TITLE PAGE

TORT LIABILITY IN THE ANGLO-NIGERIAN AND AMERICAN CONFLICT OF LAWS

BY

AHMED RUFAI MOHAMMED

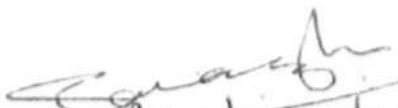
BEING THESIS SUBMITTED TO THE POSTGRADUATE SCHOOL AHMADU BELLO UNIVERSITY ZARIA IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS (LL.M).

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DECLARATION

I hereby declare that this dissertation has been written by me and that it is a record of my own research work. It has not been presented in any previous application for a higher degree. All quotations and references are indicated with specific aknowledgments.



.....SUPERVISOR. 29/9/88.

.....
AHMED RUFAI MOHAMMED.

.....SUPERVISOR.....

CERTIFICATION

This thesis entitled "Tort Liability in the Anglo-Nigerian and American Conflict of Laws" meets the regulations governing the award of the degree of Master of Laws (LL.M.) of Ahmadu Bello University Zaria and is approved for its contribution to knowledge and literary presentation.

(PROF MOHAMMED (MAN))
Chairman, Supervisory Committee Date: 27.2.1989

Member Supervisory Committee Date: 27.2.1989

DEAN POSTGRADUATE SCHOOL Date: 20/6/89

DEDICATION

To:

NANA MODIBBO MUHAMMADU

AND

USMAN MOHAMMED MAFA

PREFACE

A.V. Dicey, a renowned writer on Constitutional Law and the Conflict of Laws, was reported in a moment of exasperation to have remarked: "What a queer thing life is... Why should I ever have become involved in this Conflict of Laws".
I admit that there were occasions when I have fallen into this depressive depth. Writing on the conflict of laws is never easy. One is faced with conflicting point of views, judical decisions, and massive write ups. One has to agree with Judge Cardozo that: "it is one of the most baffling subjects of legal Science". These difficulties have in many instances created confusion. The most intellectually impeccable judges were known to have made mistakes out of context with their performance in other areas of the law. This type of situation justifies another of Judge Cardozos statement that the average judge when confronted with the problem is completely lost and like a drowning man is bound to grasp at straws. Unlike other areas of the law, the problem of research is not lack of materials but their unmanageable quantity. The task of collation, analysis, and

reconciliation is quite an enormous one, because of the division on academic point of views. Furthermore because of the attempt at citing judicial decisions to support, academic doctrines, all sort of principles are related to judicial opinions whether or not such doctrines were percieved or expressed in the decisions. The result at times, is that decisions are inadvertantly disfigured and mis-represented. Researching the present topic is therefore like an attempt at seperating the grain from the chaff distinguishing academic illusions from practical realities. I did just that by confining myself to what the courts have done and said, while at the same time contented with the fact that completely academic views are at times relevant in understanding some aspects of the law, and reflecting that fact wherever appropriate. The jungle of academic opinion in the conflict of laws is an interesting garden, but the untended outgrowths makes it quite difficult for the ordinary legal mind to enjoy its fragrance. The journey into that jungle is always a rewarding exercise in discovery of a unique area of law. There is always the satisfaction of an experience of a special

perspective to jurisprudence. As observers have stated, it is the fugal music of Law, The sparkling kaliedscopic mirror of human life under the extraordinary, and at times quaint angles at which different legal systems view it.

I have in this research, elaborated, comparatively judicial practices in England, Australia, Nigeria and America towards the solution of various issues in tort proceedings in the conflict of laws. I adopted a critical approach because the aim is to expose the defects in the Nigerian law and recommend the most viable alternatives as replacements.

I acknowledge, with sincere gratitude a great debt to my esteemed supervisor, Professor Mohammed Imam, for going out of his way both academically and administratively to help me achieve my objective. I am also grateful to Dr. K. S. Chukkol, Mr. Arshad Masood, Dr. Musa Yakubu, Alhaji Baba Shani, Dr. Ignatius Ayua, Mr. Nuhu Jamo, Mr. Sani Sukola and numerous other academic staff of the faculty of law A.B.U. Zaria for their help especially in my most difficult periods.

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Ahmed Rufai Mohammed

Maiduguri,

August 1988.

ABSTRACT

Torts in the Conflict of Laws has assumed an important position all over the world in recent times because of the rate of increase in interaction between peoples of different legal systems, brought about by technological developments. In some countries, the rules towards the solution of the issue have changed to take care of emerging problems created by the inadequacy of past rules in providing for them. However, choice of law rules in commonwealth countries, including Nigeria is not sophisticated enough to solve the problems of conflict of tort cases in contemporary times. The approaches of the courts in Commonwealth countries have not only remained rigid, conservative and absurd, but have created an atmosphere for hibernating unfair and absurd decisions. American courts, in contrast, have shown their readiness to change their attitudes in tune with the requirements of society. This work is therefore,a study of comparative legal approaches, as well as judicial principles. It highlights the three most prominent choice of law approaches in the English speaking world; the Rule in Phillips V. Eyre, the lex loci delicti approach and the proper law of the tort approach, as they affect various issues in a tort proceedings in the Conflict of Laws.

The research is composed of eight main chapters, each touching on major issues in tort proceedings in the Conflict of Laws and the mode of resolution adopted in the Four countries under study, viz: England, Australia, America and Nigeria.

Chapter One deals with the preliminary issue of establishing the jurisdiction of the court over the subject-matter and the parties. Under the Chapter, rules of jurisdiction in the Four Countries have been examined.

Chapter two deals with the issue of classification under it, the importance of classification of rules of law and the subject-matter

Chapter three contains an examination of the various ways evolved for the determination of the place of tort, and the importance attached to it.

Chapter Four gives an insight into the mode of determination of the proper plaintiff and the proper defendant to the proceeding.

Chapter Five is the Kernel of the research, it contains a discussion of the three choice of the law approaches in England, Australia and Nigeria, and their practical application by the courts of those countries.

Chapter six examines the relevance, and difficulties pertaining the necessity to invoice public policy reasons for purposes of excluding foreign law from applying.

Chapter seven examines the recognised defences available to the defendant under the three choice of law approaches.

Chapter eight deals with the twin issues of determining remoteness of damage, and the assessment of damages.

Chapter nine is the concluding chapter in which major problem areas have been re-appraised, and suggestions made for reforming the Nigeria law.

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ABBREVIATIONS

B.Y.I.L. - British Year Book of International Law.

Camb. L.J. - Cambridge Law Journal

Can. B.R. - Canada Bar Review

Harv. L.R. - Harvard Law Review

I.C.L.Q - International and Comparative Law Quarterly.

J.A.L. - Journal of African Law

L.Q.R. - Law Quartely Review

Law & Contem Prob Journal of Law and Contemporary Problems.

N.L.J. Nigerian Law Journal

Trans of Grot. Soc - Journal of the transaction of the Grotius Society.

DEFINITIONS OF TERMS

Lex Fori - Law of the Place in which a case heard.

Lex Loci Delicti(Commiss.) Law of the place where a wrong is committed.

Locus delicti - The place of commission of wrong.

Lex Causae - The law relating to the legal System governing a matter.

Lex Loci - Law of the place.

Lis Alibi Pendens - Suit pending elsewhere.

Forum non conveniens - the place is not a convenient forum.

