional assumptions. Another realist and pupil of Beale, David Cavers,⁷⁰ wrote a leading article in which he confessed being skeptical about the viability of deductive methodologies.⁷¹ Cavers delivered a stinging criticism, but he did not present an alternative system. In fact, the inauguration of the revolution in choice of law did not occur until the 1950s, largely as a result of Professor Brainerd Currie's writings.⁷²

B. Government Interest Analysis: The Emergence of Unilateralism in Modern American Conflicts Law

Currie stressed that it was inherently unsound to choose between competing laws without reference to the specific content of these laws.⁷³ He pointed out that the relationship between a state's contacts with a dispute and the

67. See Walter Wheeler Cook, *The Logical and Legal Bases of The Conflict of Law*, 33 YALE L.J. 457 (1924).

68. See ERNEST G. LORENZEN, *SELECTED ARTICLES ON THE CONFLICT OF LAW* (1947).

69. See Hessel E. Yntema, *The Hornbook Method and The Conflict of Laws*, 37 YALE L.J. 468 (1928).

70. See David F. Cavers, *A Critique of The Choice of Law Problem*, 47 HARV. L. REV. 173 (1933). Cavers strongly criticized the "jurisdiction-selecting" result-blind essence of Beale's ideology:

The court must blind itself to the content of the law to which its rule or principle of selection points and to the result which that law may work in the case before it. The conflicts rule having pointed out the jurisdiction in which the appropriate law may be found, judicial scrutiny of that law, except for the purpose of its application, is henceforth proscribed. *Id.* at 180.

71. See BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 68 (1928). Cardozo was also critical: "[W]hen I view the subject as a whole, I find logic to have been more remorseless here, more blind to final causes, than it has been in other fields. Very likely it has been too remorseless." *Id.*

72. Currie, *Notes on Methods*, *supra* note 34.

73. See CURRIE, *SELECTED ESSAYS*, *supra* note 34, at 132-33, 159, 181, 582 (1963); Hessel Yntema, *The Objectives of Private International Law*, 345 CAN. B. REV. 721, 727 (1957).

policies behind the law are critical to a choice of law decision.⁷⁴ For Currie, the *eminence grisé* of his government interest analysis ideology was that when choosing between competing laws, courts should account for the legal policies and the relevant factual scenario.⁷⁵ Whereas the *lex loci delicti* theory is a breed

74. Brainerd Currie, *The Constitution and The Choice of Law: Governmental Interests and The Judicial Function*, 26 U. CHI. L. REV. 9, 9-10 (1958); see also Brainerd Currie, *Married Women's Contracts: A Study In Conflict Of Laws Methods*, 25 U. CHI. L. REV. 227 (1958); see generally Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in The Conflict of Laws*, 10 STAN. L. REV. 205. (1958). The following statement cogently represents Currie's ideology:

[T]he court should first of all determine the governmental policy . . . which is expressed by the law of the forum. The court should then inquire whether the relationship of the forum state to the case at bar - that is, to the parties, to the transaction, to the subject-matter, to the litigation - is such as to bring the case within the scope of the state's governmental concern, and to provide a legitimate basis for the assertion that the state has an interest in the application of its policy in this instance.

75. Currie, *supra* note 34, at 178 where he articulates 5 governing principles:

1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.
2. When it is suggested that the law of a foreign state should furnish the rule of decision, the court should first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.
3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.
4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.
5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the

of multilateralism, Currie's interest analysis theory represents unilateralism. Essentially, interest analysis requires the measurement of a law's applicability through legal design (*e.g.*, whether the law is appropriate for the case), rather than through jurisdiction-selecting rules. In practice, moreover, the parties' domiciles tend to generate the most interest in terms of the contact or geographical feature of an action. Hence, interest analysis is commonly synonymous with a personal law approach, in contrast to the *lex loci delicti* theory that is more territorial.

The crux of interest analysis requires the court to ascertain the content of the different competing laws in a choice of law case. It addresses underlying legal purposes and challenges the court to decide whether each state has a legitimate interest in giving effect to its purpose on those particular facts.⁷⁶ Currie insisted that, because "law is an instrument of social control," states could extract legal rules into single statements and policies.⁷⁷ Under this legal reasoning, Currie began to imagine the "existence of anthropomorphized states with sentient wants, desires and human emotions such as selfishness and altruism."⁷⁸

A significant feature of Currie's work is his bifurcated division of government interest analysis into cases involving true versus false conflicts.⁷⁹ In a scenario where only one state is truly interested in applying its law, there is a false conflict and the state's law is appropriately applicable.⁸⁰ On the other hand, a true conflict arises in situations where two or more states have a legitimate interest in

application of its contrary policy, and, *a fortiori*, it should apply the law of the forum if the foreign state has no such interest.

Id.

76. See NORTH & FAWCETT, *supra* note 36, at 23-25.

77. CURRIE, *SELECTED ESSAYS*, *supra* note 34.

78. *Id.* at 89-94.

79. See Harold G. Maier, *Finding The Trees In Spite Of The Metaphorist: The Problem Of State Interests In Choice Of Law*, 56 ALB. L. REV. 753, 766 (1993) where he states that interest analysis (self-interest) encourages choice of law decisions having two characteristics:

First, the result reached by the forum court must not adversely affect the interstate or international systems; second, the result must not be one that would disadvantage the forum state if, in a later mirror image case, some foreign forum arrived at a result similar to the one reached by the forum in the case at bar. Once both these tests are met, the issue of governmental interests is resolved and the forum state may select as it wishes within these two parameters.

80. For an interesting diagrammatic exposition of the paradigm "false conflict" case, that of *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963), discussed *infra* at pp. 885-87; see William M. Richman, *Diagramming Conflicts: A Graphic Understanding Of Interest Analysis* 43 OHIO ST. L.J. 317, 327 (1982). Richman demonstrates that *Babcock* is fundamentally a "false conflict" case, as policies underlying the competing states substantive tort rules referred to New York contacts.

applying their respective legal rules. In these situations, courts must weigh the strength of the respective interests before determining their applicability.⁸¹ When faced with a true conflicts case, Currie⁸² advocated for the application of the *lex fori* theory,⁸³ but his contemporary followers emphasize⁸⁴ that, in numerous instances, courts continue to weigh interests and resile from forum preference.⁸⁵ A third situation, the “unprovided-for” case,⁸⁶ arises when a conflict in outcome results when neither state has a primordial interest in the application of its laws. Consider:

The classic ‘no interest’ case is one in which the plaintiff’s state has a law favourable to the defendant and the defendant’s state has a law favourable to the plaintiff . . . [T]he plaintiff’s state has no interest in protecting the defendant who comes from another state and the defendant’s state has no reason to give the plaintiff more compensation than he would get under the law of his own state.⁸⁷

Currie’s ideological attempts to cure the difficulties originating from the “true conflict” and the “unprovided-for” case incorporated a forum preference treatment regime.⁸⁸ When an overarching conflict arises or a state remains apathetic regarding choice of law, Currie believed that the law of the forum should prevail.⁸⁹ He strongly believed that the *lexi fori* had a putative claim to

81. See Richman, *supra* note 80 at 321 n.21 for a pictorial representation of the true conflict in *Bernhard v. Harrah’s Club*, 546 P.2d 719 (1976), discussed *infra* at p. 894.

82. Brainard C. Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1242-43 (1963); WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS, ch. 6. (1971).

83. See Juenger, *supra* note 7, at 10 where he states that the principal feature of Currie’s approach involves the primacy attached to forum law. Accordingly, courts can apply local law even when there is no forum interest to vindicate. Courts are required to analyze foreign policies and interests only if the parties raise the foreign law issue. But even then, analysis begins at home and is likely to end where it began: if the forum has no ‘legitimate interest,’ it probably cannot take jurisdiction in the first place.”

84. See *e.g.*, Weinberg, *supra* note 19; Weintraub, *supra* note 19.

85. See, *e.g.*, *People v. One 1953 Ford Victoria*, 311 P.2d 480 (Cal. 1957); *Offshore Rental Co. v. Continental Oil Co.*, 583 P.2d 721 (Cal. 1978); *Gordon v. Parker*, 83 F. Supp. 40 (D. Mass. 1949); *Bigelow v. Halloran*, 313 N.W.2d 10 (Minn. 1981).

86. See CURRIE, SELECTED ESSAYS, *supra* note 34, at 152-156.

87. Russell J. Weintraub, *The Future of Choice of Law for Torts: What Principles Should Be Preferred?*, 41 LAW & CONTEMP. PROBS. 146, 153 (1977).

88. Currie, *Notes On Methods*, *supra* note 34.

89. See Richman, *supra* note 80, at 323, n.29, where he illustrates the case of *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972), as a famous example of the unprovided-for contradictory scenario.

application because “normally, even in cases involving foreign elements, the courts should be expected, as a matter of course to apply the rules of decision found in the law of the forum.”⁹⁰ Subsequent critics of Currie’s brand of unilateralism view this forum preference articulation as abandoning the internationalism of private international law.⁹¹

Interest analysis philosophy implicates a strikingly different set of jurisdictional policy considerations than does multilateralism under the First Restatement. First, litigants in a multistate tort case may be able to select a court from a disparate group of impacted states, including the state where the accident occurred, the home state, and the claimant’s domiciliary state. Given these options, well-advised plaintiffs would sue in the state with the most favorable rules. The underlying expectation, typically well-founded in jurisdictions advocating interest analysis, is that the selected forum law should govern.⁹²

Second, the canon of interest analysis promotes extreme court flexibility, *ad hoc* decision-making, and particularistic judicial intuition.⁹³ The incantation of interests and policy effectuation could support favorable result-orientation, often allowing for plaintiff loss-recovery. The subsequent occurrence is a special brand of casuistic “khadi-justiz” (*ad hoc* decisions deduced from mystical references to interests) that stands in fundamental conflict with multiculturalism’s uniformity and ease of application.⁹⁴ Unilateralism arguably allows courts to avoid decisions that shock our sense of judicial fairness, but at the perceptible expense of uncertainty, failure to develop *stare decisis* principles, and consequential overall cost to litigants.

C. The Watershed Case of *Babcock v. Jackson* and Subsequent Vacillation in New York Choice of Law Ideology

Government interest analysis obtained judicial recognition and an important foothold in the New York Court of Appeals landmark decision in

90. Currie, *Notes On Methods*, *supra* note 34.

91. NORTH & FAWCETT, *supra* note 36, at 25.

92. Herma Hill Kay, an interest analyst, has distanced himself from uncritical recourse to forum law. Herma Hill Kay, *The Use of Comparative Impairment To Resolve True Conflicts: An Evaluation Of The California Experience* 68 CAL. L. REV. 577, 606, 613-14 (1980).

93. On the problems courts encounter by adoption of *ad hoc* methodology, see Paul Heinrich Neuhaus, *Legal Certainty Versus Equity In The Conflict Of Laws*, 28 LAW & CONTEMP. PROBS. 795, 802 (1963); Yvon Loussouarn, COURS GENERAL DE DROIT INTERNATIONAL PRIVE 139 (1973); HAGUE RECUEIL 271, 338-42, 1973; Kegel, *The Crisis Of Conflict Of Laws*, 112 HAGUE RECUEIL 180, 180-207 (1964).

94. See generally Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459; Lea Brilmayer, *Interest Analysis and The Myth Of Legislative Intent*, 78 MICH. L. REV. 392 (1980).

Babcock v. Jackson.⁹⁵ It represented a clean break from tradition and, as such, is probably the most important choice of law decision an American court has rendered.⁹⁶ It set the tone for the fundamental reorientation of conflicts law that followed. The decision proved to be a watershed event in the American choice of law revolution because of its timing, the importance of the court delivering judgment, and its receptiveness among conflicts academicians.⁹⁷ The subsequent circumnavigation, however, of tort choice of law principles in New York proved much less uncharted because of significant oscillations and confusing analyses.

In *Babcock*, the determinative law was that of the state that had the most dominant contacts with the matter in dispute; the decision thus marked a radical departure from the uniform incantation of the *lex loci delicti* as the governing rule. The plaintiff in *Babcock* was a passenger in the defendant's car who suffered severe injuries in a car accident in Ontario. Both the plaintiff and the defendant were New York residents, and the motor vehicle was registered and garaged there. Under Ontario law (the *lex loci delicti*), a guest statute would have prevented recovery entirely. Conversely, New York (the *lex fori*) law allowed recovery upon a showing of ordinary negligence. The New York court held that, in an action for personal injury, the applicable law was that of the forum where the injury occurred. This approach represented the extant rule in the United States at that time and determined each party's rights and liabilities. The exception to the rule was where another state had a more significant interest in either the event or the parties that warranted the application of that state's laws.⁹⁸

In *Babcock*, New York appeared to have more invested in the litigation than Ontario. The decision involved the court's candid evaluation of the merits of the competing rules, the consideration of substantive values, and the vindication of reasonable expectations. The only way for the court to avoid issuing an unjust and anachronistic loss allocation was to refuse to apply the law of the place of the injury. Fair allocation was at the forefront of loss allocation.⁹⁹

95. 191 N.E.2d 279 (N.Y. 1963). See generally David F. Cavers et al., *Comments On Babcock v. Jackson, A Recent Development In Conflict Of Laws*, 63 COLUM. L. REV. 1212 (1963).

96. In 1993, many thought the case merited another symposium. See David D. Siegel, et al., *Celebrating The 30th Anniversary Of Babcock v. Jackson*, 54 ALB. L. REV. 693 (1993).

97. See generally Korn, *supra* note 61.

98. The court moved away from the *lex loci delicti* rule for deciding cases "upon generalities which do not state the practical considerations involved." *Babcock*, 191 N.E.2d at 281 (quoting Yntema, *supra* note 39, at 468, 482-83). Courts applied a center of gravity perspective to torts, derived from the contractual case of *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954).

99. *Babcock*, 191 N.E.2d at 283 (citing *Swift & Co. v. Bankers Trust Co.*, 19 N.E.2d 992, 995 (N.Y. 1939)).

Since *Babcock*, New York courts have indulged in bewildering fluctuations of approach, palpably inconsistent decisions,¹⁰⁰ and confusing ideological policy choices. They have alternatively embraced unilateralism, multilateralism, or a mixture of the two. For a brief period, the courts employed pure government analysis, but New York more recently reverted to rules “seeking to extrapolate values and goals from prior decisions and cast them into the form of rules”¹⁰¹ in *Neumeier v. Kuehner*.¹⁰²

*Neumeier*¹⁰³ involved a different factual permutation than *Babcock*. The defendant was a New York resident, the claimant was from Ontario, and the accident occurred in Ontario. Since *Babcock*, Ontario had modified—but not repealed—its guest-host statute. The court determined that in guest-host cases, the *lex loci delicti* should govern, unless the parties have a common domicile in a

100. See Maurice Rosenberg, *Two Views on Kell v. Henderson: An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 460 (“A New York lawyer with a guest statute case has more need of an oija board today than a copy of Shepard’s citations.”). Compare *Dym v. Gordon*, 209 N.E.2d 792, 793 (N.Y. 1965) overruled by *Tooker v. Lopez*, 249 N.E.2d 394 (N.Y. 1969) (court adopted guest statute of the accident state irrespective of the New York domicile of both claimant and defendant), with *Macey v. Rozbicki*, 221 N.E.2d 380, 381 (N.Y. 1966) (court adverted to *Babcock* and rejected the application of the *locus delicti*’s guest statute); *Miller v. Miller*, 237 N.E.2d 877 (N.Y. 1968), with *Kell v. Henderson*, 270 N.Y.S.2d 552 (App. Div. 1966).

101. Peter Hay & Robert B. Ellis, *Bridging The Gap Between Rules and Approaches in Tort choice of Law in The United States: A Survey of Current Case Law*, 27 INT’L LAW. 369, 370 (1993); *Reich v. Purcell*, 432 P.2d 727, 730 (Cal. 1967); *Hurtado v. Superior Court*, 522 P.2d 666, 671 (Cal. 1974); *Bernhard v. Harrah’s Club*, 546 P.2d 719, 723-24 (Cal. 1976); see William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963), discussed *infra* at p. 894. See also *Offshore Rental Co. v. Continental Oil Co.*, 583 P.2d 721 (Cal. 1978).

102. *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972); see generally Twerski, *Emperor’s Clothes*, *supra* note 51.

103. For a recent application of the *Neumeier* rules in New York, see *Armstead v. National Railroad Passenger Corp.*, 954 F. Supp. 111 (S.D.N.Y. 1997). The claimant, a New York domiciliary, slipped and fell on ice in Virginia on property that belonged to a District of Columbia domiciliary. Virginia had an all-or-nothing contributory negligence rule, while New York had a comparative negligence rule. The defendant argued that the Virginia rule was a conduct-regulating rule, but the court rejected that argument. The court categorized the conflict as one between rules of loss-distribution, thus bringing it within the scope of the *Neumeier* rules and called for the application of the *lex loci delicti* subject to an escape. The court utilized the escape and applied New York law, citing New York’s obvious interest in enforcing its determination that its own domiciliary, whose own negligence is only partially responsible for the plaintiff’s injuries, should not go uncompensated. *Id.* at 112.

state other than the site of the accident. In these exceptional cases, the law of the common domicile would apply.¹⁰⁴

Since *Neumeier*, the New York courts have applied the decisional rules both more generally (beyond guest-host conflicts cases) and more specifically (to tort cases involving conflicting loss-allocation rules).¹⁰⁵ A notorious illustration of this extension is the case of *Schultz v. Boy Scouts of America, Inc.*¹⁰⁶ *Schultz* exemplifies the perfidious results that can occur from reliance on an inflexible jurisdiction-selection approach that is unable to respond to exceptional cases.¹⁰⁷ In *Schultz*, the claimants were residents of New Jersey, where their two children attended parochial school. A religious order, the Franciscan Brothers, incorporated in Ohio, hired and fired the parochial school teachers. The school sponsored a Boy Scout troop that the plaintiff's children joined. One of the boy's teachers served as a scoutmaster, and the teacher took the troop on a trip to a New York scout camp. While there, he sexually abused both of the plaintiff's children. The abuse continued upon the return to New Jersey, until one of the plaintiff's children committed suicide. Plaintiffs filed suit in New York against the religious order and the Boy Scouts, a New Jersey corporation.¹⁰⁸ The complaint alleged that both defendants were negligent in assigning the teacher-scout master to a position of trust with young boys because another Boy Scout camp had previously dismissed the same individual for similar improper conduct. Unlike New York or Ohio laws, New Jersey laws provided that the defendant charities were immune from liability. The New York court, quite remarkably, determined that New Jersey law applied.¹⁰⁹

The *Schultz* decision extended the impact of the *Neumeier* rules beyond guest-host statutes, which loss-allocating tort rules had virtually replaced at the time of the decision.¹¹⁰ New Jersey, as the place of incorporation, was more relevant than the Boy Scouts' organizational center in Texas. By applying the section of the *Neumeier* rules that required the adoption of the common domicile law, the court held that New Jersey's charitable immunity law applied to the Boy Scouts.¹¹¹ Further, by according significance to the escape clause in the *Neumeier* rules, the court held that the charitable immunity rule also protected the

104. *Cousins v. Instrument Flyers, Inc.*, 376 N.E. 2d 914, 915 (N.Y. 1978) (stating, in a brief opinion a few years after *Neumeier*, "the *lex loci delicti* remains the general rule in tort cases to be displaced only in extraordinary circumstances.").

105. *See Cooney v. Osgood Machinery, Inc.*, 612 N.E.2d 277 (N.Y. 1993).

106. 480 N.E.2d 679 (N.Y. 1985).

107. *See Butkera v. Hudson River Sloop "Clearwater," Inc.*, 693 A.2d 520 (N. J. Super. Ct. App. Div. 1997) for a contradictory case on a similar fact pattern.

108. *Schultz*, 480 N.E.2d at 680-81.

109. *Id.* at 686.

110. *Id.*

111. *Id.* at 685.

Franciscan Brothers, even though that corporation did not share a domicile with the plaintiffs and New York was the *locus delicti*.¹¹²

The outcome in *Schultz* is troubling because a no-liability result offends our sense of judicial fairness. The *Schultz* court could have avoided this result by interpreting tort rules, including and especially New York's no-immunity rule, as conduct regulations that fall within the legal purview of the forum where the conduct occurred. A faithful adoption of the *Neumeier* rules could have led to the application of New York law. Moreover, *Schultz* reveals the serious flaws that result from the rigid incantation of jurisdiction-selecting rules absent flexible recourse from prevailing orthodoxy in exceptional cases.¹¹³

Consequently, successive cases polluted *Babcock's* pragmatic ideals, so much so that contemporary analyses must reaffirm that judicial process is a search for justice. Three periods characterize New York choice of law. The First Restatement's multilateralism epitomizes the post-*Babcock* formalism of a rigid jurisdiction-selecting rule from the first period. The second period, from *Babcock* to *Neumeier*, was inherently pragmatic. The *Schultz* decision embodies the principles from the third period and advocates a return to formalism and natural law, a rule that the post-*Neumeier* generation follows.¹¹⁴ This progression has led some cynics to suggest that it is an overly conceptualistic and metaphysical throwback to the empty formalism of the "bad old days."¹¹⁵

D. Prevailing Choice of Law Approaches

The most widely adopted choice of law approach in the United States today is the American Law Institute's conceptual structure of the Second Restatement,¹¹⁶ under which a court determines the applicable law by referring to

112. *Id.* at 687.

113. See generally Gary Simson, *The Neumeier-Schultz Rules: How Logical A Next Stage In The Evolution Of The Law After Babcock?* 56 ALB. L. REV. 913 (1993).

114. See Posnak, *supra* note 19, at 706.

115. *Id.*

116. See Maier, *supra* note 79, at 764 (discussing the overriding importance of paying faithful attention to the systemic interests the Second Restatement of Conflict of Laws). Consider:

Probably the most important function of choice of law rules is to make the interstate and international systems work well. Choice of law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them. In formulating rules of choice of law, a state should have regard for the needs and policies of other states and of the community of states. Rules of choice of law formulated with regard for such needs and policies are likely to commend themselves to

a potpourri of factors. The Second Restatement purports to derive presumptive rules from the theory that the applicable law is the law of the state with the “most significant relationship.” The following sections of the Second Restatement illustrate the nature of the most significant relationship test:

Section 145. The General Principle (for torts).

- (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 (see below).
- (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.¹¹⁷

Courts evaluate these contracts according to their relative importance with respect to the particular issue:¹¹⁸

Section 6. Choice of Law Principles.

other states and to be adopted by these states. Adoption of the same choice of law rules by many states will further the needs of the interstate and international systems and likewise the values of certainty, predictability and uniformity of result.

117. See generally Robert A. Leflar, *The Torts Provisions Of The Restatement (Second)*, 72 COLUM. L. REV. 267 (1972) [hereinafter *Torts Provisions*]; Michael S. Finch, *Choice Of Law Problems In Florida Courts: A Retrospective On The Restatement (Second)*, 24 STETSON L. REV. 653 (1995); EUGENE F. SCHOLES, ET AL., CONFLICT OF LAWS §17.24-17.28 (3d ed. 2000).

118. For a recent application of the Restatement (Second) in relation to products liability, see *MacDonald v. General Motors Corp.*, 110 F.3d 337 (6th Cir. 1997)(decided under Tennessee’s conflicts law). See also *Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999) (where Maryland’s highest court elected to follow the Second Restatement in actions for multistate defamation caused by radio broadcasting and through the Internet).

- (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, the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 - (c) 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.¹¹⁹

The superficial attractiveness of this approach to choice of law results from its symbiotic intertwining of rule-selection and competing state interests analysis. It saves the conscience of both the multilateralist and the unilateralist; indeed, the approach is simultaneously jurisdiction-selecting and rule-selecting.¹²⁰ The Second Restatement effectively links these theories together in a bigamous union. The approach outlines specific rules and obviates any need to extrapolate true and false conflicts, but it still appeals to Currie's principles by referring to

119. See Willis L.M.Reese, II HAGUE RECUEIL 1, at 180 (1976) where, as the reporter of the Second Restatement, he asserts that the approach affects the development of clear and precise rules.

I believe that one ultimate goal, be it even so distant, should be the development of hard and fast rules of choice of law. I believe that in many instances these rules should be directed, at least initially, at a particular issue. And I believe that in the development of these rules consideration should be given to the basic objectives of choice of law, to the relevant local law rules of the potentially interested states and, of course, to the contacts of the parties and of the occurrence with these states.

120. See AMOS SHAPIRA, THE INTEREST APPROACH TO CHOICE OF LAW, 214 (1970).

“the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue.”¹²¹

The extensive list of relevant factors presents limitless indications a law reformer might use in evaluating the formulation of new rules. Numerous states¹²² have adopted this approach, and judicial intuitionism and willingness to set aside old rules in favor of newer, more equitable rules have contributed to its success. It is hardly surprising that the judiciary has rallied around this approach to resolve the inundation of choice of law problems. Neither is it surprising that the Second Restatement has had the most impact in the area of choice of law in tort, where the role of the law is more retrospective than prospective.

In one sense, the Second Restatement fulfills the optimal jurisprudential policy balance between certainty and ease of application, as set against flexibility. It requires a fresh examination of antiquated choice of law rules and facilitates an appraisal that is issue-orientated rather than concentrated on whole areas of law.

However, critics have faulted the Second Restatement approach because of its eclectic categorization of supposedly relevant factors.¹²³ Such an extensive list of factors obviously promulgates uncertainty. Critics deride the approach for being so general as to be useless and accuse choice of law opponents of including excessive possibilities for choice of law analysis without providing a corresponding explanation regarding the relevancy of the factors.¹²⁴ Critics thus submit, “the factors often point in different directions and carry in themselves no measure of their significance.”¹²⁵ To detractors, the Second Restatement flirts with both rule-selection and jurisdiction-selection at the same time, yet produces an ultimately superficial allure. Critics cannot deny, however, its substantial impact on the United States topographical legal map.¹²⁶

The same importance, although with a lesser state impact,¹²⁷ attaches to Professor Leflar’s¹²⁸ approach to choice of law factors, which recommends five

121. See Reese, *supra* note 119.

122. See Symeonides, *supra* note 59, at 266, where 21 states are listed as subscribing to the Restatement (Second). See also, Symeon C. Symeonides, *Choice Of Law In The American Courts In 1999: One More Year*, 48 AM. J. COMP. L. 144 (2000).

123. See generally, Kramer, *supra* note 50; see also William L. Reynolds, *The Silver Anniversary of the Second Conflicts Restatement*, 56 MD. L. REV. 1193 (1997).

124. Kramer, *supra* note 50, at 321.

125. David F. Cavers III HAGUE RECUEIL 75, at 145 (1975); see also, Symeonides, *The Need For A Third Conflicts Restatement (And a Proposal For Tort Conflicts)* 75 IND. L. REV. 437 (1999).

126. Reese, *supra* note 119.

127. Symeonides, *supra* note 59, at 266, where Symeonides stipulates that five states adopt the better law approach. These states are Arkansas, Minnesota, New Hampshire, Rhode Island and Wisconsin.

128. See Leflar, *Considerations*, *supra* note 11; ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW 277-279 (4th ed. 1986). For an assessment of Leflar’s work, see Robert L. Felix, *Symposium: Leflar on Conflicts*, 34 ARK. L. REV. 199 (1980).

choice-influencing considerations courts should use when resolving choice of law issues.¹²⁹ The first four considerations mirror the Second Restatement's relevant factors, but the fifth consideration is a novel departure that focuses on the "better rule of law."¹³⁰ Leflar argues that courts have almost always tacitly considered whether one of the competing laws is "anachronistic, behind the times" such that they could reasonably and candidly acknowledge that they prefer to apply the more "realistic practical modern" law to achieve justice in the individual case.¹³¹ The underlying theme here is substantivism; Leflar envisions that the guiding force in the judicial decision-making process is the quest to apply the most optimal and applicable substantive law.¹³² This theme incorporates the quiescent and sentient search for an innate justice in the chosen law. Overall, the theory reflects optimal policy considerations that are predicated on flexibility in achieving justice for individual litigants.

129. LEFLAR, *AMERICAN CONFLICTS LAW*, *supra* note 128, at 277-279. Leflar lists them as: (A) Predictability of result; (B) Maintenance of interstate and international order; (C) Simplification of the judicial task; (D) Advancement of the forum's governmental interests; and (E) Application of the better rule of law. See also LEFLAR, *supra* note 128, at 299 n.111, where he draws an interesting comparison with the language of Lord Reid in *Starkowski v. Attorney-General*, [1954] A.C. 155, 170 in dealing with a problem of legitimacy and successive marriages in different countries:

To my mind the best way of approaching this question is to consider the consequences of a decision in either sense. The circumstances are such that no decision can avoid creating some possible hard cases, but if a decision in one sense will on the whole lead to much more just and reasonable results, that appears to me to be a strong argument in its favor. *Id.*

130. Note that a number of academic commentators have broadly stipulated under the interest analysis umbrella that courts should be receptive to substantive considerations in certain kinds of cases. See Weinberg, *supra* note 19, at 626 (stressing the need for a general assimilation to ordinary judicial process in multistate cases); Robert A. Sedler, *Professor Juenger's Challenge To The Interest Analysis Approach To Choice Of Law: An Appreciation And A Response*, 23 U.C. DAVIS L. REV. 865, 886-887 (1990) (opining that he would resolve unprovided-for cases by use of a common policy among the states favoring recovery); RUSSELL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 360 (3d ed., 1986) (arguing that in both true conflict and unprovided-for cases he would favor claimants unless the rule is anachronistic or aberrational); and ARTHUR TAYLOR VON MEHREN & DONALD THEODORE TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON CONFLICT OF LAWS* 377, 394, 407-08 (1965) (advocating their preference for emerging over regressive or anachronistic rules).

131. LEFLAR, *supra* note 128, at 282.

132. See Symeonides, *supra* note 59, at 253-60, for decisions involving the application of a "Better-Law" perspective in New Hampshire, Rhode Island and Wisconsin.

According to critics, Leflar's theory, in practice, leads courts to believe that their own forum's rule of law is the most optimal choice.¹³³ Simson criticizes the application of the forum state's common law and argues that it is "behind the times" and apt to produce unjust and inherently illogical results.¹³⁴ Simson believes that if local common law is apt to produce unjust results, the logical response is not only to avoid using common law multistate cases, but to also overrule it altogether.¹³⁵ There may be confusion between reforming a state's substantive law and effecting the selection of an appropriate law to govern a multistate dispute. Judicial purview never enables a judge in one country to reformulate another country's law. Despite such criticism, however, Leflar's perspective remains the extant position in at least five states.¹³⁶

The comparative impairment theory has developed in the United States as an offshoot of Currie's interest analysis.¹³⁷ This analysis accepts Currie's interest analysis with its consequential identification of false conflicts, but it rejects the unilateral application of forum preference in true conflicts cases. Advocates of the comparative impairment theory believe that courts can reach satisfactory outcomes through the extrapolation of conflicting interests. Baxter advanced the theory in 1963,¹³⁸ and the Supreme Court of California subsequently endorsed it.¹³⁹

According to Baxter,¹⁴⁰ courts can use a principle of comparative impairment to replicate the likely outcome of multistate negotiations and "to subordinate, in the particular case, the external objective of the state whose internal objective will be least impaired in general scope and impact by

133. David F. Cavers, 49 TEX. L. REV. 211, 215 (1971); *but see* Friedrich Juenger, IV HAGUE RECUEIL 123, 253-318 (1985).

134. *See* Simson, *supra* note 50, at 296-97.

135. *Id.*

136. Reese, *supra* note 119.

137. Twerski, *Emperor's Clothes*, *supra* note 51.

138. *Id.* *See* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 9-10 (1963). He concludes that courts can resolve true conflicts by applying the law of the state that would more likely suffer domestic policy impairment if the other state's laws were applied. This approach, he argues, maximizes the likelihood that each state's law will be applied in the cases that are most important to it. *Id.*

139. *See* Bernhard v. Harrah's Club, 546 P.2d 719 (Cal. 1976); *Offshore Rental Co.*, 583 P.2d 721; Liew v. Official Receiver, 685 F.2d 1192 (Cal 1982).

140. *See* *Offshore Rental Co.*, 583 P.2d at 727 ("[T]he comparative impairment approach to the resolution of true conflicts attempts to determine the relative commitment of the respective states to the laws involved. The approach incorporates several factors for consideration: the history and current status of the states' laws; the function and purpose of those laws."). *See generally* Herma Hill Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L.R. 577 (1980); Peter North, I HAGUE RECUEIL 9, 38-40 (1980).

subordination in cases like the one at hand.”¹⁴¹ A state’s internal objective is the policy that led the state to enact domestic laws, while a state’s external objective is its desire to extend that law to multistate cases that implicate the state’s internal objective.¹⁴² In effect, Baxter concludes that courts should resolve true conflicts by applying the law of the state whose domestic policy would be more impaired if that state’s law were not applied.¹⁴³ This approach, Baxter stresses, maximizes the likelihood that courts will apply a particular state’s law when doing so is beneficial to that state.¹⁴⁴ This approach arguably counteracts the criticism levied against Currie’s mechanistic forum preference conceptual analysis. But comparative impairment, as an interest analysis device, is subject to many of the same objections that unilateralism encountered.

This Article initially stated that a bewildering chiaroscuro edifice of dominant greys and innumerable shades characterizes the landscape of American tort choice of law.¹⁴⁵ The resulting legal topographical map consists of confusing approaches, ideologies, and doctrines.¹⁴⁶ It is a patient that the United States Supreme Court has refused to cure.

E. The United States Supreme Court

141. Baxter, *supra* note 138, at 18.

142. *Id.* at 17-18.

143. *Id.* at 8-10.

144. Note that Professor Horowitz extended Baxter’s general proposition so that, for true conflicts, the applicable law would be that of the state that had the most intense interest in relation to the particular dispute. See Harold W. Horowitz, *The Law Of Choice In California - A Restatement*, 21 UCLA L. REV. 719, 755 (1974). For criticism, see Weintraub, *supra* note 87, at 146, 158, where he states that “unless supplemented by specific objectives criteria, ‘comparative impairment’ is unlikely to be a method that is cogent, feasible to administer, and predictable.” Professor Cavers’ approach involved the court in working out principles of preference meaning, in essence, detailed choice of law rules for “true conflict” situations. See David F. Cavers, *THE CHOICE OF LAW PROCESS* (1965); Cavers, *supra* note 125. The primary aim is to do justice between the interested parties, and from these equitable principles, it is anticipated more structured rules will develop as a consequence of judicial activity. See PETER NORTH, *ESSAYS IN PRIVATE INTERNATIONAL LAW* 122 (1993). For criticism on the basis of ignoring the importance of forum law, territorialist bias, and lack of appreciation for private interests, see SHAPIRA, *supra* note 120, at 221-224. In relation to interpretation of forum policy see ALBERT A. EHRENZWEIG, *CONFLICT OF LAWS* 311 (1962). See also Albert A. Ehrenzweig, *The Lex Fori-Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637, 643-645 (1960).

145. *Kulko*, 436 U.S. at 92.