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INTRODUCTION

> The realm of the Conflict of Laws is a dismal swamp filled with quaking quagmires, inhabited by learned but eccentric professors who theorise about mysterious matters in a strange but incomprehensible jargon. The ordinary court or lawyer is quite lost when engulfed and entangled in it.
>
> - Prosser, Selected Topics on the Law of Torts (1953).

The term "tort" in a loose sense refer to a civil wrong, other than a breach of contract, which the court will redress by an award of damages.[1] The law of torts serves the purpose of adjusting economic interests and other interests. It was aptly discribed as an instrument of distributive rather than retributive justice.[2] The aim of the law of torts in the Conflict of Laws is the same as its application to domestic cases.

The law of tort has a special place in the conflict of laws because of the basic necessity of ensuring that parties to tort proceedings containing elements of Foreign law have their claims not only determined but disposed of according to rules of law applicable to the issue, including any appropriate foreign law which relates to it. The law of tort came to acquire its present importance largely due to the rise in the level of

1. See Fleming, J.G. The Law of Torts 5th Ed. P.1 (1977)
2. See Morris, J.H.C. The Conflict of Laws 3rd Ed. P. 302. (1984)

pressures of new technology early this century. The twentieth century witnessed the conquest of natural barriers through the evolution of safer and faster means of transportation and communication. The conquest of the environment facilitated mass interaction of people from different countries. The division of the world into independent territories parochially oriented towards the acceptance of the territoriality of norms was rendered absurd through technological innovations. Recognition and acceptance of the applicability of foreign rules in certain situations, was further accentuated by the high level of trade, travel and communication. This has resulted in the increase of factors, acts and omissions constituting torts, and an expansion in the number of tort claims not based on the law of the forum.

A renowned writer has presented the various perspectives under which the law of tort is represented in the conflict of laws:[1]

> Dangerous drugs can cause babies to be born without arms and legs thousands of miles from the laboratory where the drugs where made; drinks (with or without snails) is sold all over the world;

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1. See Morris, J.H.C. Op. Cit. P. 303.

unfair competition is no longer confined to a single country; every year vehicles from neighbouring countries visit Nigeria and accidents occur; some affluential Nigerian homes receive programmes from all over the world with the aid of personal satellites stations; The National Television network service broadcast the same programmes all over the states; poisoned food can be sent from one state to another by post or through commerce; libel may be published all over the states; Fire can be started in one state to distroy farmlands in another. In all such situations it is quite easy for the country in which the case is instituted to apply its own domestic law to the issue without any regard to the interest or relation a foreign system of law may have on the issue. However, as Cheshire pointed out,[1] the adoption of this policy of indifference, though common enough in other ages, is impracticable in the modern civilized world, and nations have since found that they cannot afford to disregard foreign rules of law by sheltering behind the principle of territorial sovereignty, merely

1. See Cheshire, C.C., Private International Law 9th (1974) Ed. P. 3.

because the foreign law happens to be at variance with their own territorial or internal system of law. The idea, therefore, of an international body of rules to govern the mode of choosing the applicable law in cases dealing with conflict of tort laws starts from the conception that the proper foreign law should govern foreign cases, and involves the recognition of the idea of federation; the concept of unity in diversity in employing the provisions of different legal systems as guides in dealing with tortious issues.[1]

Nigerian law, like the laws of other Commonwealth countries, is tied down to English Law, with regard to the manner of resolving conflict of laws issues. English decisions have maintained endemic paternalistic relation to the laws of most commonwealth countries including Nigeria and Australia.[2] Claims for tort in the conflict of laws under the Nigerian law, therefore, follows the common law pattern. They include claims based on assault, trespass, conversion, nuisance, defamation, breach of statutory duties, damage to mines, land and

1. See Yntema H., "The Objective of Private International Law" in (1957) 35 Can B.R. 721.
2. See Jill Contrill, "An end to Slavishness: A note on Alli V. Okulaja" in (1973) J.A.L. 247.

economic trees, Admiralty damages, negligence, detinue, deciet and passing-off, malicious prosecution and enticement and harbouring.[1] The Nigerian conflict rules may not however apply to tort related wrongs based on customery laws, as there are statutory rules providing for the resolution of such conflicts.[2] Where the tort claim is based on a federal statute enforced within the federation the conflict rules will not apply. if the issue involves an internal interstate conflict.[3] They will also not apply to claims covered by international treaties which are part of Nigerian law.[4] In international conflicts, conflict rules will have no application to the so called "local actions" such as tress-pass to land, damage to land, mines, buildings and economic trees. This is mainly due to jurisdictional considerations.[5] In the inter-state context however, conflict rules apply to these claims.[6]

1. See Agbede I. O., "Conflict of Tort Laws in Nigeria: An analysis of the rule in Benson V. Ashiru" in (1972) 6 N.L.J. 103.
2. See The High Court laws. Cap 49 Laws of Northern Nigeria Cap. 61 laws of Eastern Nigeria; Cap.60 Laws of Western Nigeria and the interpretation Act (Cap 89)1964 L.F.N. & L.
3. See Benson V. Ashiru(2967) N.M.L.R 363.
4. See the carriage by Air Act(1955-58)Laws of the Fed. and Lagos. Vol. XI part I. See also Rule 26 of Dicey and Morris Conflict of Laws. 8th Ed. P. 210.
5. See Cheshire, op. cit. P. 98, Morris Op. Cit.P.75
6. See the Sheriff and Civil Process Act(1958) Cap. 189 SS.104-112.

Choice of law rules with regard to the resolution of conflict of tort issues in Nigeria also follows the common law pattern, and English law has furnished the basic foundation in that regard.[1] In England itself, the development of this aspect of the law has been quite slow and at times stagnant. The House of Lords, which remains the source of motivation and model of change in the legal structures of commonwealth countries, has maintained its traditional conservatism by sticking to rules which were proved both logically and practically defective through almost a century of academic and judicial criticisms. In this way, the "double actionability" choice of law rule formulated in the mid-nineteenth century,[2] when the world was less complex and courts were territorially oriented in character, came to survive the onslaught of scientific achievement and jurisprudential creativity.[3]

---

1. The retension and recourse to English law by the Nigerian law is for example ensured through various legestlations. See S.28 interpretation Act (1964); S.28, High Court Law, Laws of Northern Nigeria(1963); S.15 High Court laws (Eastern Nigeria(1963); S.3 High Court Law (Western Nigeria) 1959).
2. The rule was articulated as a choice of law principle by Willes J. in Phillips V Eyre(1870) L.R. 6 Q.B. I.
3. The most radical attack came from Dr. J.H.C. Morris when he formulated a revolutionery new doctrine to serve contemporary problems by way of the famous "proper law of the tort" doctrine. See Morris, "The proper law of the tort" in(1951) 64 Harv. L. Rev. 881.

A renowned commentator on the conflict of laws noted the failure of the House of Lords to motivate its jurisprudential dependants, when he stated:

> For years of accelerating life and increasing complexity, lawyers in the Commonwealth,...have awaited an opportunity for the House of Lords to restate choice of law principles in torts capable of measuring up to the problems of the second half of the twentieth century."1

While the attitude of the English law may have very little negative impact in a unified legal system like England, the rules created confusion and were proved unsuitable to the circumstances of Federated countries where each state is considered as an independent legal system, especially Canada, Australia and Nigeria. This is further compounded by the apparent lack of strong independent legal initiative by the courts of these countries.