146. See generally Symeonides, *supra* note 59, at 266.

The United States Supreme Court has refrained, despite cries in the wilderness from some academics,¹⁴⁷ from entering the vanguard of choice of law reform. Its preference is to relegate the issue to state courts. The plurality opinion in *Allstate Insurance Co. v. Hague* establishes the standard to which the current Supreme Court adheres.¹⁴⁸ In *Allstate*,¹⁴⁹ the Court steadfastly adhered to an analysis of interests as a means of testing the constitutionality of state conflicts rules and confirmed its preference for this choice of law approach.¹⁵⁰ The Supreme Court's implicit approval of interest analysis in *Hague* disregarded state court endorsements of Currie's ideological perspective.¹⁵¹

In *Hague*, the Court determined that a state must have a significant contact or an aggregation of contacts that create a state interest before the presiding court can apply that state's substantive law in a consistent and equitable way that comports with constitutional ideals.¹⁵² In short, the Supreme Court has avoided taking a leadership position in favor of letting state courts evaluate the merits and demerits of interest analysis and related jurisdictional policy implications.

III. INTEREST ANALYSIS ON TRIAL

147. See generally Linda Silberman, *Can The State of Minnesota Bind The Nation?: Federal Choice Of Law Constraints After Allstate Insurance Co v. Hague*, 10 HOFSTRA L. REV. 103, 109-10 (1981); James A. Martin, *The Constitution And Legislative Jurisdiction*, 10 HOFSTRA L. REV. 133, 147-48 (1981); Peter Hay, *Full Faith And Credit And Federalism In Choice Of Law*, 34 MERCER L. REV. 709, 727-29 (1981); Aaron Twerski, *On Territoriality And Sovereignty: System Shock And Constitutional Choice Of Law*, 10 HOFSTRA L. REV. 149, 168 (1981) [hereinafter *On Territoriality*]; Willis L. M. Reese, [*The Hague Case:*] *An Opportunity Lost*, 10 HOFSTRA L. REV. 195, 201-02 (1981); Peter Hay, *Judicial Jurisdiction And Choice Of Law: Constitutional Limitations*, 59 U. COLO. L. REV. 9, 22 (1988); See also Friedrich Juenger, *Supreme Court Intervention In Jurisdiction And Choice of Law: A Dismal Prospect*, 14 U.C. DAVIS L. REV. 907 (1981).

148. 449 U.S. 302 (1981). See also Symposium, *Supreme Court Intervention In Jurisdiction And Choice of Law: From Shafter to Allstate*, 14 U.C. DAVIS L. REV. 837 (1981); Symposium: *Conflict Of Laws Theory After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 1 (1981); Courtland H. Peterson, *A Response to the Hague Symposium*, 10 HOFSTRA L. REV. 973 (1982).

149. At issue was the question whether Minnesota courts could apply a Minnesota insurance law to a claim based on a policy held by Hague, a Wisconsin resident, who was killed in Wisconsin by a Wisconsin uninsured motorist.

150. *Hague*, 449 U.S. at 312-13.

151. *Id.*; see also John Hart Ely, *Choice Of Law And The State's Interest In Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981); Douglas Laycock, *Equal Citizens Of Equal And Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992).

152. *Hague*, 449 U.S. at 312-13. Note that the Court reiterated this basic standard in *Phillips Petroleum Co v. Shutts*, 472 U.S. 797, 818 (1985).

A. The Flawed Landscape Presented by Interest Analysis

[W]e were willing to sacrifice the certainty provided by the old rule for the more just, fair and practical result that may best be achieved by giving controlling effect to the law of the jurisdiction which has the greatest concern with, or interest in, the specific issue raised . . . in consequence . . . our decisions . . . have, it must be acknowledged, lacked consistency. This stemmed, in part, from the circumstance that it is frequently difficult to discover the purposes or policies [and] even more difficult . . . to determine on some principled basis which should be given effect at the expense of the others.

There is . . . no reason why choice-of-law rules, more narrow than those previously devised, should not be successfully developed, in order to assure a greater degree of predictability and uniformity¹⁵³

Critics have levelled a number of charges against interest analysis,¹⁵⁴ and this section adds to the list. The prevailing criticism of the ideological doctrine centers on concerns over whether it is possible to consistently determine the intended reach of substantive legislative rules and whether the attempt to ascertain competing state policies is, in reality, a wasteful exercise of sheer sophistry. In response, Maier states that “legislative intent comes as close as possible to an analogue to the self-perception of a single sentient being.”¹⁵⁵

Another concern relates to whether unilateralism’s inherent flexibility addresses the necessary structure and stability in a choice of law approach.¹⁵⁶ Brilmayer¹⁵⁷ and Juenger,¹⁵⁸ as well as other leading commentators, have questioned whether interest analysis is simply an open door to local favoritism and forum shopping in choice of law.¹⁵⁹ A recurring theme here is that the

153. *Neumeier v. Kuehner*, 286 N.E.2d 454, 457 (N.Y. 1972).

154. See generally Lea Brilmayer, *Interest Analysis And The Myth Of Legislative Intent*, *supra* note 94; Ely, *supra* note 151; Korn, *supra* note 61; Willis L.M. Reese, *Choice Of Law: Rules Or Approach*, 57 CORNELL L. REV. 315 (1972); Twerski, *Enlightened Territorialism*, *supra* note 45.

155. Maier, *supra* note 79, at 759.

156. Juenger has stated that: “Neither litigants nor the administration of justice stand to gain if state supreme courts adopt Ambrose Bierce’s definition of an appeal, i.e., putting ‘the dice into the box for another throw.’” Juenger, *supra* note 7, at 42.

157. Brilmayer, *Interest Analysis And The Myth Of Legislative Intent*, *supra* note 94.

158. Juenger, *supra* note 7.

159. But see Posnak, *Choice Of Law: Interest Analysis and Its New Critics*, 36 AM. J. COMP. L. 681 (1988); Robert A. Sedler, *Interest Analysis And Forum Preference in the Conflict of Laws: A Response To The New Critics*, 34 MERCER L. REV. 593 (1983);

fundamental assumption of government interest analysis, the articulation that choice of law conclusions can effectively have their derivation from extrapolating policies behind substantive rules, falls by the wayside when subjected to strict scrutiny. These critics stigmatize the ideology as a mere adoption of anti-rule homilies.

According to Rosenberg, for instance, the three dimensional chess games of interest analysis¹⁶⁰ may suit scholars bent on flexing their jurisprudential muscles, but they are too complex for busy courts and counsel and ill suited to a system based on precedent.¹⁶¹ Other academicians share Rosenberg's condemnation of *ad hoc* approaches as ineffectual substitutes for effective rule-selection.¹⁶² In this sense, critics stigmatize interest analysis as a countersystem of abstract normative preferences, built on an edifice of quicksand, by which judges uncertainly apply their special brand of "khadir-justiz." This particularistic judicial intuitionism contrasts with the effective, uniform and certain approach of multilateralism, which propagates *stare decisis* and offers an enticing ease of application.¹⁶³

The tale of American choice of law principles has become the story of a thousand and one inconsistent tort cases. Further, contemporary critics can level new complaints against interest analysis, especially with respect to its limited and parochial ambit. For the interest analyst, the primary discussion is constrained to the evaluation of interstate guest-host statutes and predicated upon the paradigm road traffic accident. In practice, as stated in the introductory section, modern torts are more sophisticated in nature, and the issue of proximity in a particular tort now addresses multistate transaction concerns. A case where interest analysis is connected to economic torts involving disparate elements in numerous jurisdictions provides one illustration.

Because of its parochialism, limited ambit of influence, and inappropriateness to multistate transactions straddling different jurisdictions, this section rejects interest analysis theory as a solution to the current ills of English choice of law principles. In reaching similar conclusions, scholars have asserted "interest analysis has done a disservice to federalism and internationalism by relentlessly pushing a viewpoint which inevitably leads to conflicts chauvinism,

Weintraub, *supra* note 19; Weinberg, *supra* note 19 (arguing conflicting academic views defending Currie).

160. Maurice Rosenberg, *Comments On Reich v. Purcell*, 15 UCLA L. REV. 551, 641, 644 (1968).

161. See Maurice Rosenberg, *Two Views On Kell v. Henderson, An Opinion For The New York Court of Appeals*, 67 COLUM. L. REV. 459, 464 (1967); see also, Von Mehren, *supra* note 42, at 932 (doubting whether variations among the laws of different states inevitably reflect genuine policy disagreements).

162. See Silberman, *supra* note 147, at 109-10; Reese, *supra* note 147, at 201-02; Hay, *Full Faith and Credit and Federalism in Choice of Law*, *supra* note 147, at 722, 727-29; Twerski, *On Territoriality*, *supra* note 147, at 168.

163. See generally Kramer, *supra* note 50, at 321.

or more accurately, tribalism in view of the emphasis on the nation being a group of people.”¹⁶⁴ In summary, it seems that the interest analysis ship has now sailed into choppy waters and has been cast adrift on the hard rocks of flawed jurisprudential policy considerations. Persistent problems with interest analysis include its facilitation of parochial approaches, its promulgation of the domiciliary claimant’s interests, its employment of a talismanic and cumbersome methodology, and its overarching metanarrative that overstates the existence of governmental interests in the private sphere.¹⁶⁵ It is instructive to deconstruct these perceived failings of the interest analysis doctrine and to recalibrate essential jurisprudential policy directives.

1. The *Brutum Fulmen* Search for Interests and Policies

Currie purported to ascertain the scope of substantive rules through their underlying policies and through the enunciation of legislative intent. Such policies do not come with self-branded labels trumpeting their spatial dimensions; nor, for that matter, is construction of intent a basic *a priori* process. In reality, many statutes are silent with respect to legislative interests, and many states do not even publish legislative histories.¹⁶⁶ Currie deduced principles of inference that were products of his own normative beliefs about how far certain policies ought to reach. To the non-believer, it seems Currie and others drew inferences from seemingly silent statutes in a manner that resembles veritable will-o-the-wisp card tricks, where a sleight of hand blurs the affected process and outcome.

Moreover, a court usually employs a more scrutinizing analysis when evaluating another state’s legal interest than when evaluating its own laws. Beyond the hypothecate of a facially silent statute, it may well be that a particular statute reflects a fudged compromise and lacks any discernible state policy. It is often the case that legislatures enact almost identical statutory provisions for wholly different reasons. In reality, as Rosenberg has cogently opined, it is often impossible to determine the intended reach of substantive rules:

164. See P. John Kozyris, *Interest Analysis Facing Its Critics--And, Incidentally, What Should Be Done About Choice of Law For Products Liability?*, 46 OHIO ST. L.J. 569, 577 (1985).

165. Brilmayer, *Interest Analysis And The Myth Of Legislative Intent*, *supra* note 94.

166. It seems clear that, on occasions, the courts have made general assumptions (“guesstimates”) regarding underlying purpose without giving any authority for their reasoning. See, e.g., *Challoner v. Day & Zimmermann, Inc.*, 512 F.2d 77 (5th Cir. 1975); *Tramontana v. S. A. Empresa*, 350 F.2d 468, 471 (D.C. Cir. 1965); *Kuchinic v. McCrory*, 222 A.2d 897, 899-900 (Pa. 1966); *Griffith v. United Airlines*, 203 A.2d 796, 807 (Pa. 1964).

Searching for governmental interests presupposes that the purposes behind substantive rules are so clear, so singular, so unequivocal that we can hope to discover them with some certainty and some consensus. This is at odds with reality. Even the simple rules that raise rights and duties with regard to personal injuries are a composite of thrusts and counter-thrusts of many kinds. For instance, there are many substantive rules favouring recovery for negligent injuries; but contributory negligence, assumption of risk, workmen's compensation exclusions and other rules are opposed to recovery. To try to bring all the huffing and puffing together into a policy that runs clearly in one direction and that has a measurable intensity that permits comparing it with some contrary policy is, in my judgment, pure fantasy.¹⁶⁷

From this, one might conclude that Currie's novices focused almost exclusively on the painstaking but futile assessments of competing state interests, a veritable "transcendental meditation over guest statutes,"¹⁶⁸ when, in the real world, tort cases involving international product liability issues, multistate defamation, or negligent misrepresentation affecting transitional loss were far more complex.¹⁶⁹ The intrinsic problem here involves ascertaining the underlying premise behind competing state policies in the international context.¹⁷⁰ It is an exercise in superfluous deductive syllogism to assume that one can affect government interest analysis by learning the purpose behind a substantive law; this process becomes even less reliable when foreign legislative policy is at issue.¹⁷¹ The assumption that one can discern a clear-cut rule of law in this sphere is an empty *brutum fulmen*.

167. Rosenberg, *supra* note 161.

168. See P. John Kozyris, *No Fault Insurance And The Conflict Of Laws – An Interim Update*, 1973 DUKE L.J. 1009, 1033; see also Juenger, *supra* note 147.

169. See Juenger, *supra* note 7.

170. See Himes v. Stalker, 416 N.Y.S.2d 986, 990 (Sup. Ct. 1979), where a federal trial judge trying to elucidate the rationale behind an Ontario guest statute featured prominently in New York jurisprudence, rhetorically opined:

[I]s one to subpoena the Prime Minister of Canada, or a knowledgeable Ontario Legislator into a New York court to give evidence on the issue? And, is it realistic to believe that anyone will admit, under oath, that just plain old political patronage may have been one, or the sole motivation that led to the involved legislative enactment.

171. See Kahn-Freund, *Delictual Liability And The Conflict Of Laws*, 124 HAGUE RECUEIL 1, at 60-61 (1968); Konrad Zweigert, *Some Reflections On The Sociological*

In fact, many rules are simply representative of a settled compromise among conflicting policies.¹⁷² It is doubtful whether variations among the laws of different states inevitably reflect genuine policy disagreements.¹⁷³ An inherent bias attaches when interest analysis disregards multistate policies; in effect, interest analysis circumvents the ultimate application of the forum's laws. Shapira, in this context, has correctly derided what he sees as the "irresistible urge" of many interest analysts to "impute to virtually every legal norm some underlying concrete social or political purpose."¹⁷⁴ He adds:

The intellectual premise of such a process may become rather shaky as one encounters legal rules whose supporting policy goals are obscure, cumulative or even contradictory. In the absence of reliable information as to the intended policy function of the legal norm in question, the process may readily degenerate into speculative postulation, or even fabrication, of putative underlying policies, solely on the ground of their assumed plausibility.¹⁷⁵

2. Pro-domiciliary Bias and Unfair Plaintiff Advantage

It is significant in a systematic formulation of interest analysis that the most important geographic vortex is the litigants' places of domicile.¹⁷⁶ This formulation is the unilateralist's lodestar of dispute resolution. The quintessential feature of the litigation in tort cases, the epicentre of interest analysis, is the plaintiff's domicile in a pro-recovery state or the defendant's domicile in an anti-recovery state. This will often make those states "interested."¹⁷⁷ There is undoubtedly a trend for judges to distill parochialism, whereby the party who is domiciled in the forum and who benefits from local law (invariably the claimant) receives preferential treatment. This process, Currie's critics would allege, results in an imbalance in the choice of law and amounts to an egregious failure. The

Dimensions Of Private International Law Or What Is Justice In Conflict Of Laws, 44 COLO. L. REV. 283, 288-89 (1973).

172. Rosenberg, *supra* note 161.

173. Von Mehren, *supra* note 42.

174. See Amos Shapira, *Grasp All, Lose All: On Restraint And Moderation In The Reformulation Of Choice Of Law Policy*, 77 COLUM. L. REV. 248, 262 (1977).

175. *Id.*

176. Twerski, *supra* note 51, at 107-08. See also Arthur Taylor Von Mehren, *Choice of Law and the Problem of Justice*, 41 LAW & CONTEMP. PROBS. 27 (1977); J.J. Fawcett, *Is American Governmental Interest Analysis the Solution to English Tort Choice of Law Problems*, 31 I.C.L.Q. 150 (1982).

177. Juenger, *supra* note 7; Brilmayer, *Interest Analysis And The Myth Of Legislative Intent*, *supra* note 94, at 394; Ely, *supra* note 151; Kozyris, *supra* note 168.

outcome arguably wrongs parties who request the application of non-forum law, discredits the judicial process, and encourages forum shopping.¹⁷⁸ Kozyris, a fierce critic of interest analysis, has identified the discriminatory flaw of a unilateralist perspective:

Its conflicts values revolve around the home connection and the forum preference, and its methodology of assessing state interests on a case-by-case, issue-by-issue basis is often nothing but a cover for the relentless pursuit of these two values. Currie's writings, and on this there is no disagreement among his successors, reveal a pervasive belief that states are and should be more interested in their people (citizens, domiciliaries, residents) than in events or actions within their territory. The personalism versus territorialism debate is as old as they come. . . . [T]he additional fact that interest analysis uses the home connection not neutrally, blindly or bilaterally, and that it does not apply the *lex domicilii* of the tort victim regardless of its content or whether the victim is a domiciliary of the forum, makes matters even worse. If this reduces to the notion that states are interested in applying their protective laws only in favour of their own people and their burdensome laws only against non-residents, the resulting blatant discrimination not only is unwise, but would violate constitutional standards, especially the privileges and immunities clause. Currie's position on this issue is Delphic if not apocryphal, and it is gratifying that at least some interest analysts expressly disclaim any intent to prejudice the non-residents. However, even under the best of circumstances and with the best of intentions, the emphasis on both the *lex domicilii* and the *lex fori* in the context of plaintiff's wide choice of fora all too often will bring about such a result and we cannot close our eyes to it.¹⁷⁹

A hypothetical example illustrates the deleterious impact of interpreting the scope of protective and compensatory statutes so they benefit solely forum

178. *But see* Weinberg, *supra* note 19 (illustrating departures from disfavored forum law, defenses of forum bias, and arguments for functional solutions to multistate problems). *See also* Weintraub, *supra* note 19, at 497 (asserting a functional approach moves public policy to the foreground to shape the original selection of governing law instead of serving as a last minute escape from that choice).