In contrast, Americds strides in that direction is quite enviable. The independence and decisiveness shown by the American courts in changing from obsolete rules in favour of new ideas is unequalled in the world. At the moment, through their recently acquired choice of law approaches influenced by "the proper law of the tort"[2] doctrine, they are developing better and sophisticated means of estimation of the most

1. Graveson,"Towards a modern applicable law of torts" in (1969)85 L.Q.R. 505. The opportunity came the very year Graveson wrote his Essay. In Boys V. Chaplin(1969) 3 W.L.R. 322, the House of Lords stuck to the former principles.
2. See Morris J.C. "The proper law of the tort"(1951) 64 Harv. L. Rev. 881.

appropriate law to govern particular issues in tort in the conflict of laws. Case law literature in that regard is still growing, and an appraisal seems to indicate the overwhelming advantages of the approach. Most of the American decisions are based on interstate conflicts, which is accounted for by the amount of autonomy enjoyed by the states under the American constitution. The most important difference however in the mode of resolution between internal conflicts and international conflicts can be discerned from the pervasive influence of the American constitution. The independence of the states towards each other is reasonably truncated by constitutional provisions aimed at maintaining the national identity of the American nation. For example, the full faith and credit clause [1] sets forth the measure of respect which each state must give to acts records and decisions of sister states; the due process clause[2] imposes limits beyond which a state may not extend the jurisdiction of its courts or the range of application of its laws; the priviledges and immunities clause[3] imposes limits upon the extent to

1. Article IV, S.I of the U.S. Constitution.
2. Under the 14th Amendment of the U.S. Constitution.
3. Article IV. S.2 of the U.S. Constitution .

which a state may discriminate against the citizens of other states and; the equal protection clause[1] requires the states to give effect to the constitution, statutes and treaties of the United States and to the authoritative decisions of the Federal Courts in areas of national law.

There is no equivalent provisions in the Nigerian constitution, as there is no need for them. Safeguards with regard to interstate conflicts is catered for by the fact that Nigeria has a unified judicial structure with the Court of Appeal and the Supreme Court as the highest Court in the land.[2] Secondly, on all matters that may fall within the federal jurisdiction, including tort claims, the whole federation is looked at as a Unit.[3] Thirdly, the states have formed regional forums for purposes of ensuring uniformity in rules commonly inherited from the former regions.[4] Furthermore, the country was for the greater part of its independence, governed

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1. Under the 14th Amendment of the U.S. Constitution.
2. See SS. 212, 213, & 220 of the Constitution of the Federal Republic of Nigeria 1979.
3. See Benson V. Ashiru(Supra); The Sheriff and Civil Process Act(Supra).
4. The Northern States mostly amend their laws after a consensus and due consultation with each other.

by the military, which stultified the growth of divergent conflict rules by enchroaching on the traditional rights of the statesin a federation and by direct control of the states by the Federal Government.[1] Because of all these, Nigeria is spared the avalanche of conflict cases of the type obtaining in America in the near future.

The aim of this work is to state the various means adopted in England, Australia, Nigeria and America, in resolving most issues pertaining the tort proceedings in the conflict of laws. Consequently, this will entail a study of three choice of law principles on comparative basis. viz: The principles in Phillips V. Eyre; the lex loci delicti approach and; the proper law of the tort approach. The resolution of all other issues is dependent on the method adopted on the major issue of choice of law. The only exception in this regard is the issue of jurisdiction. The inclusion of a chapter on jurisdiction is however justified in that all proceedings have, as a starting point, the establishment of the courts jurisdiction over the action. Furthermore the rules with regard to jurisdiction, though general in character admit of some aspects which are peculiar to torts.

1. The military was in power in 19 out of the 28 years of independence.

The study has a comparative and critical framework. The aim is to show the defects and advantages of the aforementioned choice of law rules in their application to the various issues forming part of the tort claim so that suggestions may be made for reforming the law or shaping it up for purposes of removing the defects.

Chapter one of the write up will examine judicial jurisdiction in relation to the action, parties, and in some cases subject matter.

Chapter two will tackle the elusive subject of classification, and its practical importance in the application of the three rules.

Chapter three deals with the issue of determining the law area in which a tort is committed, through various approaches adopted in the four countries under study.

Chapter four examines the intricate issue of determining the proper parties to the action by examining the right of the plaintiff to litigate as a plaintiff and the obligation of the defendant to defend the action under the three choice of law approaches.

Chapter five will focus on the kernel of the whole work - choice of law. Under the chapter, the requirements of the three choice of law rules, and their practical application in the four jurisdictions will be examined.

Chapter six will deal with the issue of exclusion of foreign law by way of invoking public policy, in the application of the three choice of law approaches.

Chapter seven will examine the defences available to the defendant under the three choice of law approaches.

Chapter eight will concentrate on the twin issues of damage, and assessment of damages in the practical working of the three choice of law approaches.

Chapter nine, is a general conclusion, under which major aspects of the study will be re-appraised, and recommendations for reforming the Nigerian law based on the various findings will be made.

CHAPTER ONE

JURISDICTION.

Jurisdiction generally refers to the power and authority of the court to hear and determine an issue upon which its decision is sought in a case involving at least one foreign element.

The rules regulating Jurisdiction of the courts in a conflict of law case is usually classifiéd as proce dural,i.e. the domestic law of the forum governs. Consequently, statutory enactments of the forum are in most cases the dominant sources of the rules.

In this chapter, an attempt will be made to examine the various Jurisidictional rules applicable to a tort action in England, Australia, America and Nigeria.

Generally, the power and authority of the court over a tort involving elements of foreign law may, among other things, depend on two major considerations; First is the enforceability of any judgement the court may render. The court may decline jurisdiction where it has reason to believe that its judgement might be in vain. The second consideration is the defendant's appearance before the court. The courts are in most cases reluctant to assume jurisdiction where

the defendant cannot be compelled to submit to the jurisdiction of the court.

The English, Australian, and Nigerian rules with regard to jurisdiction are in many respects similar. This is mainly due to the fact that the common law had been the basis of their origin and development, and the common law structure has been generally maintained. There are some divergences, however, with regard to some of the rules and to some extent there has been development of new doctrines on some aspects of the courts jurisdiction. There are also some developments, especially in Australia, America and Nigeria reflecting the federal nature of these countries.

1.1 International and Interstate Considerations

In non-unified legal systems, the tendency is to treat each constituent state as an autonomous legal system, so that rules governing conflicts between one state law and another would have to be developed. Consequently, even rules of jurisdiction have the tendency of treating a sister state as a foreign jurisdiction on the same pedestal as an independent country. However, in some instances the rules may differ in certain respects between international and interstate conflicts.[1]

1. See Grayson R.H. "Problems of Private International law in non unified legal systems"1974 Recueil des cours 149.

The United Kingdom is in some respects looked at as a single country. Nevertheless, as far as the practical working of rules of jurisdiction in the conflict of laws is concerned, there is a complete dem arcation between England and other constituent parts of the United Kingdom e.g. Scotland.

Generally, English law considers any other place outside England as a foreign legal system. No attempt has been made to develop separate jurisidictional rules that may apply only to jurisdictions within the United Kingdom. In that respect the rules of jurisdiction in England is uniform. [1]

The above, however, is not the case with the other three countries. They are Federations in the strict sense of the term , with reasonable amount of legal autonomy to the states. Each state is treated as a foreign country for purposes of the rules of Jurisdiction. In the same vein, there are some differences in the rules governing jurisdiction between interstate and international conflicts.

In Australia, Dixon C.J. in Laurie V. Carrol[2], restated the jurisdictional autonomy of the states when he said:

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1. See Horn V. North British RY(1878)R.1055; Naftalin V. L.M.S. RY(1933) S.C.259.
2. (1958) C.L.R. 310 at 331.