179. *See* Kozyris, *supra* note 164, at 573-75.

residents.¹⁸⁰ Consider a scenario involving a defective product liability case: suppose that State X enacts consumer protection legislation in relation to defective products and, in accordance with the interest analyst perspective, it designs the policy specifically to protect domiciliaries from X. Alan, a domiciliary of State X, contracts with Brenda, from State Y, to purchase a washing machine. An X statute provides tort compensation for damage resulting from negligent manufacture, which state courts have interpreted as including defective design. State Y has a statute that covers negligent manufacture, but excludes negligent design.

Brenda has designed and manufactured a washing machine that causes injury to Alan. The question arises whether either party has a distinct interest in the application of its domiciliary law. The answer and outcome tends to be pro-domiciliary and favors forum residents. If Y law excludes compensation for design defects, then X has an interest in seeking recovery for Alan under its own parochial law, since X's law appears to have a compensatory policy (purpose) that affects its application to assist home claimants. The converse scenario does not produce similar favorable results for defendants.

If, for instance, Y was a strict liability state that did not exclude recovery for design defects, the prevailing orthodoxy of interest analysis would imply that X's interest would become irrelevant since the application of X's laws no longer benefit Alan. In comparison to strict liability, a fault-based system (negligence) appears supportive of manufacturers.

But in this hypothetical example, the manufacturer is a non-domiciliary.¹⁸¹ This inculcated rule-selection encourages blatant forum shopping and home bias. The fundamental premise here is that Currie's ideological perspective, the extrapolation of interest, is inherently skewed in favor of the home domiciliary. The underlying ethos is attainment of the best possible outcome for the home litigant via application of the most beneficial of the competing laws.

Currie's personal law principle presents other intractable problems. As the English experience demonstrates, the identification of an individual's domicile is enduringly troublesome,¹⁸² especially in relation to the *animus* requirement of

180. See Brilmayer, *Interest Analysis And The Myth Of Legislative Intent*, *supra* note 94, at 408-11 (presenting an amended hypothecate on a subject that Professor Brilmayer had previously elucidated).

181. *Id.*

182. See e.g., J.J. Fawcett, *Law Commission Working Paper No. 88: The Law of Domicile*, 49 M. L.R. 225 (1986); Richard Fentiman, 6 O.J.L.S. 353 (1986); P.B. Carter, *Domicil: The Case For Radical Reform in The United Kingdom*, 36 I.C.L.Q. 713 (1987); Peter North, 1 HAGUE RECUEIL 13 (1990).

establishing domicile.¹⁸³ Reference to “home state” or “residence” is no less complicated given the vagueness of such terminology.¹⁸⁴

Additional concerns contribute to the complexity of existing shortcomings. How, for instance, ought one respond to a situation where an interested party to the action changes her residence or domicile after the action has commenced? No obvious answer to this dilemmatic issue presents itself.¹⁸⁵ Perhaps more problematic is that the personal law doctrine breaks down when the litigants do not share a common domicile. As these examples demonstrate, we are left frustrated in the search for resolution of conflicts involving disinterested forums and clarification of the Hobson’s Choice issue of the “unprovided-for” case, in which no state has an overarching interest. Moreover, the premise that courts should apply protective and compensatory policies when doing so benefits only the forum litigant raises issues of fundamental fairness and efficacy. It seems reprehensible to propagate blatant parochialism and inequitable to provide a choice of law bonus for the perambulatory forum-shopping claimant.¹⁸⁶

3. Problems with Uniform *Lex Fori* Application

A further perceptible difficulty with interest analysis is that the preponderance of courts that rely on the doctrine apply forum laws. Although a number of critics disagree with the conclusion,¹⁸⁷ one could reasonably infer that the application of *lex fori* principles, with their reductive syllogism, appeals to many unilateralists. A relevant aspect of this inference is that interest analysis ideology urges judges to apply their own law whenever the forum has some interest in the case, a proposal that most judges embrace because of their familiarity with local laws. Consequently, it is hardly surprising that a busy judge with a crowded docket will, quite naturally and gladly, abstain from considering the intricacies and multifarious policies of other foreign states. The allure of home law via Currie’s forum rule of preference may be overwhelming.¹⁸⁸

183. In relation to the former attitude towards intention and requirement of “permanence,” see *Winans v. A-G*, [1904] A.C. 287 and *Ramsay v. Liverpool Royal Infirmary*, [1930] A.C. 588. For a more relaxed concept of *animus* in more recent cases, see *Re Flynn*, [1968] 1 W.L.R. 103 and *Re Fuld’s Estate (No. 3)*, *Hartley v. Fuld* [1968] P. 675.

184. NORTH & FAWCETT, *supra* note 36, at 159-70.

185. *See, e.g.*, *Reich v. Purcell*, 432 P.2d 727 (Cal. 1967).

186. *See, e.g.* *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732 (C.D. Cal 1975); *see also* Twerski, *Emperor’s Clothes*, *supra* note 51; Brilmayer, *Interest Analysis and The Myth of Legislative Intent*, *supra* note 94.

187. Juenger, *supra* note 7.

188. Kozyris, on this particular issue, states:

A primary concern associated with the *lex fori* theory, however, is that it encourages the calculated selection of a forum in order to enjoy the inapposite benefits of a law that are favorable to the claimant. Relatedly, it may be pernicious to allow courts to hold defendants responsible for conduct that would not constitute liability in the place of commission if amenability to jurisdiction were established elsewhere.

Interest advocates have mounted a strong defense against prosecutorial charges.¹⁸⁹ Proponents have argued that criticisms are misconceived insofar as unilateralism does not always represent a template for *lex fori* preference; instead, it simply offers equity with an innate tendency toward justice in difficult cases.¹⁹⁰ Some commentators have decried the accusation that there is a problem in discerning the purposes behind competing state laws and policies on the basis that these commentators overstate the difficulty of finding policies represented by foreign rules.¹⁹¹ Unilateralists view these opponents as morally bankrupt critics who lack an effective model of their own.¹⁹² They view rigid rule-selection as subject to its own manipulation via the avoidance devices of *renvoi*, characterization, and public policy.¹⁹³ Unilateralists argue that theirs is a functional approach that simply moves public policy (interest analysis) to the foreground to shape the original selection of a governing law rather than serving as a last minute escape from that choice.¹⁹⁴

[I]nterest analysis, however, goes far beyond using the *lex fori* as a residual tie-breaker. Currie's main thesis was that whenever the forum has any measurable interest in the matter, its law should inexorably apply regardless of the importance of the contacts with and the interests and concerns of any other state. The rejection of any balancing and mutuality purportedly derives from Currie's restricted view of the judicial function. According to Currie, it is not for the courts to choose comity over their own law. One could also detect his negativism toward a co-operative effort in conflicts at all levels.

Kozyris, *supra* note 164, at 576.

189. Juenger, *supra* note 7.

190. See Weintraub, *supra* note 19 at 494, 496-97 (asserting that when choice of law analysis focuses on the reasons underlying putatively conflicting domestic rules, it simply mirrors the form of intelligent analysis employed in all fields of law).

191. *Id.* at 495; Weinberg, *supra* note 19, at 595-98; Sedler, *supra* note 19, at 1628-30.

192. See generally Posnak, *supra* note 19.

193. Weintraub, *supra* note 19, at 497.

194. See Sedler, *supra* note 19; Weintraub, *supra* note 19, at 497 (opining that a functional approach moves public policy to the foreground to shape the original selection of governing law instead of serving as a last-minute escape from that choice).

Despite strong unilateralist arguments, the present analysis concludes that the contemporary concept of interest analysis as a choice of law model falls woefully short of achieving judicial efficiency and fairness. The weight of evidence against interest analysis is compelling. The United States experience has revealed a confused *ad hoc* methodology, anti-rule homilies, and particularistic judicial intuition. This inherent flexibility, an abrogation of *stare decisis*, and lack of certainty makes this form of interest analysis inappropriate as a conceptual model for English choice of law ill.

B. The Application Of Interest Analysis As A Panacea to English Choice of Law Problems

The United States revolution in tort choice of law, effectuated through interest analysis principles, occurred at an intrastate level and not in the international arena. A basic correlation existed between competing state laws and policies that is fundamentally absent in the international playing field. In England, the dilemmatic tort choice of law is presented on a multinational level, between competing foreign laws and involving multistate interactions, disputes, and transactions.¹⁹⁵ This bifurcated division makes the interest analysis ideological presentation and its related policy constructs unsuitable as practical tools to resolve English choice of law concerns. Professor Baade's extremely optimistic viewpoint that a "few idle hours work with foreign law books and pocket dictionaries"¹⁹⁶ will reveal governmental interests in an international case has proved widely off the mark. International laws, opposed to intrastate doctrine, may have no clear and explicit intention or purpose; there is a huge dichotomy between basic state guest-host and wrongful death limitation statutes on one side of the scales and complicated national level substantive tort policies on the other.¹⁹⁷

The legal construction between the United States intrastate dispute resolution and the English extrapolation of domestic and foreign legislation are also markedly different in approach and application.¹⁹⁸ The American legal experience embodies more sociological jurisprudential realism than its English counterpart. American lawyers and judges have a mindset that allows for more

195. See generally Fawcett, *supra* note 176, at 150-51.

196. Hans W. Baade, *Marriage & Divorce in American Conflicts Law: Governmental Analysis & Restatement (Second)*, 72 COLUM. L. REV. 329, 378 (1972).

197. See *Frummer v. Hilton Hotels International Inc.*, 304 N.Y.S.2d 335, 341 (1969). The problems that confronted the American court in *Frummer* vividly exemplify the difficulty in applying international choice of law rules in a case involving contributory negligence rules in England and New York.

198. See Gerald C. MacCallum, *Legislative Intent*, 75 YALE L.J. 754 (1965).

reflective interpretations of underlying internal laws.¹⁹⁹ This form of inculcated rationalization stands in stark contrast to the straightforward English practice of statutory interpretation. English lords can only deviate from the actual, literal meaning of statutes in very rare cases that invoke the mischief rule for ambiguity.²⁰⁰ English statutes generally lack preambles and explicit references to parliamentary debates.²⁰¹ The English legal system prizes judicial efficiency and is skeptical of illusory searches for legislative intent.²⁰²

The conceptual and superficial attractiveness of interest analysis may be inapplicable in the international arena, where guesswork is required from expert witnesses over the specific import of foreign laws. With no definite answers, expert opinions are often contradictory in nature. The obvious danger here is that, if a local court cannot elucidate the meaning of foreign law or if it resorts to subjective speculations of statutory purpose, the court is more likely to incorporate parochialism as a significant factor in tort choice of law cases. Courts will favor the forum law, viewing it as the only interested state. This nationalistic preference for *lex fori* principles, rooted in a mistrust of foreign law, has been blatantly evident in some American cases involving international disputes.²⁰³

The English judiciary, which is extremely careful about treading on the toes of parliamentary sovereignty, would find it problematic to embrace the unilateralist doctrine with its overtones of *ad hoc* methodology, anti-rule homilies, and particularistic judicial intuition. The sparseness of continental case law to use for reference complicates the dilemma; the available European case law is so tersely worded that it is counter-productive to the case-by-case development of the interest analysis edifice.

Most significantly, interest analysis fails, in the author's view, to comport with the required elements of jurisprudential policy that systematic tort choice of law doctrine requires in multistate transactions. It fails to satisfy the certainty, predictability, and attainment of the parties' expectations that are vital

199. Note that a number of United States cases that have applied interest analysis techniques have included numerous interpretative aids for judges. See *Tramontana v. S.A. Empressa*, 350 F.2d at 470 (in assessing the strength of a policy, it is permissible for judges to examine the earlier repeal of a state law that limited recovery and state constitutions that bar particular laws); see also *Macey v. Rozbicki*, 221 N.E.2d at 382 (N.Y. 1966); *Tooker v. Lopez* 249 N.E.2d at 397-98; *In Re Estate of Clark*, 236 N.E.2d 152, 157 (N.Y. 1968) (courts prepared to read statute as a whole, looked at the preamble and at the wording of earlier statutes dealing with the same topic; they have also looked at law reform reports).

200. See *Black-Lawson v. Papierwerke*, [1975] 1 All E.R. 810.

201. For the American position see Harlan F Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 15 (1936).

202. See *Black-Lawson v. Papierwerke*, [1975] 1 All E.R. 810, 814-15 per Lord Reid.

203. See *e.g.*, *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975) (involving decedents from over 24 countries. However, the judiciary concluded that California, the forum, had the greatest interest in the application of its laws; the court did not ascertain the content of the other applicable laws).

aspects of an effective doctrinal model. European trends in the related areas of jurisdiction and enforcement of judgments have been, via adoption of the Brussels Convention,²⁰⁴ towards uniformity, certainty, and harmonization. This trend has impacted recent and fundamental changes in English choice of law principles that now align with the Western European perspective based on a modified *lex loci delicti* model. The flawed nature of these reforms is immediately apparent insofar as interest analysis ideology is out of kilter with this trend.

To achieve the uniformity that a European Community Convention requires, the chosen doctrine must accomplish certain and predictable results, neither of which interest analysis seeks to achieve. The additional cost to the client similarly runs contrary to the English ethos of certainty of legal advice; ironically, this same feature forms the principal apex of America's sociological jurisprudential realism. The inherent lack of predictability in interest analysis prevents litigants from knowing their legal rights and duties and enhances the possibility of future litigation. Therefore, interest analysis offers no cure for the perceived ills of the English system discussed below. English courts must strike a balance in policy objectives between the ease of application and concern with *stare decisis*, but they must also be flexible enough to respond adequately and fairly to difficult cases. As the following sections reveal, recent reforms under English common law have achieved this delicate balance. The Privy Council decision in *Red Sea Insurance*²⁰⁵ revealed the vaguely-worded and poorly-drafted recent statutory legislation to be an unnecessary and misconceived revolution.

IV. THE ENGLISH REVOLUTION IN TORT CHOICE OF LAW PRINCIPLES

A. Introduction

In factual scenarios such as these, one of the first issues that addresses itself to a lawyer (the question of which law will apply to determine liability) may appear to resemble Fermat's

204. The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968. The Civil Jurisdiction and Judgments Act of 1982 contains the relevant legislation to bring the Convention into effect in the U.K. The relevant provisions came into force on January 1, 1987.

205. [1995] 1 A.C. 190.

Last Theorem - the answer best assumed as a fact without any attempt to determine the precise answer.²⁰⁶

The traditional and current basis of discussion of English tort choice of law rules centers around the paradigmatic scenario of the motoring accident. Even the English and Scottish Law Commissions Reports, which presaged Part III of the Private International Law (Miscellaneous Provisions) Act of 1995, took this common situation as their basis.²⁰⁷ Indeed, a motor accident was in issue before the High Court of Australia in its determinative case of *Stevens v Head*,²⁰⁸ which is illustratively problematic. This relatively straightforward tort has caused substantial uncertainty and confusion in approach throughout courts in Europe, Australia, and the United States. Fundamentally, the problems it creates are more manifest in the commercial area. Radical changes in English tort choice of law rules over the last five years have supplemented century-old laws, both through common law development and statutory reform.

These changes have created a bifurcated choice of law ideology. Traditional common law rules of double actionability continue to govern the tort of defamation. Because the new statute governs all other classifications of tortious causes of action, courts must now make a clear delineation between defamation and other causes of action.

A brief comparison of Australian jurisprudence is useful in helping to put the old English common law rules into context. The High Court of Australia struggled to apply a consistent and prevailing test before ultimately settling on a rigid double actionability approach that is predicated on the nineteenth century English authority of *Phillips v. Eyre*.²⁰⁹ In fact, Canadian laws for intrastate torts have undergone similar changes due to the Supreme Court's adoption and application of multilateralism and a rigid jurisdiction-selection rule of *lex loci delicti*.²¹⁰

The following section will provide a comparative analysis of English rules through the extrapolation of existing Western European choice of law principles. This analysis will demonstrate, as the previous discussion established, that recently enacted English initiatives mark a shift toward harmonization with

206. Stuart Dutson, *Product Liability and Private International Law: Choice of Law in Tort in England*, 47 AM. J. COMP. L. 129, 129-30 (1999).

207. *Private International Law: Choice of Law in Tort and Delict* (1990), Law Com. No. 193. Note that the relevant provisions in Part III of the 1995 Act, subsections 9 through 15, came into force on May 1, 1996. The Act is not retrospective and the common law rules still apply to torts committed before that date.

208. (1993) 112 A.L.R. 7.

209. [1870] L.R. 6 Q.B. 1.

210. See *Tolofson v. Jensen*, [1994] 120 D.L.R. (4th) 289 (Can.); discussion *infra* p. 921.

its Continental partners. Finally, the section will explore jurisprudential policy implications and contrast them with the United States experience.

B. The Common Law Rule of Double Actionability For Defamation

1. The General Rule

The traditional English common law principles relating to tort choice of law have been based for over a century on the decision in *Phillips v. Eyre*.²¹¹ This case marked the formulation of the general rule on the imposition of double actionability under both the *lex fori* and the *lex loci delicti* theories. In *Eyre*, the Governor of Jamaica allegedly committed acts of assault and false imprisonment in Jamaican territory.²¹² No liability was imposed, as an Act of Indemnity retrospectively justified such conduct. Lord Justice Willes outlined the procedure plaintiffs needed to satisfy to bring an action in England for a foreign tort:

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.²¹³

The House of Lords in *Boys v. Chaplin* confirmed that the decision in *Phillips v. Eyre* laid down a double actionability choice of law rule.²¹⁴ *Chaplin* involved a motor accident in Malta, in which the plaintiff, a passenger on a motor scooter's pillion, suffered personal injuries as a consequence of the defendant's negligent driving of a motor vehicle.²¹⁵ Both parties were British residents serving duty in the British forces in Malta, and the defendant had insurance coverage through an English company.²¹⁶ The plaintiff brought suit in England to recover from injuries resulting from the defendant's negligent driving, and the central

211. [1870] L.R. 6 Q.B. 1.

212. *Id.*

213. *Id.* at 28-29. See *The Halley* [1868] 2 L.R. 193 (P.C.) (Eng.) (noting that the first limb of the test, actionability as a tort under English law, was a result of the decision); *Patrick Grehan v. Medical Inc. and Valley Pines Assoc.* [1988] E.C.C. 6 (Ir.) (criticizing the dual actionability rule and suggesting it should not be followed); *but see*, *An Bord Trachtala v. Waterford Foods PLC* [1994] F.S.R. 316, 321-23 (Ir.).

214. [1971] A.C. 356 (H.L. Eng.).

215. *Id.* at 359.

216. *Id.*

issue for determination was whether the plaintiff could recover damages for pain and suffering (i.e. general damages), which were only recoverable under English, not Maltese, law.²¹⁷

Their Lordships, in a judgment lacking in clarity, unanimously determined that damages for pain and suffering should be awarded in accordance with English law.²¹⁸ Appellate courts subsequently adopted the principles set forth in *Chaplin* so that, as a general rule, a defendant's conduct must be "actionable 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."²¹⁹ An exception to this general rule exists, however, when a party can demonstrate clear and satisfactory grounds that justify the application of the system of law having the most significant relationship²²⁰ with the issue and the parties in place of the proper law of the tort.²²¹

The *Boys v. Chaplin* decision and the concurrent application of this exception to the general rule employed purely English law, i.e. the *lex fori*.²²² In

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 406. Note that the flexibility that Lord Wilberforce advocated was based on the significant American Restatement's relationship test.

221. *Id.* Although the *Boys v. Chaplin* decision held that a flexible exception should exist, it did not determine the predication for the exception; the nature and scope of the exception to the general rule was uncertain. See Dutson, *supra* note 206, at 140-41 where he outlines the factual scenarios that could provoke the court to apply the exception and ignore a case's connection with a particular country in favor of the law of another country. These scenarios include: the damage or injury occurs within the relevant country due only to a transitory, fortuitous or fleeting presence within the country; the accident occurs in the relevant country's territory on an aircraft in flight or on a ship on voyage that was not scheduled to include any entry or stop in the relevant country's territory; a schoolchild is injured due to a defect in a product purchased in country X, in an isolated part of the relevant country while on a school camp from country X; the producer manufactured the product within the relevant country and actively marketed it overseas in country X where a resident of country X suffers injury or damage; the plaintiff and defendant are permanent residents within the same country – country X—not being the relevant country; the injury or damage is committed wholly aboard a ship from another country – country X – in the relevant country's territorial waters; the nature of the defect in an aircraft or ship is such that it forces the vessel into the relevant country's territory where the injury or damage further crystallizes, and the aircraft or ship was not scheduled to include any stop in the relevant country; or, the product was specifically manufactured for the domestic market of country X and the plaintiff himself imported the product into the relevant country. If the court applied the exception in any of these cases, it could choose to ignore the case's connection with the relevant country, possibly in favor of country X, in its determination of which laws to apply.

222. *Id.*

subsequent English cases, the judiciary formulated the exception to apply English law to the exclusion of foreign law.²²³ What was unclear until the recent Privy Council decision in *Red Sea Insurance v. Bouygues SA*²²⁴ was whether the judiciary could apply the exception with the *locus delicti* rules, thereby subverting any application of the *lex fori* principles.²²⁵

Finally, a brief consideration of the general rules makes evident that, when a tort allegedly transpires in England, our courts usually apply English law to the dispute. Courts apply this rationale irrespective of the foreign elements involved or the total lack of factual connection with England. *Szalatnay-Stacho v. Fink* provides a pertinent illustration of this application.²²⁶ In *Fink*, the plaintiff was the Czech Acting Minister of England, who sought damages for defamatory libel resulting from allegations of misconduct in an English publication. Although the fact that all parties to the suit were Czech, the judiciary applied English law.²²⁷ The decision in *Fink* thus undermined the *Chaplin* exception in cases where the tort occurs in England.

2. Problems Associated with the Double Actionability Rule

The difficulties that arise from a rigid double actionability rule are evident in a brief overview of Australian legal developments. Australian laws have followed the traditional English approach so that a multilateralist ideology now prevails and certainty, stare decisis, and simplicity are promulgated.²²⁸ In *Stevens v. Head*, a New Zealand woman was injured when a motor vehicle struck her in a pedestrian crosswalk in New South Wales (the *locus delicti*).²²⁹ She obtained judgment in Queensland. The trial judge assessed the plaintiff's damages according to the *lex fori* and not the *lex loci delicti* principle. But the

223. See Henrietta Steinberg, *Allegation of Libel in Metropolitan Police Report to Police in West Germany*, 120 Solic. J. 690 (1976) (discussing Church of Scientology of Cal. V. Metro. Police Comm'r); *Johnson v. Coventry Churchill Int'l Ltd.* [1992] 3 All E.R. 14.

224. [1995] 1 A.C. 190 (P.C.) (Eng.); see Adrian Briggs (1995) 111 L.Q.R. 18; Carter [1995] C.L.J. 38; Pippa Rogerson, *Choice of law in Tort: A Missed Opportunity?* (1995) 44 I.C.L.Q. 650; Dickinson, (1994) L.M.C.L.Q. 463; Richard Fentiman in H.L. Paper No. 36 (1995) Written Observations at 19-24.

225. *Red Sea Insurance*, [1995] 1 A.C. 190 (P.C.) (Eng.).

226. [1948] K.B. 1 (Eng. C.A.).

227. *Fink*, K.B. 1 at 13. Note that the English judiciary suggested that it could only apply foreign law in a case such as this, if legislation expressly provided for the application of foreign law. *Fink*, K.B. 1 at 13.

228. See generally Martin Davies, *Exactly What Is the Australian Choice of Law Rule in Torts Cases?* 70 A.L.J. 711 (1996).

229. (1993) 112 A.L.R. 7; see Brian Opeskin, *Conflicts of Laws and the Quantification of Damage in Tort*, 14 SYD. L.R. 340 (1992); Davies, *supra* note 228.

appellate court held that the Queensland court should have applied the law of New South Wales, specifically Section 79 of the Motor Accidents Act 1988 (NSW) which, *inter alia*, states, no plaintiff shall be awarded non-economic loss or pain and suffering or loss of amenity, unless the injuries significantly impair the person's ability to lead a normal life.²³⁰ Additionally, the appellate court restricted the maximum amount of the award for non-economic loss to \$180,000.²³¹

The High Court of Australia was thus faced with the issue of determining the applicable choice of law rule when defendants committed torts in Australia. In *Breavington v. Godleman*, a majority of the court rejected the notion that the different states are separate countries for private international law purposes such that the *lex loci* should apply.²³² However, in *McKain v. R.W. Miller & Co (SA) Pty Ltd* a majority of the court reiterated that the states are separate countries in private international law and accepted a narrower restatement of the double actionability rule they had enunciated in *Phillips v. Eyre* that applied both the *lex fori* and the *lex loci delicti* laws.²³³

The *McKain* court determined that a South Australian law, imposing limitations on the time a plaintiff could bring an action in state courts for damages for a tort committed within that state without extinguishing the cause of action, was not a substantive law that precluded the commencement of an action in the courts of New South Wales for damages.²³⁴ The majority followed a line of authority that distinguished between a statute of limitation that prohibited court enforcement of a claim and a statute that extinguished civil liability and destroyed a cause of action. The former is classified as a *procedural* law, the latter as *substantive*.

In *Stevens*, the High Court, through a bare majority, followed the *Phillips* double actionability rule as reformulated for interstate torts in *McKain*.²³⁵ A plaintiff may bring any tort action in a state regarding acts or events that occurred in another state if the circumstances are of such character that, had they occurred in the first state, they would have given rise to a cause of action enabling the plaintiff to enforce against the defendant a civil liability of the kind which the plaintiff claims to enforce.²³⁶ This test derives from English law which, *vis à vis*

230. *Stevens*, 112 A.L.R. 7, 10.

231. *Id.*

232. (1988) 169 C.L.R. 41 (H.C.A.); *see generally* Adrian Briggs, *Tort in the Conflict of Laws*, 105 L.Q.R. 359 (1989).

233. (1991) 174 C.L.R. 1; *see* Brian Opeskin, *Choice of Law in Torts and Limitation Statute*, 108 L.Q.R. 398 (1992). For a more recent case applying *McKain* in an international context, *see* James Hardie & Co. v. Hall (1998) 43 N.S.W.L.R. 554.

234. *McKain*, 174 C.L.R. 1 at 14.

235. *Stevens*, 112 A.L.R. 7, 13-14.

236. *Id.*

defamation, also adopts a similar double actionability analysis.²³⁷ However, the Australian rule does not include a flexible exception. It is worth reiterating Lord Wilberforce's assertion in *Boys v. Chaplin*.²³⁸ Here are exceptional cases in which courts can depart from the general rule if clear and satisfactory grounds justify the applicability of the law having the "most significant relationship" with the issue and the parties.²³⁹

This approach of applying the proper law of the tort has been the rule rather than the exception in a number of American states since the landmark decision of *Babcock v. Jackson*.²⁴⁰ This approach clearly has the advantage of flexibility, but it has created uncertainty and confusion in areas where there should be a degree of predictability.²⁴¹ An American academic has aptly described the cases as "awesome to behold--dissents, shifting doctrine, results not easily reconcilable. In short, a law professor's delight but a practitioner's and judge's nightmare."²⁴²

Australian courts have utilized the motor accident example in intra-national torts to create a rigid unitary choice of law rule predicated on double actionability; it presents a modern day vignette of Bealian conceptualism as a classic example of a multilateralist jurisdiction-selecting rule. Australian courts

237. One now needs to make a very strict delineation under English law between the tort of defamation, which common law rules of double actionability continue to govern, and other torts that are now subject to statutory rules under the Private International Law (Miscellaneous Provisions) Act of 1995. This statute has fundamentally altered English principles on choice of law. However, defamation is specifically excluded from the ambit of reform by § 13 of the 1995 Act.

238. *Chaplin*, [1976] A.C. 356. Note that most academic writers in Australia have asserted that the majority decisions in *McKain* and *Stevens* embody an emphatic rejection of any role for the flexible exception in intra-Australia cases. See, e.g., P.E. Nygh, *The Miraculous Raising of Lazarus*, 22 U.W. AUST. L. REV. 386, 392 (1992); Mark Moshinsky, *Choice of Law in Torts*, 1 T.L.J. 169, 174 (1993); William Tetley, *Choice of Law – Tort and Delict – Common Law/Civil Law/Maritime Law*, 1 T.L.R. 42, 50 (1993); S. Walker, *Choice of Law in Defamation Actions*, (1994) 2 T.L.J. 228, 242-43; see also Gardner v. Wallace, (1995) C.L.R. 95; Rahim v. Crawther (1996) W.A.R. 559.

239. The English common law rule, still applicable to defamation suits, is set out clearly in Rule 203 in ALBERT V. DICEY & JOHN H.C. MORRIS, *THE CONFLICT OF LAW* (12th ed., 1993). Rule 203 provides as follows: (1) as a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both, (a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort, and (b) actionable according to the law of the foreign country where it was done. (2) but a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties.

240. See *supra* at pp. 885-89.

241. See *supra* at pp. 886-87; see, e.g., *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972).

242. Weintraub, *supra* note 87, at 148; see also Rogerson, *supra* note 6, at 656.

apply this same approach to international torts.²⁴³ The essential feature of the rule is that the successful plaintiff must demonstrate to the court that the particular case gives rise not only to civil liability under the *lex fori*, but it also applies under the *lex loci delicti* between the respective parties applying the same facts.²⁴⁴ A whole series of defamation cases applied such a test.²⁴⁵ If the plaintiff in these cases failed under the defamation law of the forum, the action is ended. If the plaintiff clears the first hurdle, the court then examines the applicable law of the forum where the tort occurred to determine whether the second hurdle allows civil liability for the defamatory publication.

A similar general rule applies to defamation under English common law, but following the recent and significant Privy Council decision in *Red Sea Insurance v. Bouygues S.A.*, the current rule allows for greater flexibility.²⁴⁶ This authority represents a landmark decision in common law development. It should, in the present author's view, have rendered statutory intervention unnecessary. The decision could have created a clear path for American and Australian courts to follow in international cases, avoiding the deleterious consequences of having a rigid double actionability rule with no exception.

The much-criticized Scottish Court of Session decision in *McElroy v. McAllister* exemplified these problems and led to a preposterous result.²⁴⁷ The pursuer's late husband was injured in an accident in Cumbria, England, forty miles south of the Scottish border, while riding in a lorry during the course of conducting business for his Scottish employer. All factual connections, except the geographical location of the accident, were with Scotland, the *lex fori*. The widow brought an action under the Fatal Accidents Act in Scotland on behalf of his estate.²⁴⁸ The widow based her claim on English law under the Law Reform Act of 1934, but the Scottish rule of law was that the right of action of an injured person died with him.²⁴⁹

In the alternative, the plaintiff claimed under the Scottish internal law for *solatium*, and under both laws for funeral expenses.²⁵⁰ Unfortunately, the poor

243. Note that the *Stevens* court left undecided the issues of whether the new Restatement was suitable for application to multistate cases and international dispute resolution regarding torts occurring outside of Australia. *But see* James Hardie & Co. v. Hall, (1998) 43 N.S.W.L.R. 554 (applying *McKain* in an international context).

244. *See* Walker, *Choice Of Law In Defamation Action*, *supra* note 238, 233-34.

245. *See, e.g.*, Gorton v Australian Broadcasting Commission (1973) 22 F.L.R. 181 (Austl.); *see also* Carleton v. Freedom Publishing Company Pty Ltd (1982) 63 F.L.R. 326, Cawley v. Australian Consolidated Press Ltd. (1981) 1 N.S.W.L.R. 225 (Austl.).

246. [1995] 1 A.C. 190 (P.C.) (Eng.); Rogerson, *supra* note 6.

247. (1949) S.C. 110. It is noteworthy that the Special Public Bill Committee of the House of Lords strongly criticized the decision prior to the enactment of the 1995 Act. The written evidence of this criticism is published as H.L. Paper No. 36 of Session 1994-1995.

248. *McElroy*, (1949) S.C. 110, 112.

249. *Id.* at 114.

250. *Id.*

widow recovered only for funeral expenses, as *solatium* was unrecoverable under English law.²⁵¹ The decision thus represents a clear illustration of the inherent dangers of the double actionability rule. It mirrors the problems the First Restatement engenders through its rigid conceptualism and its subsequent avoidance through escape devices.

The Australian judgment in *Gorton v. Australian Broadcasting Commission* highlights the unfortunate consequences that can result from a double actionability rule for international defamation.²⁵² The *lex fori* was Australian Capital Territory, where the plaintiff commenced an action for defamation, complaining of defamatory material broadcast in Victoria, New South Wales and in Australian Capital Territory.²⁵³ The defendant lacked applicable defensive strategies in Victoria and Australian Capital Territory, but he raised an applicable defense in New South Wales over one imputation. The judiciary applied a double-barrelled choice of law rule and concluded that the plaintiff failed in respect to the relevant imputation in New South Wales, but succeeded and was deserving of damages for the publications in Victoria and Australian Capital Territory.²⁵⁴

Clearly, egregious difficulties are created over choice of forum. One could reasonably infer that the plaintiff's claims would have failed if he had commenced proceedings in New South Wales for international defamatory statements published in Victoria and Australian Capital Territory. The defendant could rely on the *lex fori* defense to deny liability without even reaching the second hurdle of liability under the *locus delicti*.²⁵⁵ The lack of harmonization or uniformity in substantive libel laws throughout the states exacerbates such difficulties. For example, a defendant in Victoria can use truth as a defense, whereas a defendant in New South Wales must prove both truth and that the statement relates to a matter of public interest or is published under a qualified privilege.²⁵⁶ Different results will apply through the chance of forum determination.

A choice of law test based on double actionability can lead to absurd consequences depending on the type of accident in the forum. Intangible or economic torts that incorporate defamation are illustrative of these problems. Even in the scenario of the basic motor accident, the decisions in Australia since *Stevens* that apply the rigid formulation of double actionability for intra-national torts, as the courts are obliged to do, have served only to produce incumbent

251. *Id.*

252. *Gorton*, (1973) 22 F.L.R. 181 (Austral.).

253. See Walker, *Choice of Law in Defamation Action*, *supra* note 238, at 233-34.

254. *Gorton*, 22 F.L.R. 181, 191.

255. *Id.* at 232.

256. *Id.*

anomalies and uncertainty.²⁵⁷ The *lex fori*'s substantive or legislative position can lead to different outcomes, even in cases with identical fact patterns.²⁵⁸ In this regard, fundamental changes in English tort choice of law rules through common law and statutory reform over the last five years have created and offered suitable escape devices.