> .... In questions of jurisdiction each Australian state is to be treated as distinct and separate country or law area.

Notwistanding the Commonwealth, rules of jurisdiction apply in interstate conflicts in the same way as they apply to international conflicts. However, the states are expected to observe the provisions of the Commonwealth Constitution, especially the full faith and credit clause .[1] Further, under the Service and Execution of Process Act 1968 Writ of summons issued out of or requiring the defendant in any court within the Commonwealth may be served on the defendant in any part of the Commonwealth. This statute has far reaching effect as far as jurisdiction is concerned. It served the purpose of destroying the state boundaries in matters of service of the writ of summons. While explaining this provision of the Act, Davidson J. in Commissioner of Road Transport V. Green Star Trading Co. stated:

> The object of that legislation (Service and Execution of Process Act) appears to have been to treat the whole Commonwealth as one unit for purpose of service.2

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1. See SS. 51 and 118 of the Commonwealth Constitution.
2. (1936) 36 (N.S.W.)320 at 327.

The Act is a federal legislation and it seemed to have contradicted the various state statutes which providedrules with regard to service of processes out of jurisidiction. The courts have however come to interprete the situation as alternative modes of service of process within the Commonwealth. In Dowd V. Dowd, Philip J. stated:

> The Federal Act introduced an alternative method for valid service out of Jurisdiction but for service only in Australia.1

America on the other hand has the most liberal federal set-up among the countries under consideration in terms of the legal autonomy enjoyed by the states. In consequence, the states are not constrained in any way in regarding other states as foreign jurisdictions. Unlike Australia and Nigeria, there is no federal statute to simplify service of the writ of summons between states.[2]

Notwithstanding all these, there is one significant limitation that has the capability of forcing the states to differentiate between interstate and international conflicts as far as matter of jurisdiction is concerned. Because

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1. (1946) St. R. Qd. 16 at 17.
2. See Scoles E. and Hay S., Conflict of Laws (1982) P.261. S.2 of the Restatement, second defines "state" as "a territorial unit with a distinct general body of law".

the question of Jurisdiction has a constitutional linkage, via the due process clause, the full faith and credit clause, and the priviledges immunity and equal protection clauses of the United States Constitution,[1] it has served the purpose of checking arbitrary exercise of jurisdiction by the state courts. Some writers are, however, of the view that the absence of such limitations with regard to international cases does not mean that rules of jurisdiction are different in an international conflict because, in general terms, the court has to advise itself in a manner as if it is dealing with an interstate conflict of laws.[2]

In the case of Nigeria, the Federal Constitution contains nothing in the nature of the full faith and credit clause of the Australian and American Constitutions or the due process and immunity clauses of the American Constitution. However, the Sheriff and Civil Process Act provides rules for out of state service of writs within the country.[3]

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1. See Home Insurance Company V. Dick, 281 U.S. 397 (1930), Bradford Electric Co. V. Clapper 286 U.S. 145(1932). Crfield V. Carryell 6 Fed. Cas 546 (1828) Kentucky Finance Corporation V. Paramount Auto exchange corp. 262 U.S. 544(1923).
2. See Scoles and Hay op.cit. Ibid.
3. Cap. 189, L.F.N & L. 1958 ed.

The Act is a carbon copy of the Australian Service and Execution of Process Act 1958. Like the Australian law, it also provides that a writ of summons issued out of any state may be executed in any part of Nigeria.[1] The interpretation of it, as in the case of the Australian statute, would be that it provides an alternative mode of service of Process for those states which already have statutes providing for out of state service. However, since the laws of Lagos and the Western States do not have similar provisions, the Act will apply there as exclusive rules of jurisdiction.

1.2 Personal Jurisdiction

Jurisdiction, as a means of establishing the court's right to hear and determine a case, involves the act of giving notice to the defendant, of the case against him through the service of a writ of summons. Judicial jurisdiction over defendants is therefore secured through the writ which in traditional legal terms, began with the concept of physical power, asserted by physically bringing the defendant before the court.

1. S. 96(1)

Though jurisdictional rules in all the countries under consideration had moved beyond the narrow conception of the writ as an expression of the court's physical power, the Writ still remains the most important implement of subjection to jurisdiction.

1.2.1 Rules of Personal Jurisdiction in England, Australia & Nigeria.

In English, Australian, and Nigerian laws, the common law rule has remained that the court has jurisdiction whenever the defendant can be served with a writ of summons within the forum. The emphasis is on presence of the defendant within the forum and service of the writ on him.[1] In that regard, even the most transient presence of the defendant is enough to make him amenable to the jurisdiction of the court, except where he was fraudlently enticed for the purpose of facilitating service of the Writ.

Statutory rules have provided exceptions to the strict requirement of personal service of the writ by providing for substituted service, i.e. taking all necessary steps to bring the writ

1. Kansas City, Fort Scott & Memphis Ry. Co. V. Daughtry 138 U.S. 298(1891).

to the defendant's notice.[1] However, this is allowed only where personal service could not have been possible at law.

Where the defendant is a partnership the statutes provide for service on any individual partner who may be within the forum, and the writ may be in the Partnership name.[2]

In the case of Corporations, presence within jurisdiction refers merely to the act of transacting business within the forum or the incorporation of the company in the forum. The only recognised mode of service on the company is by sending the writ by post to the registered office of the Company or by leaving it at the office.[3]

Where a defendant was not within the forum at the time when the writ was issued, the court may still have jurisdiction where by way of conduct he submits himself to the jurisdiction, e.g. where he instructs his solicitor to accept service of the

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1. England: Rules of the Supreme Court ord.65 r.4 Nigeria: Northern States High Court laws Ord. 5.R.5 Australia: Rules of the Supreme Court of Victoria, Ord. 10 R.I.
2. England: Or. 81 R.1: Nigeria Or. 5.R.5.
3. See English Companies Act 1948 S. 437: Nigerian Companies Decree 1968 S.36; Australia: Or. 13 R.1.

writ or where he had started an action as a plaintiff thereby giving the court jurisdiction to entertain a counterclaim related to the matter.[1]

With regard to all these the English, Australian & Nigerian rules of jurisdiction are similar.[2]

1.2.2 Rules of Personal Jurisdiction in America

In America too, presence of the defendant within the forum as a means of making him amenable to the jurisdiction of the court is a very important element in determining the exercise of the courts authority.

However, unlike in England, Australia and Nigeria, the Jurisdiction has some constitutional linkages, to the extent that it has become more acceptable for the courts themselves to sometimes question the use of mere presence alone as a basis for exercising judicial jurisdiction in all situations.[3] Notwithstanding this, the rule still remains that service of the writ of summons

1. England Or. 10 R.1: Nigeria Or. 5 R.3.
2. Both Australia and Nigeria derived their jurisdiction rules from England. The rules of the supreme court of England has therefore been the source of the rules adopted by the two countries.
3. See Mcdonald V. Mabee 243 U.S. 90,(1917)

within the forum is valid even though a non resident defendant was only temporarily within the state. In Grace V. McArthur,[1] service of the writ in an aircraft passing over state was upheld as valid. Like the position in England, Australia and Nigeria, jurisdiction will not be exercised where the defendant is fraudulently enticed into the state for purposes of serving on him the court processes.[2]

With regard to the jurisdiction of the court over Partnerships and Corporations, the American law is very much similar with the position in the other countries we have considered, and in that regard very much affected by substantive law concepts.[3]

Most states in America permit service of the writ in the name of the partners in cases brought against Partnerships. The law recognises each partner as an agent of the firm. The writ can also be served in the firm name.

With regard to Corporations, once it is incorporated in a state then it is subject to the jurisdiction of the courts of that state.

1. 170 F. Supp.442(1959)
2. See A.A.A.A. Creative Inc. V. Sovereign Holidays Ltd 76 III. App. 3d. 514(1979).
3. See The Restatement, second, Conflict of Laws S.40(1971)

tort committed within jurisdiction;[1] where the relief sought is against a person domiciled or resident within the forum;[2] where an injunction is sought to order the p laintiff either to do or refrain from doing anything within the jurisdiction;[3] and where the person out of jurisdiction is a necessary party to a tort action properly brought within the jurisdiction.[4] These are the only situations allowed by the statutes with regard to a tort action. An order for service of writ out of Jurisdiction is completely discretionary. Because a discretion is an uruly horse. capable of been subjected to the individuals whims and caprices, the courts have been reluctant to avail themselves of that power. In The Hagen Farwell, L.J. delivering a judgement in the English Court of Appeal, expressed this reservation when he stated:

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1. English Supreme Court Rules Ord. 11R.1(1) Nigerian High Court rules(Western States): Ord.4.R.I. Australia: Ord.13 R.L.2
2. England: Order 11 r.1: Nigeria: Order 4. r.1(b) Australia: Or 13 r.5.
3. England: Ord. 11 r.1(1)(b).;Nigeria:ord.4 r.1)g) Australia: Or 13 r. 7.
4. English Ord. 11 r. 1(1); Nigeria: Ord. 4. r. 1 (h) Australia: Ord 13 r. 6.

> It becomes a very serious question and ought always to be considered a very serious question whether this court ought to put a foreigner who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his right in this country and for one, I say most distinctly that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.1

The learned justice went on to lay down that where there is any doubt with regard to the construction of such statutes, the doubt is to be resolved in favour of the defendant, and, secondly, full and fair disclosure should be made to the court in view of the fact that the application is generally made ex parte.[2]

Under American law, too, the courts have discretionary powers to order service of process out of jurisdiction in both international and interstate situations. Statutory provisions have been made in most states giving power to the courts to litigate claims against persons out of the state. These legislations are, however, subjected to constitutional tests through the due process and full faith and credit clauses of the American Constitution with regard to interstate

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1. (1908) A.C. 189 at 201.
2. Ibid at 200.

cases. It has been submitted, however, that the absence of such constitutional safeguards over international cases does not necessarily mean that the courts can act with reckless abandon in claiming jurisdiction. The practice is for the courts to adopt the same attitude as if they are deciding over an interstate conflict.[1] Even where the court may have had jurisdiction, it has to fall under one of the two bases of discretionary jurisdiction that have been accepted throughout the United States. These are; persistant personal relationship of the defendant with the forum, or activities within or having effect within the forum.[2]

1.4 Limitation On Jurisdiction

There are two doctrines developed by the courts in the four countries under which the courts decline jurisdiction even where by the strict rules of jurisdiction they have the power to hear the case. The two are mainly the courts reaction to the difficulties that may emanate from a strict observance of the "transient" rule

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1. See Schisty V. Westernholz(1870) L.R. 6 Q.B155
2. See Scoles and Hay op. cit. p.262. See also SS.24,28,32, & 33 of the Restatement Second.

of jurisdiction whereby a mere visitor to the country will be held subject to jurisdiction. They serve the purpose of preventing the plaintiff from abusing his relational advantages through forum shopping.

Although the two serve similar purposes in the conflict of laws, they are of different origins and remain so in practice. The two doctrines are Lis alibi pendens and forum non Conveniens.

1.4.2 Lis Alibi Pendens

Lis alibi pendens is the prevailing doctrine for declining jurisdiction in England, Australia and Nigeria. It is designed to give power to the court to stay proceedings before it or restrain a foreign proceeding by way of an injunction in situations where two actions are brought by the same plaintiff in more than one forum. The reasons for these are many. For example, where he does that to harass the defendant or even out of a legitimate desire to have his case tried under a more favourable forum or law, or where he finds the property of the defendant he may wish to levy.

The doctrine is a completely Common Law doctrine adopted in Nigeria and Australia.[1] Initially the English courts were reluctant to order a stay unless the continuance of the action would work an injustice because it will be "oppressive or vexatious" to the defendant, or it will be an abuse of the process of the court, and it will not cause an injustice to the plaintiff.[2] This requirement came to be interpreted more flexibly to the extent that in Mcshanon V. Rocware Glass Co. Ltd.[3] the House of Lords ordered a stay in a case believed by writers not to be a case for lis alibi pendens at all.[4] In the case, the plaintiff, a Scotsman resident in Scotland was injured in an accident in a factory in Scotland owned by his employers Company registered in England. On the advice of his solicitors, he brought his action in England because it was believed that he will get a higher damage and that proceedings in Scotland may take a

1. Australia and Nigeria were colonised by Britain.
2. See St. Pierre V. South American Stores Ltd(1936) 1 K.B. 382 See also the Atlantic Star, where the proposition was interpreted more flexibly (1974) AC 436.
3. (1978) A.C. 792.
4. See Morris J.C. The Conflict of Laws 3rd Ed. p.93. (1984)

longer time to conclude. However, it was proved by way of evidence that the comparative costs and inconvenience will be greater in England than if the trial takes place in Scotland. The House of Lords unanimously ordered a stay of proceedings in the English action. Lord Diplock stated two propositions for staying action:

> In order to justify a stay, two conditions must be satisfied one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less in convenience and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.[1]

The Australian High Court has adopted the doctrine as part of the laws inherited from England.[2] There are two important differences, however. First, there is no Australian decision that tends towards accepting the much more liberal attitude of the House of Lords in the Mcshannon case. Secondly, the Australian courts have of recent adopted the American doctrine of forum non conveniens in deciding upon issues over which lis alibi pendens

1. (1978) AC 792 at 812 A - B.
2. See Cluther Development PTY Ltd. V. Marion Power Shovel Co Inc. & or(1973) 2 NSWLR 173.

may well apply.[1]

Lis alibi pendens has never been part of American law. This may be because the courts have adopted forum non conveniens as a much certain and satisfactory doctrine.

In Nigeria, lis alibi pendens is part of rules of jurisdiction. Unlike in Australia, however, there is paucity of judicial decisions on the matter especially with regard to torts. In Enwonwu V. Enwonwu,[2] a case relating to matrimonial proceedings, the Lagos High Court stayed the proceedings before it on the ground of inconvenience because an action was pending in the High Court of the Eastern state on the same issue. In two other cases dealing with contract, the Supreme Court unequivocally accepted the decision of the House of Lords in the Atlantic Star[3]

1.4.2 Forum Non Conveniens

Forum non Conveniens means that the court is not the convenient forum to hear the matter. It was developed by the American courts for the

1. See Glasson V. Scott(1973) A.L.R. 370
2. (1962) 2 ALL NLR. 239.
3. See Sonaar(Nig)Ltd V. Patenrederi (1985) 3 N.W.L.R. 135: G.B.N. Line V. Allied Trading Co. Suit NoFCA/V123(1984).

same reason the English Courts developed lis alibi pendens, namely, to avoid hardship on the defendant and on the court that can result from undue forum shopping, which was encouraged by accepted concepts in establishing jurisdiction through the mere presence of the defendant.