3. *Red Sea Insurance v. Bouygues S.A.*

Under the new English provisions, the ultimate objective is to impose a balance between certainty and flexibility (through displacement) and between past precedent and new law. It remains to be seen if the reform achieves its objective, but the implicated policy concerns nevertheless present a viable alternative to the *ad hoc* methodology of interest analysis. Particularly noteworthy is the exclusion of defamation from the new legislation. The double actionability rule, albeit with a proper law exception, is still determinative. Subsequent to *Boys v. Chaplin*, where the court based the applicability of the flexible exception on a test of the "most significant relationship" between the *lex fori* (English law) and a higher damages award, it has become unclear whether flexibility permits the simple application of the *lex loci delicti* and the complete exclusion of English law. The Privy Council considered this question in *Red Sea Insurance Co Ltd v. Bouygues S.A.*, a common law decision that, considered in tandem with statutory legislation, has revolutionized English private international law rules.²⁵⁹

In *Red Sea Insurance*, the plaintiff brought an action against the defendant insurance company in Hong Kong.²⁶⁰ The defendant insurance company was incorporated in Hong Kong but maintained its head office in Saudi Arabia. The claim involved indemnification under an insurance policy issued by the defendant for loss and expense incurred in relation to a building project in Saudi Arabia over construction of the University of Riyadh.²⁶¹ The defendant's counterclaim against

257. See Martin Davies, *Too Little Imagination Or Too Much?: Phillips v Eyre Revisited Yet Again*, (1995) 3 T.L.J. 273.

258. In relation to motor accidents, note that three cases following the *Stevens* decisions highlight the anomalies associated with motor accidents and illustrate the problems that substantive/legislative *lex fori* provisions exacerbate. See, e.g., *Wilson v. Natrass* (1995) 21 M.V.R. 41 (S.C. Vic. (AD)); *Martin v. Kelly* (decided by the same court on the same day but unreported S.C. Vic. App. Div., 16 May 1995); *Soszynski v. Soszynski* (1994) 62 S.A.S.R. 197. In *Wilson*, the plaintiff's failure under the law of the forum to establish the threshold impairment criterion denied liability, while the *Martin* court held that the plaintiff supplanted this hurdle within the limitation period. See also, *Nalpantidis v. Stark* (1995) 65 S.A.S.R. 454, *Gardner v. Wallace* (1995) 184 C.L.R. 95; *Woodger v. Federal Capital Press* (1996) 107 A.C.T.R. 1.

259. [1995], AC 190; Rogerson, *supra*, note 6.

260. *Red Sea Insurance*, AC 190 at 201.

261. *Id.*

PCG, a consortium comprised ten of the plaintiffs, alleged that PCG supplied faulty precast concrete prime building units for the project, thereby breaching its duty of care to the other plaintiffs.²⁶² The defendant claimed that if it was liable under the policy to the other plaintiffs, it was entitled to recover that amount from PCG by way of subrogation to the rights of the other plaintiffs.²⁶³

In the alternative, the insurance company sought leave to amend its counterclaim to assert that it was entitled to sue PCG directly for the damage caused to the other plaintiffs. Both counterclaims existed under Saudi Arabian law (the *lex loci delicti*), but Hong Kong (the *lex fori*) did not allow an insurance company to sue directly for negligence.²⁶⁴ The issue before the Privy Council was whether the appellant could rely purely on Saudi Arabian law, the *lex loci delicti*, to establish direct liability in tort when Hong Kong law, the *lex fori*, did not recognize such liability.

The leading judgment, that of Lord Slynn, made clear that the flexible exception to the general rule of double actionability allowed displacement of the *lex fori* and permitted the *lex loci delicti* to determine the whole claim.²⁶⁵ Lord Slynn stated:

In *Boys v. Chaplin* it is not suggested that the exception can be relied on only to exclude the *lex loci delicti* in favour of the *lex fori*. Their Lordships do not consider that the element of flexibility which exists is so limited. Whilst recognising that to do so is a departure from the strict rule in *The Halley* (LR 2 P.C. 193), they consider that in principle the exception can be applied in an appropriate case to enable a plaintiff to rely exclusively on the *lex loci delicti*. To limit the rule so as to enable an English court only to apply English law would be in conflict with the degree of flexibility envisaged by Lord Wilberforce, though the fact that the forum is being required to apply a foreign law in a situation where its own law would

262. *Id.* at 205.

263. *Id.* at 207.

264. See the earlier Hong Kong precedent of *The Adhiguna Meranti*, (1988) 1 Lloyd's Rep. 384.

265. The Privy Council determined that the arguments in favor of applying Saudi Arabian law were overwhelming. The policy of insurance was subject to Saudi Arabian law, the project was to be carried out in Saudi Arabia and the Saudi Arabian government owned the property. The main contract, the supply contract and the consortium's service contract were all subject to the law of Saudi Arabia. The breaches and the alleged damage occurred in Saudi Arabia. The expense of repairing alleged damage occurred in Saudi Arabia. The defendant, though incorporated in Hong Kong, had its head office in Saudi Arabia. *Red Sea Insurance*, A.C. 190 at 207.

give no remedy will be a factor to be taken into account when the court decides whether to apply the exception.²⁶⁶

There is a no more striking example of the manifest reform of English choice of law provisions. Let us postulate a problem where Company A, an English incorporated company, publishes defamatory material in Germany about B, a famous actor. B, although domiciled in England, is totally unknown there but enjoys an excellent reputation throughout Germany for his acting prowess. B brings action in the English courts.²⁶⁷ *Red Sea Insurance* introduces flexibility and allows courts to use either the *lex fori* or the *lex loci delicti* to displace the general rule in respect to the whole claim. By avoiding a rigid formulation of double actionability and applying a flexible exception, beneficial results have accrued. Clearly, in the problem postulated above, it would be ludicrous to apply English law to the action, and courts can now avoid this inequity through the application of the exception to the rule of double actionability in foreign torts and the application of the *lex loci delicti* to the whole claim.

The flexibility *Red Sea Insurance* promotes is logically compelling, and such an approach has potential to eradicate the rigid test of double actionability. It represents an optimal policy trade-off between certainty and flexibility. It is debatable whether this decision ought to have nullified the implementation of statutory reform. However, the beneficial impact of *Red Sea Insurance* is now restricted to the ambit of the tort of defamation, because new rules set forth in Part III of the Private International Law (Miscellaneous Provisions) Act of 1995 govern all other torts.

266. *Id.* at 206. Note that, in *Pearce v. Ove Arup Partnership Ltd.* [1999] 1 All ER 769, 803-04, the Court of Appeal utilized the exception to apply Dutch law where the defendant infringed upon Dutch copyright laws in the Netherlands. See John Harris, *Justiciability, Choice Of Law And The Brussels Convention*, (1999) L.M.C.L.Q. 360. It became apparent after the *Red Sea* decision that a claimant could rely on the laws in the place where the tort was committed—even in cases where the claim would not be actionable under the law of the forum. Also, courts may apply the exception to the total claim and not merely to specific isolated issues. *Red Sea Insurance*, A.C. 190 at 206-07. Less clear is the role of policy considerations in determining whether the exception can apply to produce reduced recovery for a claimant, and whether it is permissible to apply to a tort the law of a country which is neither the forum nor the place of the wrong. See generally, Richard Fentiman in *Written Evidence H.L. Paper 36* (1995), at 19-24 and oral evidence of North at 37.

267. Note that, in relation to English court jurisdiction under the traditional common law rules, the inapplicability of the Brussels Convention is based on the defendant's presence or submission. Alternatively, a plaintiff can serve a claim form on an absent defendant under RSC Ord. 11.

C. A Comparative Analysis Of European And Commonwealth Choice Of Law Provisions

Before considering the recent English statutory reforms, it is interesting to consider the degree of European and Commonwealth harmonization of tort choice of law provisions.

The prevailing orthodoxy throughout Western Europe is to apply a *lex loci delicti* test, or a closely amended variant of that approach.²⁶⁸ In France, the courts have deduced from Article 3 (1) of the Civil Code that the *lex loci delicti* applies. The Dalloz commentary to the Code asserts: "Subject to contrary provisions of international treaties, non-contractual obligations are regulated by the law of the place where the fact which gave rise to them occurred." Similar principles are operative throughout Belgium²⁶⁹ and Denmark.²⁷⁰

German courts apply a modified form of the *lex loci delicti* theory. If a tortious act has an impact in more than one state, German law prefers *the law of the place that is more favorable to the injured party*. The place where the tortfeasor acted is where he (or a person instigating or assisting him) acted in whole or in part. Preparatory acts do not qualify. If there is more than one such place, the law most favorable to the injured person applies.²⁷¹ The place in which the consequences take effect is the location where the object of legal protection is impaired, and it does not matter where the damage occurred.²⁷²

268. See generally C.G.J. Morse, *Choice Of Law In Tort: A Comparative Study*, 32 AM J. COMP. L. 51 (1984). Note that Switzerland is an exception. The Swiss have adopted a general rule that the law of the parties' habitual residence governs delictual rights. Under Swiss federal law, the *lex loci* is only applicable in situations where the primary rule fails for lack of such a common residence. This position is replicated, in part, under the new Dutch draft provisions that look to the "closest connection" as the overriding principle to identify the applicable law, but the provisions also engage in territorially orientated presumptions.

269. The test is that of the law of the country where the event giving rise to liability occurs. Provided that the event generating the damage arose there, courts apply the foreign law without any need for the responsible party to be present or reside there.

270. In Denmark, the *lex loci delicti* normally applies. If the tortious act is intended to produce effects in another country, a claimant can make a good argument for applying the law where the effects actually result. Normally, courts do not weigh the fact that the two parties involved in the tort come from the same country. For example, if two Danish registered cars were to collide in Germany, the Danish court would still apply German law.

271. This rule is known as the principle of most favorable law, i.e. *günstigkeitsprinzip*.

272. There are two exceptions to the general rules: (a) by reason of unlawful act committed in a foreign country, no greater claims can be enforced against a German than those created by German law; and (b) claims for extra-contractual damages based on an act or omission of a German national committee abroad are governed by German law, insofar as a German national has been damaged.

However, as Reimann has stated, the basic rule of the *lex loci delicti* raises additional and problematic choices when there is a division between the place of the wrongful act and the place of the harmful result.²⁷³ There is no broad consensus among European countries in such a scenario as to which of the two is operative.²⁷⁴ Problems have arisen because of the numerous statutory and judicial exceptions that different countries apply to the broad rule.²⁷⁵ These exceptions have developed in cases where the tort occurs within a pre-existing relationship, commonly between family relations, where the law governing that relationship supplants the place of the tort. Many countries also have displayed a marked preference for departing from the *lex loci delicti* approach on the basis that “the closest connection” is elsewhere.²⁷⁶ This flexibility is engendered where the parties have a “significantly stronger relationship” with one state more than any other, potentially enhancing the applicability of that state’s laws irrespective of other factors.²⁷⁷

Importantly, some countries in Western Europe have adopted specific provisions to meet the difficulties that certain torts present. In particular, a number of countries have adopted the Hague Convention on the Law Applicable to Traffic Accidents and have subjected products liability cases to the Hague Convention on the Law Applicable to Products Liability. In Austria and Switzerland, unfair competition has merited a legislative response through federal law initiatives.²⁷⁸ These specifically designed initiatives will, of course, supplant the more general choice of law rule.

An interesting dichotomy thus prevails between the European and American substantive choice of law rules. The United States courts have adopted a broad proper law analysis with inherent flexibility, whereas the European analysis has been more circumspect. The primary rule is to apply the *lex loci delicti*; a clear preference exists for the application of a certain rule and courts make exceptions only in rare circumstances. As Reimann states, “[D]epartures

273. M. REIMANN, *CONFLICT OF LAWS IN WESTERN EUROPE: A GUIDE THROUGH THE JUNGLE* 135 (1995).

274. The clear preference is to adopt the law of the place where the act was committed. However, French courts apply the laws of the place where the injury occurred, while Swiss courts apply either law, depending on the circumstances of the case. Portugal’s rules replicate the Swiss rules and practices.

275. REIMANN, *supra* note 273, at 136.

276. *Id.*

277. *Id.*

278. *Id.* The U.K. is not a party to the Hague Convention of May 4, 1971 on the Law Applicable to Traffic Accidents, or to the Hague Convention of October 2, 1973 on the Law Applicable to Products Liability. Note that the European Convention on Civil Liability for Damage Caused by Motor Vehicles of 1973 relates to unification of substantive law but is inapplicable to choice of law issues.

from the rule do occur, but they are considered exceptions from a general principle and require convincing justifications.”²⁷⁹

Significantly, the Supreme Court of Canada, which historically followed the Western European approach, has recently abandoned the broad rule in *Phillips v. Eyre* in favor of a rigid and inflexible *lex loci delicti* approach in provincial intra-Canadian cases. In *Tolofson v. Jensen*, a case involving the paradigmatic motor accident, the majority of the Canadian Supreme Court asserted that such a rule complied with the territorial principle of international law, the practical concerns of certainty, ease of application, and the expectations of ordinary people and the majority of other states.²⁸⁰ Justice La Forest explained:

Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs. If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least, generally, respected. Stability of transactions and well-grounded legal expectations must be respected. Many activities within one state necessarily have impact in another, but a multiplicity of competing exercises of state power in respect of such activities must be avoided.²⁸¹

279. *Id.* at 137.

280. *Tolofson v. Jensen*, [1994] 120 D.L.R. (4th) 289 (Can.); see also, Jean-Gabriel Castel, Q.C., *Back to the Future! Is the “New” Rigid choice of Law Rule for Interprovincial Torts Constitutionally Mandated?*, 35 OSGOODE HALL L.J. 35 (1995); Peter Kincaid, *Jensen v. Tolofson and the Revolution in Tort Choice of Law*, (1995) 74 CAN. BAR REV. 537; William Tetley, *New Development in Private International Law: Tolofson v. Jensen and Gagnon v. Lucas*, 44 AM. J. COMP. L. 647 (1996). See, e.g., *Brill v. Korpaach Estate* [1997] 148 D.L.R. (4th) 471 (Can.) and *Leonard v. Houle* [1997] 154 D.L.R. (4th) 640 (Can.) where *Tolofson* was followed and where the Courts found the rule to be “clear, certain and predictable,” that it “discouraged forum shopping” and that it “complied with the requirements of the Canadian Constitution.”; see generally, Janet Walker, *Choice of Law in Tort: The Supreme Court of Canada Enters the Fray*, 111 L.Q.R. 397 (1995);

281. See *Tolofson*, 120 D.L.R. (4th) at 305. Note that the judgment of Justice La Forest may be interpreted as being more sympathetic to having an exception in international cases than in inter-state cases.

The Australian approach, a rigid double actionability test founded on *Phillips v. Eyre*, is now a distinctively Australian phenomenon since all of Western Europe and the Commonwealth have abandoned the approach, at least with respect to inter-provincial torts within a federal system. England has also abolished double actionability, with statutory reform acting as a catalyst for indirect harmonization.

D. Reform Of Applicable English Choice Of Law Rules: The Private International Law (Miscellaneous Provisions) Act of 1995

English choice of law provisions have been predicated for almost a quarter of a century on the House of Lords decision in *Boys v. Chaplin*.²⁸² This decision introduced a rule of double actionability, although courts could depart from the general rule in exceptional cases to apply the law that had the most significant relationship with the issue and the parties. However, in a crucially significant development, the English Parliament, following Law Commission recommendations,²⁸³ has completely abolished the old common law position except in cases of defamation.²⁸⁴ The Private International Law (Miscellaneous Provisions) Act of 1995 states quite categorically that the rules of the common law, insofar as they require actionability under both the law of the forum and the law of another country for the purpose of determining whether a tort is actionable in the forum, are abolished.²⁸⁵ The new general rule is to apply a modified *lex loci delicti* approach containing certain presumptions on ascertainment. Section 11, the key provision, provides:

- (1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or *delict* in question occur.²⁸⁶

282. [1971] A.C. 356.

283. U.K. Law Com No. 193 (1990); Scot Law Com No 129 (1990).

284. Note that § 9 (6) of Part III of the Private International Law (Miscellaneous Provisions) Act of 1995 provides a key illustration of this fundamental reform. The old common law rationale was to apply only English law when the tort occurred in England, irrespective of the degree of foreign elements involved. The decision in *Szalatnay-Stacho v. Fink*, [1946] 2 All E.R. 231 (C.A.) displays this point. See *supra* p. 911. Section 9(6) provides: “for the avoidance of doubt (and without prejudice to the operation of § 14 below) this part applies in relation to events occurring in the forum as it applies in relation to events occurring in any other country.”

285. See § 10 of the Private International Law (Miscellaneous Provisions) Act of 1995 (U.K.).

286. If infringement of copyright transpires in the Netherlands, courts apply Dutch law, by virtue of § 11(1), albeit subject to displacement possibilities. See *Pearce Ove Arup Partnership Ltd.*, [1999] 1 All E.R. 769 (C.A.).

- (2) Where significant elements of those events occur in different countries, the applicable law under the general rule is to be taken as being :
 - (a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;²⁸⁷
 - (b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged;²⁸⁸ and
 - (c) in any other case, the law of the country in which the most significant element or elements of those events occurred.²⁸⁹
- (3) In this section 'personal injury' includes disease or any impairment of physical or mental condition.

If one were to hypothetically apply the new English choice of law approach to intra-national torts in Australia, vastly different results would occur. The reference to Queensland law as the *lex fori* in *Stevens*, for instance, would be rendered completely void, and only the New South Wales provisions would be relevant. Similarly, any reference to Australian Capital Territory provisions in *Gorton* would be impractical *vis a vis* the defamatory publications in Victoria and New South Wales. In effect, although the new English standard in section 11

287. An illustration of the applicability of this section is where a defendant negligently manufactures a product in Virginia but causes personal injury in England. English law would be determinative.

288. Acid rain is illustrative of this section. For example, emissions from a nuclear power station in England form acid rain that damages crops (property) in France. French law would be determinative.