While constitutional limitations through the full faith and credit and the due process clauses seem to reduce the descretionary tendencies of the American courts, with regard to personal jurisdiction, they are convinced that where the required threshold of constitutional requirement is satisfied, there may still exist, circumstances in which the defendant will suffer hardship and inconvenience if the case is not tried elsewhere.[1] Consequently, the doctrine of forum non conveniens was adopted by them as a basis for the court to exercise its descretion to remit the parties for trial in another available forum. In that regard they have tried to lay down a well defined standard to preserve the doctrine from the abuses of arbitrary exercise of descretion.

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1. See Scoles and Hay, op. cit. p.261. See also S.84, of the Restatement, Second.

In declining jurisdiction through forum non conveniens, the court is expected to advise itself on certain factors. Justice Jackson's Judgement in the United States Supreme Court's decision in Gulf Oil Corporation V Gilbert, highlighted these factors:

> If the combination and weight of factors to given results are difficult to forecast or state, those to be considered are not difficult to nameand the one likely to be most pressed is the private interest of the litigant. Important factors are, the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view will be appropriate to the action and all other practical problems that make trial of a case easy, expeditious and inexpensive. The court will weigh relative advantages and obstacles for fair trial.1

Like in the case of Lis alibi pendens the plaintiff has to be well protected. As Traynor J. stated in Goodwine V. Superior Court;

> Unless the balance is strongly in favour of the defendant, the plaintiffs choice of forum should rarely be disturbed.2

English courts have rejected Forum non Conveniens even in situations where there is an apparent merger of the principles of lis alibi

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1. 330 U.S. 501(1947) at P. 507.
2. 63 Cal. 2nd 48(1965).

pendens and forum non conveniens. In the case of Meshannon V. Rockware Glass Co. the House of Lords rejected the doctrine. The Lords were however aware of the borderline effect of their judgements, and so the judgments were laced with categorical denial of any attempt at the application of forum non conveniens to the case. Lord Salmon in his judgment had to state:

> This doctrine(Forum non conveniens) had never been part of the law of England and in my opinion it is now too late for it to be made so except by an Act of Parliament [1]

The doctrine appears to have been accepted by the Australian and Nigerian courts, though the Australian courts have not made a categorical statement with regard to the doctrine, except that certain decisions point towards an implicit acceptance.

In Nigeria too, there is no judicial pronouncement as to whether the doctrine has been adopted or not. The decision of Adefarasin J. in Anerobi V. Glasco Allenbury(Nig. Ltd.[2] has been cited with some reservations as an acceptance of the doctrine.

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1. (1978) A.C. 795 at P.817 B.
2. (1965) LLR 219 at 220.

However, the judgment itself has been criticised as totally out of context with the facts of the case. The inconveniences highlighted by the learned judge in support of refusing to exercise jurisdiction were said to be irrelevant since they were not proved by evidence.[1]

1.5 Comparisons

The discussion in this chapter highlited the rules of jurisdiction, partaining torts in the four countries under study. By way of a general statement, it can be stated that there is little difference between them. In those areas where they seem to differ, such differences reflect the practical requirement of individual circumstances as well as the relative legal development, especially brought about by the political systems they run. This is the basic reason with regard to the development of international and interstate jurisdictional considerations in Australia, U.S.A. and Nigeria, while England maintains a uniform conflict rule.

As we have seen, even the attempt at operating international rules of jurisdiction independent of rules operating in interestate situations has not been successful, to such an extent that in

1. See Agbede, I.O., Conflict of Laws (1985) p.334-335.

America, the courts have not highlighted the basic necessity of such differentiation. It is,however, a commendable trend that the American courts in deciding matters of international conflicts, feel bound by the limitations imposed with regard to interstate jurisdictions.[1]

In Australia and Nigeria, federal statutes with regard to service of process within jursidiction,[2] have tended to simplify service of writs of summons, by regarding the whole country as a single jurisdiction for that purpose. Apart from this, the rules of jurisdiction with regard to international cases will be applicable. Australia, however, may have a slight difference with Nigeria in that the Commonwealth constitution, contains a due process clause in the nature of those of the American Constitution that compels the states to respect and enforce the laws of other states.

It will be worthwhile if the Nigerian Constitution has a clause that can safeguard against the prospect of one state assuming jurisdiction in situations where there is a clear case for declining jurisdiction.

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1. Through the Various Constitutional Clauses.
2. See the Australian Service and execution of process Act(1963) The Nigerian Sheriff and Civil Process Act (1958).

Presence of the defendant in the jurisdiction seems to be the general basis of jurisdiction in all the countries considered. The defect in this is the fact that it gives the courts powers over more visitors to the forum. This rule can be abused if applied indiscriminately. While the propect for this is unlikely in America due to constitutional considerations, the spectre of its hapenning is very much surrounding the rules of England, Nigeria and Australia. The situation can be remedied if some factors, basedon the defendant's relationship to the forum is adopted as the basis of jurisdiction. This remedy should also be the guiding factor in the exercise of discretionery jurisdiction.

The present mitigating doctrines of lis alibi pendens and forum non conveniens cannot adequately serve the purpose for which they were developed. As we have seen, the present considerations for granting an order of lis alibi pendens en unciated by the House of Lords in Mcshannon v. Pockware glass Ltd., that allows for the order even where there is no pending foreign proceeding, cannot be distinguished from the American concept of declining jurisdiction thrcugh the doctrine of forum non conveniens.

If both the English and American remedies are accepted, the same criticisms can be directed against them. In the working of both of them, the list of factors for consideration is not exhaustive. Because decisions are to be taken on a case to case basis, and consequently, there will be an infinite variety of these factors, there will be a lengthy hearing before the trial of the main issues. Secondly, in the process of relitigating the issue in a new forum the plaintiff may even have his suit barred by some statute of the new forum, and thirdly, the two doctrines can be subjected to the same abuses as the rules they are meant to remedy. The doctrine of lis alibi pendens if left to the interpretation given to it in the Atlantic Star will be more beneficial than the principles in the Mcshannon case. The Nigerian Supreme Court's decision in Sonnar(Nig) Ltd and Rubicon Nigeria Ltd. V. Parten reederi M.S. Nordwind and Chairpon Rice Co. Ltd. and the Federal Court of Appeal's decision in G.B.N. Line Ltd V. Allied Trading Co. Ltd.[1] are in line with this view, it will be justified if the Supreme Court maintains that conservative posture in future dicisions.

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1. Suit No. 1983/F.C.A./L/128 decided in April 1984.

CHAPTER TWO

CLASSIFICATION

Classification is a normal and necessary process of human thought. Knowledge and experiences would have to be identified and arranged into groups and classes in order to understand them better. This process operates in the field of law just as it operates in other fields of knowledge. Classification would have to be indulged into either consciously or unconsciously by the court, in some instances well after the jurisdiction of the court over the issue and the parties has been established. In its theoretical context, it reflects a very difficult exercise. However, as far as the practical working of the conflict of laws is concerned, the courts have treated the issue in an empirical manner, so that except in the area of substance and procedure, the court of all the countries studied in this work never tried to lay down any rule that will guide them in resolving the problem,[1] and there was no pronouncement by them that they were guided by the many theoretical view point propounded by writers.[2]

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1. Morris, The Conflict of Laws 2nd Ed. p.479. (1980)
2. Ibid.

In a general sense, classification denotes the process of allocation of a question raised by the facts of a particular issue before the court to its correct legal catergory for purposes of revealing the choice of law. Such allocations are in terms expressing juridical concepts or categories.[1] For example, it may be necessary for the courts to determine whether a particular issue is a matter of substantive law, or of procedure or whether it is tortius, contractual or relating to the administration of estates. In certain situations each of these categories may have substantial relations to each other becausee of the constitution of each category by the same facts, that may constitute the other. Where the domestic law classifies the issue differently from the foreign legal system, the problem of classification arises because the court will have to determine what particular mode of classificaion to adopt.

As earlier stated, the problem is a simple and obvious one in the generality of cases. Nevertheless, legal theorist believe that there are certain cases which,though rare, require the judge to give special attention to the need for classification. The requirement of such a

1 Dicey and Morris, The Conflict of laws 9th ed. p. 1099. (1974)

rule is much more necessary with regard to the separation of matters of substance from those of procedure. Throughout the cases and text books, the courts and writers, under various formulations, have tried, albeit unsuccessfully, to lay down general rules. The importance of classification lies at the basis of the conflict of laws itself because to classify a matter wrongly results in the application of the wrong law, which in turn defeats the fundamental aim of the conflict of laws.

In this chapter, an attempt will be made to look at the methods used in the separation of the substantive aspects of a tort case in the conflict of laws from its procedural aspects, and in the second segment I will look at the practical application of rules of classification to other aspects of the law of tort, apart from the twin issues of substance and procedure.

2.1 Substance And Procedure

In England, Australia, America and Nigeria, the general rule, as in other parts of the world, is that matters of procedure are governed by the law of the forum, while those of substance are

governed by the appropriate foreign law. Dicey and Morris have this as a principle of law. They stated:

> All matters of procedure is governed by the domestic law of the country to which the court wherein any legal proceedings are taken belongs.[1]

The proposition provides an exception, to the general application of foreign law in the conflict of laws.

There are many reasons given for this differentiation by writers, Cheshire highlighted the difficulties involved in allowing foreign law to govern when he stated:

> A person who resorts to an English court for the purpose of enforcing a foreign claim cannot expect to occupy a different procedural position from that of a domestic litigant. The department of procedure constitutes perhaps the most technical part of any legal system and it comprises many rules that would be unintelligible to a foreign judge and certainly unworkable by a machinery designed on different lines. A suitor in England must take the law of procedure as he finds it. He cannot by virtue of some rule in his own country enjoy greater advantages than other suitors here; neither must he be deprived of any advantages that English law may confer upon a litigant in a particular form of action.[2]

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1. Rule 204. *Op. Cit.*
2. Cheshire G. C., **Private International Law** 9th Ed. (1974) p.683.

This reasoning is applicable to all jurisdictions. The rationale behind the division is mainly convenience. The question may be relevant at this stage, as to what is procedure?

According to Lush J. procedure is:

> The mode of proceeding by which the legal right is enforced as distinguished from the law which gives or defines the rights and which by means of the proceeding the court is to administer; the machinery as distinguished from the products.1

This definition has been criticised as vague, unjust and inconvenient.[2] In general terms, procedural law cannot define the substantive rights of the parties to a conflict case, mainly because the application of foreign law does not depend on the existence of its equivqlent under the domestic law.

Courts in England, Australia and Nigeria, have battled with the difficulty of demarcating between what is of substance and what is of procedure. While it is so easy to list what is of substance and proceedure, it is a difficult exercise in real cases because of the existence of certain concepts in foreign legal systems that may not be

1. Poyser V. Minors (1881)7 QB.329 at 333.
2. Cheshire, op. cit. p. 687.

easily related to any other concept in the domestic law. This difficulty was highlighted by Scarman J. in The Estate of Fould(No.3) when he stated:

> when is a question one of substantive law? When is a question merely of evidence or procedure? I attempt no general answer to these questions; for an answer can only be made after analysis of the specific questions calling for decision, its legal background and factual context.1

Obviously, this is a correct approach to this problem. Nonetheless, the search has continued. The commentators have tried in one way or the other to lay down a formula that will save the courts from the predicament of solving the problem.

According to Cook, since the general aim for distinguishing between matters of substance and those of procedure is for purposes of convenience, the court will have to determine how far it would apply the rule of foreign law without inconviencing itself so that the test of determining procedure will be the test of finding all those rules of particular inconvenience to the court of the forum.

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1. (1968) P. 675 at 695.

He states:

> If we admit that the "substantive" shades off by imperceptible degrees into the "procedural" and that the line between them does not "exist" to be discovered merely by logic and analysis but is rather to be drawn so as best to carry out our purposes, we see that our problem resolves itself substantially into this: How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself.1

Cheshire is in support of such a solution. His argument is that it will serve the underlying policy of the conflict of laws so that if the policy of applying foreign substantive law may be defeated by a slavish adherence to a rigidly demarcated substance and procedure, it is the duty of the court to consider whether such adherence is necessary.[2] As Cook himself stated in a different work, the problem is a bit fictitious, and arises only because of the failure to state it accurately by relying on the assumption that a line exists which must be drawn, and that line to be drawn is the same for all purposes.[3]

As Ailes also stated:

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1. The Logical and Legal Basis of the Conflict of Laws P. 166. (1942)
2. Cheshire, Op. Cit. P. 674.
3. "Substance and 'procedure' in the conflict of laws" in (1933)42 YaleLJ.33

> It is preferable to rest the distinction upon the low practical ground that without it judicial business could hardly continue... it is one thing to admit proof of foreign law to establish a tort... it is quite another to investigate a foreign law on every one of the multitude of points regarding summonses, affidavits, attachments, pleadings, trials, evidence, execution and costs which will arise.1

One other solution that has been proffered can be cited here not because it has any practical relevance, but merely to show the length at which some writers have been concerned about it.

According to Cavers:

> Before trial each party could (apply)...for the use of one or more specifically identified procedural rules to be drawn from the law of the state supplying the substantive law of the case relevant to the issue or issues to which the procedural rules related.2

The practical difficulties involved with regard to this solution is better imagined. The theory can at best be unwarkable because it will not only place an additional and unnecessary burden on the court but may also subject them to an exercise which is not certain to be fruitful.

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1. Ailes, E.H., "substance" and "procedure" in the conflicts of laws" in (1941)39 Mich.L.R. 392 at 416.
2. The Conflict of Laws 9th Ed. Rule 204,P.1099

There has been an attempt to loosely state the common law position. According to Dicey and Morris the list of procedural rules in the common law includes, remedies and process damages, statute of limitations, priorities, Set off, counterclaim and security for costs. There was no attempt however to conclude that the list was exhaustive.[1] The Nigerian Court of Appeal adopted this view in Ramon V. Jinadu[2(a)] However, the Nigerian Court's stand on the importance of the division and the extent to which matters of procedure can be specifically identified is vague. The court was more content at stating that:

> In the conflict of laws, matters of procedure are those for the court of the Forum. But then "procedure" in this respect means remedies for the process damage, limitation of action evidence parties, priorities, set off, counterclaim and costs2(b)

In America, there was no attempt to set down a rigid list of what should constitute matters of substance and what should constitute those of procedure. The reluctance of American

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1. See Dicey and Morris, op. cit. Ibid.

2(a) (1986)N.W.L.R. 103.

2(b) Per Nnaemeka-Agu J.C.A., in the leading judgement.

law to provide for this distinction is reflected in the Restatement, First, Conflict of laws. In article 584 it provides;

> The court of the forum determines according to its own conflict of laws rules whether a given question is one of substance or procedure.