289. Note that it is vital to look at the essential elements of the cause of action in the case of multi-country torts. *See generally*, Rodger, *supra* note 6 (arguing that it is extremely difficult to identify the statutory *lex loci delicti* in cases of cross-border personal injury/property damage, cross-border professional negligence cases and unknown torts). In regard to the last scenario, see *Soutar v. Peters* 1912 S.L.T. 111 on seduction; *id.*, at 207-09). Multistate defamation or facilitation of infringement of copyright via the Internet provide additional examples; in the case of Internet abuse, there could be connections with numerous jurisdictions: uploading (input in A); display on a screen in B, and transmission via a number of other countries.

does not amount in express terms to a *lex loci delicti commissi* rule – the resembling orthodox position in Western Europe – it does come extremely close to producing the same outcome. For example, suppose a parent in England sees a television broadcast of his child injured in a fatal accident in Scotland; the parent then suffers from nervous shock.²⁹⁰ The physical injury to the child occurs in Scotland, but the parent’s nervous shock occurs in England. Which subsection of law under section 11 is applicable? The answer, applying a test akin to that of *lex loci delicti*, involves the examination of the “events constituting the tort,” here, the infliction of nervous shock via the broadcast medium in England.²⁹¹

The new statutory legislation also allows for the displacement of the general rule in accordance with the important terms of section 12:

- (1) If it appears, in all the circumstances, from a comparison of:
 - (a) The significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and
 - (b) The significance of any factors connecting the tort or delict with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or of any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.

290. See, e.g., *Alcock v. Chief Constable of South Yorkshire Police*, [1992] 1 A.C. 310. *Alcock* involved the Hillsborough football tragedy where 95 people died and over 400 were injured when the South Yorkshire Police allowed an excessive number of spectators to crowd into the football ground at Hillsborough. See also *Frost v. Chief Constable of South Yorkshire*, [1997] 1 All E.R. 540 (C.A.); *Hunter v. British Coal Corp.*, [1998] 2 All E.R. 97.

291. Dr. Peter North presented this example to the Special Public Bill Committee. Note that the court has to look at the events constituting the tort, the very acts and consequences that make up the tort, and must exclude such matters as the residence and nationality of the parties. It is incumbent upon the court to identify the most *significant* element or elements of these events. See *Cheshire and North*, *supra* note 36, at 364.

- (2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events.²⁹²

Hence, the broad general rule contains flexibility that allows courts to displace it with the law of another country when doing so is “substantially more appropriate.” This reasoning parallels sections 11 and 12 of the United States Second Restatement of the Conflicts of Laws, which seek to salve the conscience of multilateralists and unilateralists alike; a parallel also exists in the 1995 Act between a bigamous union of jurisdiction-selecting rules and proper law approaches. Jurisprudential policy considerations that reflect current English beliefs in the tort choice of law are a vital component of the new general rule and displacement exception.²⁹³ Overall, policy objectives reflect a concern for certainty, precedent, flexibility and ease of application.²⁹⁴ The Australian High Court’s adoption of the rigid and inflexible rule formulation in *Stevens*²⁹⁵ should have implicitly addressed and promoted each of the aforementioned policy objectives.²⁹⁶ In *Boys v. Chaplin*, Lord Wilberforce supported the compromise approach of maintaining the general rule for most cases, but allowing for a limited proper law exception.²⁹⁷ He rejected the *ad hoc* nature of the United States choice

292. Note that courts have criticized this flexible exception for lacking any proper conceptual basis. See Fentiman in Written Evidence *H.L. Paper* 36 (1995) at 28-31; see generally, P.B. Carter [1995] C.L.J. 38, at 40-41; James Blaikie, (1995) S.L.T. 23, 26-27; Floyd and Purvis [1995] 3 E.I.P.R. 254; Peter Kincaid, *Justice in Tort Choice of Law* 18, ADEL. L. REV. 191 (1996). See also Law Com. No. 193 (1990), paragraph 3.8, where they give three rudimentary illustrations of where a displacement rule might apply: first, where the law of the place where the tort is committed is fortuitous, such as where a tort or delict is committed wholly aboard a ship in territorial waters; second, where there is a prior existing relationship between the parties, such as where a group of friends, all from England, take a motoring holiday together in Europe; third, where every factor in a case other than the place of the accident points to a particular system of law. The Law Commissions illustrations are demarcated by a grouping together of connecting factors to a particular country away from that delineated by the general rule.

293. See generally Fawcett, *supra* note 52.

294. *Id.* at 656-58.

295. The United States Supreme Court adopted the choice of law test as reformulated by Justice Brennan in *Breavington v. Godleman* (1988) 169 C.L.R. 41 (quoted in *McKain v. R.W. Miller & Co.(S. A.) Pty Ltd.* (1991) 174 C.L.R. 1 and *Stevens v. Head*, not allowing for any “flexible exception.” See *Stevens v. Head* (1993) 176 C.L.R. 433, 453 (1993) (opinion by Justices Brennan, Dawson, Toohey, and McHugh).

296. See discussion, *supra* note 272.

297. *Chaplin*, [1971] A.C. 356 at 391.

of law.²⁹⁸ Of course, the price paid for the overt certainty of treating double actionability as a statute may be, on occasion, investing the *lex fori* with excessive importance, allowing courts to treat cases with identical fact patterns differently, and encouraging forum shopping. Post *Stevens* decisions in Australia highlight these difficulties.²⁹⁹

V. THE ESCAPE DEVICES

A. Public Policy

Conflicts of law has become a veritable playpen for judicial policy makers [The] courts are saddled with a cumbersome and unwieldy body of conflicts law that creates confusion, uncertainty and inconsistency, as well as complication of the judicial task. [The task] has been like that of the misguided physician who treated a case of dandruff with nitric acid, only to discover . . . that the malady could have been remedied with medicated shampoo. Neither the doctor nor the patient need have lost his head.³⁰⁰

The clear intention of the Act of 1995 is to allow claims based on causes of action or heads of damage that were previously unfamiliar to English law; however, English courts have the option of backing away from the applicable law under section 14 (3)(a)(i) if the law would “conflict with principles of public policy.”³⁰¹ The ambit of this exception demands evaluation. If the judiciary applies this exception regularly and widely, the *lex fori qua* public policy will remain operative. Policy makers never intended for the exception to apply only where the applicable foreign law is “manifestly incompatible” with English public

298. *Id.* at 391-92.

299. In *McKain v. R W Miller & Company (South Australia) Pty Ltd* (1991) 174 C.L.R. 1, the majority of the High Court clearly evinced the importance of certainty: “[M]indful of the freedom of intercourse throughout this country and the general similarity of the laws in force in the various parts of Australia ... the overwhelming *desideratum* in a rule for intra-national torts is certainty of application or, more accurately, as much certainty as the subject matter admits.” *McKain* (1991) 174 C.L.R. 1 at 38.

300. *Paul v. Nat’l Life*, 352 S.E.2d 550, 551, 553 (W.Va 1986).

301. Private International Law Miscellaneous Provisions) Act of 1995 (U.K.). Note that the Act finds its origins in the Law Commission Report, *supra* note 207. However, it departs from the draft bill annexed to the report in a number of significant respects. A Special Public Bill Committee of the House of Lords considered the bill and published its discussion as H.L. Paper No.36 of Session 1994-1995. This evidence refers to the position adopted in Western Europe, and to bring English law into line with our Continental partners was an implicit aim of the new Act.

policy.³⁰² The Lord Chancellor advocated a less restrictive usage, a suggestion that the Labour Party spokesman for legal affairs supported in the proceedings of the Second Reading Committee of the House of Commons.³⁰³ Indeed, Lord Irvine explicitly stated: “the courts will have no difficulty in applying the public policy exception in Clause 14(3).”³⁰⁴

The application of a public policy criterion introduces an underlying tension. It engenders the embarrassment of an English judge’s resort to the stigmatization of the applicable foreign law as contrary to English public policy. The alternative, which the Act demands, is to allow and apply foreign laws that are entirely unfamiliar and possibly unacceptable to the judiciary and to create a remedy where no tort exists under English law. Plaintiffs have the option to override the English rules by bringing an action abroad and seeking English enforcement of the decision. Nevertheless, it seems inappropriate to fuse English rules of law with foreign tort rules in areas where existing English substantive tort principles are sufficient.³⁰⁵

A number of examples illustrate the invidious uncertainty that can result from the application of unfamiliar foreign tort rules of the type the *lex fori qua* public policy sought to strike down. If courts were to apply unfamiliar foreign tort rules in these examples, the results would be unsatisfactory and anomalous.

1. Pure Economic Loss Through Negligence

It is instructive to consider choice of law ramifications in light of *Caparo v. Dickman*.³⁰⁶ The issue before the House of Lords was whether auditors of the target company owed a duty of care to shareholders or potential investors when the latter acted to their financial detriment in reliance on company accounts.

302. See, e.g., Adrian Briggs, *Choice of Law in Tort and Delict*, (1995) L.M.C.L.Q. 519, 525; P.B. Carter, *Choice of Law in Tort: The Role of the Lex Fori* (1995) 54 C.L.J. 38. Note that Briggs favors a wide view of public policy in relation to Part III and points to the absence of the word “manifestly” preceding “public policy.”

303. Report of the Second Reading Committee (June 7, 1995), col. 4.

304. Hansard H.L. Deb. 1994 vol. 562, col. 1413, 1414 per Lord Lester.

305. Of course, it may be said within the context of the European Economic Area that plaintiffs may, under the Brussels and Lugano Conventions, readily enforce foreign judgments based on foreign torts in this country. That is undeniable. However, it is one thing to facilitate the enforcement of foreign judgements and quite another to allow English courts to use foreign laws to adjudicate and grant remedies for exotic and unfamiliar foreign torts! In any event, many unfamiliar torts come from countries beyond the European Economic Area, thereby falling outside the scope of the Brussels and Lugano Conventions. For these countries outside Western Europe, the range of defenses to enforcement is far wider. See Hansard H.L. Deb., vol. 562, col. 1413.

306. *Caparo Indus. v. Dickman*, [1990] 2 A.C. 605; see generally Alan Reed, *Commercial Tort Choice of Law Provisions*, 1994 Lloyd’s Mar. 8 Com. L.Q. 248.

Their Lordships held that the auditor's statutory duty³⁰⁷ to prepare accounts extended to the body of shareholders as a whole, thereby requiring them to exercise informed control of the company and prohibiting individual investors from buying shares with a view to profit. Lord Bridge explained that the requisite proximity existed where the defendant knew that his statement would be communicated to the plaintiff, either as an individual or as a member of an identifiable class in connection with a specific transaction or transactions of a particular kind, and that the plaintiff would be very likely to rely on it for the purpose of deciding whether or not to enter into the transaction.³⁰⁸ Thus, the auditors did not owe a duty of care simply because someone might have reasonably and foreseeably relied on them.³⁰⁹

In *Caparo*, Lord Bridge also acknowledged that some jurisdictions in the United States adopted views directly contrary to his own.³¹⁰ Likewise, a majority of the Court of Appeals in New Zealand (Justices Woodhouse and Cooke) held, in *Scott Group v. McFarlane*, that auditors owed take-over bidders a duty of care based simply on the probability that the company would attract a take-over bidder and the bidder would rely on the audited accounts.³¹¹ This duty was derived from the foreseeability of reliance per se.

Thus, one could imagine a problematic but not unusual commercial tort choice of law dilemma. Suppose that an auditor in England negligently prepares accounts for a client and that others will rely on these audited accounts. These accounts are transmitted to an American state, which adopts a reasonable foreseeability test unlike that in *Caparo*. The parent company is incorporated in that state, and it is there that the parent company receives and acts upon the accounts to its detriment. The parent company, part of a group structure, sends these same accounts to another subsidiary based in New Zealand. The subsidiary company also suffers financial losses. The main issue in an English court of law, according to section 11 of the Act, is determining the country in which the events constituting the tort in question occur.

In *Diamond v. Bank of London and Montreal Ltd.*³¹² and *The Albaforth*,³¹³ courts applied a test based on the location where the plaintiff

307. The requirement of the appointment of auditors and annual audit of accounts derived from the Companies Act of 1985, subsecs. 235-46.

308. *Caparo Indus v. Dickman*, 2 A.C. 605 at 621.

309. *Id.* at 625.

310. *Id.* at 624-25.

311. *Scott Group v. MacFarlane*, [1978] 1 N.Z.L.R. 553.

312. *Diamond v. Bank of London and Montreal*, [1979] Q.B. 333 (CA). See Rodger, *supra* note 6, at 206-10.

313. *Cordoba Shipping Co. v. National State Bank*, [1984] 2 Lloyd's Rep 91 (C.A.). In cases involving manufacturing defects, the judiciary views the location of the tort as the place of manufacture or initial supply. In design defect cases, the location of the tort is the place of product design. Finally, in instructional defect cases, the location of the tort is the place where the manufacturer knowingly places the goods on the market for distribution.

received and acted on the negligent misrepresentation in a “substance of the tort” approach. In the example above, this place would be the state where the parent company is incorporated. However, if a foreign law is determinative, it is possible that, because the plaintiff received and acted upon the information in the United States, an English court would award damages for a tort even though damages would not be available under the forum’s law.³¹⁴

It seems odd that a plaintiff who relies on negligent misrepresentations that originate in England might successfully sue in England while an English plaintiff could not, though the accountant in each case actually acted in England. Such a result appears counterintuitive. A legitimate concern is whether a defendant could rely upon an English court to conclude that liability would be contrary to public policy. Certainly, the *travaux préparatoires* to the 1995 Act envisage liability for causes of action that are contrary to established English substantive law. This Article suggests that, to avoid inequitable and absurd results, the *lex fori qua* public policy deserves a distinct role.

The retention of such a role for the *lex fori qua* public policy to cover *Caparo*-like situations may appear to be both discriminatory and xenophobic. However, there are strong arguments for this approach, particularly with respect to the underlying rationale of *Caparo* itself. The *Caparo* holding was an inherently policy-oriented decision to curtail parties who could claim recovery for economic loss. On policy and judicial floodgate grounds, their Lordships prevented liability from accruing to an indefinite and indeterminate class. Lord Bridge clarified:

To hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to all and sundry for any purpose for which they may choose to rely on it is not only to subject him, in the classic words of Cardozo CJ to ‘liability in an indeterminate amount for an indeterminate time to an indeterminate class;’ it is also to confer on the world at large a quite unwarranted entitlement to appropriate for their own purposes the benefit of the expert knowledge or professional expertise attributed to the maker of the statement.³¹⁵

See *Distillers Co. v. Thompson*, [1971] AC 458, 468; *George Monro Ltd. v. American Cyanamid*, [1944] 1 K.B. 432, 441.

314. One should be wary of assuming that the judiciary will adopt the same definition of the place of the tort in the jurisdictional context as in the substantive choice of law provisions.

315. *Caparo Indus. v. Dickman*, 2 A.C. 605 at 621. A proper law of the tort approach, which allows the judiciary to consider each particular tort separately, also provides that a defendant could commit a separate tort in New Zealand, where the claimant receives and acts upon the statement.

The argument in favor of retaining the *lex fori qua* public policy is strengthened when one considers the otherwise serious dilemma that might arise in commercial undertakings with respect to liability insurance. The auditors' representation may be reliable in a number of different jurisdictions. A manufacturer may provide a product in state A, which is marketed in states B, C, D and E without his direct knowledge and causes subsequent physical injury or property damage without the manufacturer's being adequately insured. Lord Oliver considered this sensitive problem in *Caparo* and highlighted an important reason for rejecting the reasonable foreseeability test adopted in New Zealand and a number of American states. Lord Oliver said:

To apply as a test of liability only the foreseeability of possible damage without some further control would be to create a liability wholly indefinite in area, duration and amount and would open up a limitless vista of uninsurable risk for the professional man.³¹⁶

Caparo was a decision based on pragmatism. The court restricted the class of claimants for policy reasons and also because of the unfairness that would otherwise result in professional undertakings with respect to uninsurable risks. Given the reasoning behind not imposing liability on domestic plaintiffs, it appears inconceivable that courts should apply a wholly different approach when foreign plaintiffs are involved in a dispute.

2. Negligent Statements Relied Upon By A Third Party

A party to a case may also invoke the public policy exception in the converse situation where substantive liability arises under English law, but the relevant American state precludes action. Consider, by way of illustration, the hypothecate of negligent employer references.³¹⁷ In *Spring v. Guardian Assurance Place*, the English Court of Appeal held that, as a matter of policy, an employer does not owe a duty of care relating to an employment reference because it would undermine the defense of qualified privilege in an action for defamation (which would normally apply in the context of a reference).³¹⁸ A plaintiff can overcome the defense of qualified privilege by showing proof of the defendant's malice, but a court's decision to allow a cause of action in negligence would compel the plaintiff to prove carelessness on the part of the defendant. The

316. *Id.*

317. See generally *Edwards v. Lee*, THE INDEPENDENT, Nov. 1 1991.

318. *Spring v. Guardian Assurance Place*, [1994] 3 W.L.R. 354; see generally, Tom Allen, *Liability for References: The House of Lords and Spring v. Guardian Assurance*, 58 M.L.R. 553 (1995).

House of Lords, relying on *Caparo's* tripartite test for the establishment of the duty of care, reversed the decision.³¹⁹ In concluding that it was just and reasonable to impose a duty of care, Lord Woolf said that an action for defamation provided a wholly inadequate remedy for an employee who sustained loss as a result of a negligently inaccurate reference. According to Lord Woolf, the duty of care placed a wholly disproportionate burden on the employee to prove malice, which is difficult to establish. The court determined there was no rule under English law that barred a plaintiff's claim for economic loss that resulted from a negligent employment reference simply because the plaintiff would have the burden of proving malice on an occasion of qualified privilege if he were suing for damage of reputation. Markedly different principles apply in the United States, where actual malice is generally a prerequisite to substantive liability.³²⁰

Suppose, for example, that a director of an English parent company, A, forwards a negligently prepared reference about X, an employee, that alleges misfeasance. The reference is forwarded to A's subsidiary company in New York and transmitted to other interested prospective employers in several American states. X sues A Company before the High Court in London. By the choice of law process effectuated in the 1995 Act, it is possible that the court would choose United States principles as the relevant and applicable law such that no liability would accrue because of the actual malice criterion. The respective litigants, however, are English domiciliaries and the negligent reference was also prepared in England. The dilemmatic choice presented is whether, in direct corollary to *Caparo*, this would be an occasion to make public policy transcendent, to disregard the chosen American law, and instead apply the relevant principles disseminated by the House of Lords in relation to negligent statements relied upon by a third party. Thus, a captivating anachronism has developed between articulation of enshrined domestic tort principles and appropriate chosen law. The ambit of public policy to resolve this conflict is shrouded in mystery.

3. Privacy

The exception for defamation provided by section 13 of the Private International Law (Miscellaneous Provisions) Act of 1995 is probably confined to liability for statements and actions against the press and others for breach of privacy and is subject to the full rigor of the new choice of law rules. Lord Lester

319. See *Szalatnay-Stacho v. Fink*, [1946] 2 All E.R. 231 (C.A.) where the judiciary said the tripartite test comprised reasonable foreseeability, proximity and, potentially, the just and reasonable imposition of liability. See also *Caparo Indus. v. Dickman*, 2 A.C. 605.

320. See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

articulated the inherent uncertainty of this approach with clarity and force in the House of Lords debates on the proposed new Act.³²¹

Under French law, defamation involves the fusion of criminal and civil law. It is markedly less restrictive on free speech and freedom of the press than are current English practices. Newspapers may rely on publication in good faith as a complete defense and, in tandem, damage awards are extremely limited. However, there is also a course of action for breach of privacy that is legally distinct from defamation. The development of this action evolved to protect not simply honor and reputation but, additionally, a person's personality. A right to a remedy exists for any interference with the privacy right. Defenses predicated on truth, good faith, or public interest are wholly inapplicable. French courts have very broad power to order preventative measures, including interlocutory injunctions to restrain invasions. Additionally, the French courts have the power to order the press to publish corrective statements that courts draft.

Let us again postulate a hypothetical example wherein an English newspaper publishes an article that is distributed to France, although the main circulation is in this country. The article, albeit entirely accurate and published in good faith and the public interest nevertheless breaches the French civil law of privacy. No defense would prevail under French law, even though defenses exist under the *lex fori*. Assuming that privacy falls outside the scope of section 13 of the 1995 Act, the French plaintiff would have the option of suing the defendant newspaper in English courts for both damages and an injunction on the basis of French civil law, even though the conduct was not wrongful under well-established English tort law principles. The unwelcome consequence will be a chilling of free speech and free press. It seems very unlikely, given the whole tenor of the Act, that one could stigmatize French privacy laws as contrary to English public policy.³²²

4. Unfamiliar Foreign Torts

There are numerous examples of overseas torts, the enforcement of which in England may prove to be either undesirable or extremely difficult. Intrinsic to these problems are issues of characterization that focus on a threshold test of defining the ambit of the tort. The written evidence the Norton Rose Group presented to the Special Bill Committee provides vivid illustrations of the possible anomalies of enforcement.³²³

- (a) In many states the wrongful initiation of civil legal proceedings is a recognized tort.

321. Hansard, 562 Parl. Deb., H.L. (5th ser.) (1994) 1412.

322. See oral evidence of Collins in H.L. Paper 36 (1995) at 72.

323. See H.L. Paper No. 36 of Session 1994-1995, Written Evidence of the Norton Rose Group, at 47.

- (b) Many states impose strict liability upon the manufacturer of goods for consequential damage caused to the ultimate consumer. This is in contradistinction to English law which, with certain statutory exceptions, is predicated on proof of negligence. One could reach the egregious conclusion that an American purchaser of defective goods manufactured in the *lex fori* can recover, whereas the English buyer within the *lex fori* cannot. This hardly represents a logically rational situation.
- (c) *Adams v. Cape Industries* provides a clear illustration of the differences between English and United States tort law.³²⁴ The *Adams* court subjected the English parent company to liability in Texas under United States principles. This subjection was based upon the company's ownership of a South African subsidiary that supplied the raw product to the Texas manufacturer and causally led to the plaintiff's asbestosis. Under English law, fundamentally different principles would have applied to the parent and subsidiary relationship in terms of piercing the corporate veil.

5. Unfamiliar Heads of Damage

The facts in *Mitchell v. McCulloch* offer persuasive examples of the prevailing difficulties that can arise from the application of unfamiliar heads of damage.³²⁵ In that case, a company director, a resident of Scotland, was injured in a shooting accident in the Bahamas through the defendant's negligence. Clearly,

324. *Adams v. Cape Industries*, [1990] Ch. 433 (English Chancery Division). Briggs provided another cogent example in his written evidence, which he presented to the Special Public Bill Committee. Suppose, he contended, that National Power, carrying out its generations operations in scrupulous compliance with the terms of its license and with English law, is accused of tortiously causing environmental damage in Norway through the destruction of trees. Is a judge required to apply Norwegian law so as to allow recovery of damages? It may be that in a Norwegian court and/or under the Lugano Convention this practice would be applicable such that the judgment would, in principle, be enforceable in England (subject to limited defences under that Convention). But is this reason enough for an English court to simply and uncritically apply foreign law? I suggest that this question demands a negative reply.

325. *Mitchell v. McCulloch*, 1976 S.L.T. 2.

a tortious assault occurred under the respective laws of Scotland and the Bahamas. However, among the heads of damage the plaintiff claimed were loss of profits by a company, of which the pursuer was an executive director, and a fall in the value of the company owing to the plaintiff's absence. The claim under the common law and double actionability failed because the forum's (Scotland) law did not recognize the heads of damage. Interestingly, the laws of the *lex loci delicti* (the Bahamas) would have recognized these claims. The applicable law under the general rule, applying section 11, would be the law of the country where the individual sustained the injury, *ex hypothesi*, the law of the Bahamas.

Accordingly, the central issue for determination by the courts of the forum involves consideration of whether liability is imposed on a defendant for a head of damage that is not available under domestic law. A related issue is whether courts should utilize public policy to reduce burdens on defendants when doing so limits a plaintiff's human rights and civil liberties. An eminent conflicts of law scholar describes the dangers of an unduly broad application of public policy as follows:

Once it is accepted that rules of private international law can be discarded as a matter of public policy simply in order to achieve what the forum considers to be just results, the gate is open through which the proverbial unruly (but locally bred) horse can pass so as to wreak havoc on international pastures.³²⁶

This description asserts that English courts cannot apply public policy simply because they do not like the foreign law. Nonetheless, section 14(3)(a)(i) may represent a means of denying application to foreign heads of damage that courts regard as unruly, wild, and unmanageable stallions. At this juncture, observers must take a wait and see approach.

B. Characterization

English courts may use the process of characterization in tandem with public policy as an operative device to refrain from applying an unacceptable

326. See H.L. Paper No. 36 of Session 1994-1995, quoting Carter. *See generally* P.B. Carter, *Choice of Law in Tort and Delict* 107 L.Q.R. 405. It should be stressed that the rather limited judicial guidance on the issue of public policy has generally been restricted to the fields of matrimonial causes and the recognition of foreign judgments. *See, e.g.*, *Vervaeke v. Smith* [1981] 1 All E.R. 55; *Armitage v. Nanchen* 147 [1983] J.P.R. 53; *Kendall v. Kendall* [1977] 3 All E.R. 471; *Newmarch v. Newmarch* [1978] 1 All E.R. 1.

foreign law.³²⁷ It is a critical component in the formulation of choice of law rules and defines the scope of the rules.³²⁸ A scholar offers the following explanation of section 9(2): “the characterization for the purposes of private international law of issues arising in a claim as issues relating to tort is a matter for the courts of the forum.” A threshold test, determined by the *lex fori*, is applied to the determination of a tort.³²⁹ Undoubtedly, the abolition of the first limb of *Chaplin v. Boys* means that courts may apply the Act to allow claims that extend beyond the confines of English torts, although the extent is unclear.³³⁰ Courts lack prior jurisprudence upon which to base this choice of law characterization. Article 5(3) of the Brussels Convention provides a related context of jurisdiction, but the article’s scope lacks clarity.³³¹

Very problematic issues of English law will arise that are fundamental to the practical application of Part III of the Act. For example, should courts characterize an action for breach of statutory duty as an action in tort? What about restitutionary obligations or whether one tortfeasor must contribute to the damages another tortfeasor pays to the plaintiff? Should English law characterize breach of confidence as a tort? Given the broad playing field for foreign causes of action that plaintiffs may wish to bring in England, the issue of classification is crucial to the determination of the number of pitches available to these claimants. It seems self-evident that, in the case of some causes of action unknown to English law, the question of classification may prove to be a tremendously lucrative, but perilous, field of litigation.

It will be extremely interesting to observe over the next few years whether English courts avoid the unfortunate application of foreign laws, which might produce unwanted outcomes through the process of characterization. It would, as commentators have stressed,³³² be naive to suppose that the total

327. In this regard, the meaning of the classification of the cause of action is the allocation of the question the factual situation raises before the court to its correct legal category. Its object is to reveal the relevant rule for the choice of law; *see e.g.*, NORTH AND FAWCETT, *supra* note 36, at 36-38.

328. P.B. Carter, *supra* note 326, at 408-409.

329. *See* Adrian Briggs, *supra* note 302, at 521. It seems that English courts might, in practice, adopt a middle position so that, as long as sufficient similarities exist between the actions available under the *lex fori* and under the *lex loci delicti*, the courts will characterize the acts in question as a “tort” for conflict of laws purposes, even though they do not constitute a tort under substantive domestic law. *Cf. Re Bonacina* 2 Ch. 394 (1912) (recognizing contract formed in Italy despite contrary English law).

330. Note that § 9(2) tells us that the English courts are to characterize (classify) the issue as one in tort or otherwise, but does not tell us what criteria the courts should apply in doing so.

331. In this regard, contrast Case 189/87, *Kalfelis v. Schröder*, 1988 E.C.R. 5565 with *Kleinwort Benson v. Glasgow City Council* [1994] 4 All E.R. 865, for an illustration of the pervasive difficulties.

332. Reed, *supra* note 306.

elimination of forum control provided by the *Halley* doctrine would not increase the temptation to have recourse to this escape avenue.³³³ Axiomatically, the underlying premise of the *Halley* doctrine is to protect English courts from being forced to apply deeply unfamiliar and unattractive foreign rules. It seems beyond question that the abolition of a determinative *lex fori* application to choice of law disputes may promote the impetus to achieve an identical result through the application of other forum control techniques. The end result may be to deny reform and to precipitate uncertainty and litigation.

Significantly, the general dissatisfaction with tort choice of law provisions in the United States has split into two classifications: rigid Bealian conceptualism³³⁴ that advocates multilateralism, and a proper law prospective that promulgates unilateralism's flexibility with uncertainty.³³⁵ This division has, in some cases, caused courts to avoid the tort question altogether.³³⁶ These courts characterize the subject matter not as tort, but rather as contract,³³⁷ family law,³³⁸ or succession,³³⁹ thereby legitimizing the application of a different and more satisfactory choice of law rule. For example, in *Haumschild v. Continental Casualty Company*,³⁴⁰ the Wisconsin court totally avoided the necessity under tort rules of referring to the *lex loci* by characterizing a wife's ability to sue her husband for the injuries she suffered from an out of state car accident as a matter of family law, appropriately left to the laws of the marital domicile state.

333. [1868] 2 L.R. 193 (P.C.). The court held that liability must exist under the *lex fori* as well as the *lex loci delicti*.

334. Brillmayer, *supra* note 25; Borchers, *supra* note 62.

335. Morris, *supra* note 33.

336. In this regard, a claimant may avoid uncertainty by persuading the court that the issue before it is not one of tort, but is to be classified in some other way with a different choice of law rule. For instance, courts may classify the issue of the survival of a cause of action as procedural and not tortious, and hence subject to forum law. *See Grant v. McAuliffe*, 264 P.2d at 94.

337. *See Harker v. Caledonian Insurance Co.*, [1977] 2 Lloyd's Rep. 556 (Q.B.). *See generally Plozza v. South Australian Insurance Co. Ltd.* (1963) S.A.St.R. 122, 128; *Hall v. National and General Insurance Co.* (1967) V.R. 355 (1967); *Stewart v. Honey*, (1972) 2 S.A.St.R. 585; *Schmidt v. Government Insurance Office of New South Wales* (1973) 1 N.S.W.L.R. 59, 70; *Ryder v. Hartford Insurance Co.* (1977) V.R. 257.

338. Recharacterization has arisen in the United States in the context of whether a child can sue her parents; *see, Balts v. Balts*, 142 N.W.2d 66 (1966); *Emery v. Emery*, 289 P.2d 218 (1955); *Pierce v. Helz*, 314 N.Y.S.2d 453 (1970).

339. *See Grant v. McAuliffe*, 264 P.2d 944.

340. *Haumschild v. Cont'l Cas. Co.*, 95 N.W.2d 814 (1959). *See also Schwartz v. Schwartz*, 447 P.2d 254 (1968), where the court reached the same conclusion in applying the choice of law rule of the Second Restatement. In Australia, courts have adopted contradictory rationales on the point. *See Warren v. Warren* (1972) Q.R. 386, 390-91 (supporting application of the law of the domicile), *but see Schmidt v. Government Insurance Office of New South Wales* (1973) 1 N.S.W.L.R. 59, at 71, the court explicitly stated that inter-spousal immunity was subject to *Phillips v. Eyre* double actionability rule.

American courts have also applied this characterization approach when they determine that a particular issue is procedural rather than substantive to allow the *lex fori* to determine the matter. In *Kilberg v. Northeast Airlines Inc.*, the deceased, a New York resident, was killed in Massachusetts on a flight that originated in New York.³⁴¹ The defendant, a Massachusetts corporation, invoked a Massachusetts law that limited wrongful death awards to \$15,000. In holding for the plaintiff, the New York Court of Appeals reasoned that the measure of damages was an issue of procedure, subject to the law of the forum. Chief Justice Desmond stated:

It is open to us . . . particularly in view of our 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 State policies.³⁴²

A pernicious result of the new Act is to impose consequential threshold difficulties over tort classification. The immediate realities are likely to be uncertainty, delay, and higher costs (through the necessity of obtaining evidence of foreign law, causes of action and heads of damage). In the longer term, of course, categories of causes of action may well become established. Nevertheless, the shifting nature of foreign tort and the creation of exotic torts unknown to the forum should ensure a fruitful and lucrative practice for lawyers engaged in the area.

VI. CONCLUSIONS: LESSONS FROM TRIBONIAN'S SLAVE

In my jurisprudential universe, fixed but revisable rules which lead to good results in the overwhelming majority of the cases, and which are supplemented by some general corrective principles to mitigate injustice in the remaining cases, are superior to, and incredibly more efficient than, a system in which each case is decided as if it were unique and of first impression. This is even more applicable to conflicts.³⁴³

This Article has examined the paradigm shift in principles that has occurred in Anglo-American choice of law in tort. It has extrapolated relevant jurisprudential policy needs and considerations that have underpinned the

341. 172 N.E.2d 526 (1961); *see supra* note 28, for discussion of escape devices from the First Restatement's rigid jurisdiction-rule.

342. *Kilberg*, 172 N.E.2d at 529.

343. Kozyris, *supra* note 164, at 580.

fundamental legal reorientation. In the present author's view, the optimal choice of law solution for international multistate cases must strike a balance between concerns of certainty, the *stare decisis* doctrine, and ease of application, but it must also have potential for limited flexibility in appropriately defined circumstances.

English law has experienced a marked shift of emphasis with Part III of the Private International Law (Miscellaneous Provisions) Act of 1995, which abrogated double actionability except in cases of defamation and torts committed prior to May 1, 1996. The common law still governs these limited spheres; the doctrine purveyed in *Chaplin* and *Red Sea Insurance* retains a modicum of influence. However, the rigid application of a primary double actionability rule can cause deleterious consequences, as the Australian treatment of intra-national and international torts and the *McElroy v. McAllister* decision show. The multilateralism of a rigid double actionability ethos, the mirror of Bealian's deontological reasoning, reflects a blind jurisdiction-selecting rule. It is suggested that, without any opportunity to distill its harshness with flexibility in appropriate cases, it is inapposite to universally affect a legitimate resolution of multistate transaction disputes.

At the opposite end of the spectrum, a proper law of the tort analysis, applicable in a number of American states since the landmark decision of *Babcock v. Jackson*, has created confusion, uncertainty and attendant delays. Like the heroine in a Doestoevsky novel, it is imbued by vagaries of excessive fluctuation. The orthodox choice of law position in Western Europe of applying a broad *lex loci delicti* rule is more austere, although exceptions apply in a number of countries. Part III of the Private International Law (Miscellaneous Provisions) Act of 1995 has indirectly achieved a certain degree of harmonization in this regard, as applying in section 11 a general rule akin to a *lex loci delicti* approach. This approach articulates the adoption of the law of the country in which the tort or delict in question occurs, but permits potential displacement by section 12 in situations where another law is substantially more appropriate. Unfortunately, the statute fails to provide a definition that relates to this latter terminology; other palpable difficulties likewise hinder its application. The Private International Law (Miscellaneous Provisions) Act was predicated upon the 1990 Reports of the English and Scottish Law Commissions. However, this author suggests that the subsequent decision in *Red Sea Insurance* rendered statutory intervention unnecessary because it allowed a degree of flexibility in double actionability cases. The *lex loci delicti* then became the only applicable option in cases where it formed the social, factual and geographical center of gravity of the dispute.

The English bifurcated model created through statutory legislation is neither better nor worse than its predecessor. The *ad hoc* nature of United States choice of law, which interest analysis and the Second Restatement promulgate, has proven similarly ineffectual: "If one lesson emerges from the United States

decisions it is that case to case decisions do not add up to a system of justice.”³⁴⁴ Consequently, the Anglo-American conflicts revolution has affected a paradigm shift in tort choice of law ideology and has, in the process, constructed a veritable Pandora’s box for legal advisers, academicians and judges.

344. *Chaplin*, [1971] A.C. 356 at 391-392 *per* Lord Wilberforce.