The Restatement, Second, has also adopted the same statement though it went on to list the area of procedure to include jurisdiction, procedural capacity, the form of action, the service of process, the sufficiency of pleadings, the necessary parties or the method of trial.[1] The list is not exhaustive.[2]

Generally, therefore, classification of any rule of law as substantive or procedural depends on the reasoning of the courts. In most circumstances, the procedural nature of the rules is very clear, and in that respect, there will be no question as to which class it belongs. The forgoing, however, shows that in the rare cases where such clarity is not percieved, the court will have to decide on its own.

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1. Restatement, Second Conflict of Laws(1971) SS.122, 123, 124, 125, 126, 127, 129, 130.
2. See Spiro E,"Forum Rigit processum" in(1969) 18 ICLQ 949 at 950.

2.2 Classification of the Subject-matter

Under the double barrelled approach to choice of law in tort cases provided by the decision in Phillips V. Eyre,[1] which is the choice of law approach in England, Australia,[2] and Nigeria,[3] classification of the subject matter or any issue which forms part of it is not relevant. The reason is that the approach virtually closes the doors of the courts to actions not recognised by the domestic laws as tortius and imposes the supremacy of the lex fori over all foreign torts. Consequently, all classifications will be according to the law of the forum.

In the United States on the other hand classification of subject matter and related matters has played a significant part throughout the history of the Conflict of Laws in that country, In that regard, it has come to have far reaching implications in tort cases.

Under the lex loci delicti approach to choice of law, and later the Restatement, first,

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1. 1870 L.R. 6.QB.I
2. See Koop V. Bebb(1961) 84 CLR.629
3. See Benson v. Ashiru(1967) NMLR P.363.

incorporating the same approach, the tendency was to mitigate the absurd results connected with the mechanical nature of that choice of law rule. Once a case can be classified into a catergory, the courts will have an insight as to the particular law that will govern, and where the result is seen as unplatable, a classification into a much more desirable catergory is then undertaken to make the whole decision much more reasonable and justified.[1]

As one commentator noted:

> It sometimes seems as though the court, having pressed a button marked(e.g.) 'tort' and found the result distasteful recharacterisked the issue before it, pressed another button marked e.g. 'contract' and reached a different result.2

Two cases seems to plainly indicate the American courts approach to the issue of classifying the subject matter under the lex loci delicti approach. In Grant V. McAuliffe,[3] a collision occured between two automobiles in Arizona. All four men involved in the accident were residents of California. The Supreme Court of California held that the question whether a cause of action in tort survived the death of

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1. See Scoles & Hay, S, Conflict of laws(1982) P.54
2. Morris, The Conflict of Laws 3rd ed. at P.488. (1984)
3. 41 Cal. 2nd 859(1953)

the tort feasor was governed by the law of California where all the tort feasors estate was administered and not by the law of Arizona where the tort was committed. The court reached this conclusion by reclassifying the issue; as relating to the administration of estates rather than tort.

In another case; Levy V. Daniels U. Drive Auto Renting Co.[1] X hired a car in Conneticut from the defendants, who carried on the business of letting cars, while the plaintiff was a passenger in the car, X parked it so negligently on a Massachussetts highway that the plaintiff was injured. By the law of Massachussets the defendants were not vicariously liable for X's negligence; but Connecticut had a statute which provides that any person renting or leasing to another a motor vehicle owned by him shall be liable for any damage to any person or property caused by the operation of such motor vehicle. If the lex loci delicti was applied, the defendants would not have been liable, but the court held that the plaintiff was an indeterminate third party beneficiary of an implied term imposed by the statute in a contract governed by the law of Connecticut.

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1. 108 Comm. 333 (1928)

The abandonment of the lex loci delicit approach by most states in favour of the Restatement, Second's, "proper law" doctrine, made the issue of classification under American Law less important. While the Restatement, second retained subject-matter classification, it did so by calling for the application of the law of the place with the "most significant relationship to the particular issue.[1(a)]

Similarly in states where the "interest analysis" approach to choice of law has been adopted, the courts focus on the interest of the states concerned in having their respective laws enforced, in classifying issues connected to the tort.[2]

2.3 Comparison

In general, the issue of classification, presents similar problems as far as the determination of substance and procedure is concerned in all jursidictions so far considered. The problem should be solved more or less by percieving the necessity of giving the court the necessary lattitude of determining those matters that can be regarded as procedural, and not by subjecting it to a rigid and exhaustive list.

1(a) See S.7 of the Restatement, Second.

In the area of subject-matter classification only the American courts seem to have any resort to it, chiefly because, as was pointed out, the English, Australian and Nigerian approach to choice of law in tort cases is of such a nature as to render classification unnecessary.

Virtually, therefore, what is important in the issue of classification is the distinction between matters of substantive law and those of procedure. As we have seen, the application of foreign law to a case will have to depend on these. The approach adopted by the English, Australian, Nigerian, and American courts should be retained. Classifying a particular rule of law as a matter of procedure should not depend on rigid rules that deprive the court room for determining the issue according to the particular circumstance of the case. Both the courts and writers are unanimous in accepting this view. It not only simplifies the work of the court, but also serves in conditioning issues arisen out of cases, according to the nature of such cases. It has been shown that most issues arising in the conflict of laws cannot be satisfactorily determined according to inflexible rules. In the garden of the conflict of laws, rigidity breeds sterility and stagnation that can destroy any attempt at internationalisation of justice.

CHAPTER THREE

DETERMINATION OF THE PLACE OF TORT

In most situations, it is simple to point to a particular law area as the place of commission of a tort. Nevertheless, there are other situations where the place of tort cannot be easily ascertained because the act constituting the tort and the consequences that followed may be connected with different legal systems. The court will have to determine where between two or more legal system, the tort was committed.

Under English, Nigeria and Australian law, there are two reasons, as to why it is necessary to know in what place a tort is committed. First, the various court rules confer on the courts discretionary powers to order service of writ of summons out of jurisdiction, if it is found that the action is founded on a tort committed within jurisdiction.[1] The implication is that before the service of the process abroad, it is necessary for the courts to verify the place where the tort was actually committed.

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1. England R.S.C. ord. 11 r.I.; Nigeria (N.S.) High Court rules order 9 r. 14; Australia, Rules of the Supreme Court of Victoria ord. 11 r. 1.

Secondly, because of the rule of choice of law obtaining in English, Australia and Nigeria, derived from the case of Phillips V. Eyre[1] which provides that a tort is actionable 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 will be a tort; and
>
> (b) actionable according to the law of the foreign country where it was done.2.

It becomes quite necessary to refer to the locus deliciti in order to determine the validity of the requirement of the second limb.

There are three solutions identified by writers for this problem.

The first is the "last event" rule propounded by the First Restatement of American law.[3] Under this approach, the place of wrong is in the state where the last-event to make the actor liable takes place. Accordingly, if a defendant through his negligence in maintaining his car in country 'A' causes an injury to another in country 'B' as a result of which he dies in country 'C', the

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1. (1870) L.R.6 QB.I - This case was approved in Australia and Nigeria Respectively in the cases of Koop V. Bebb(1951) 84 C.L.R. 629 and Benson V. Ashiru (1967) NMLR 363.
2. See Dicey and Morris, The Conflict of Laws (1974) 9th ed. Rule 178.
3. (1934) Article 377.

tort is committed in country 'B'. This view was judicially ignored by the American courts even at the time when the Lex Loci delicti, which formed the focal point of the First Restatement was the governing choice of law rule. The Second Restatement does not contain any rule with regard to the issue of determining the place of tort, because the issue is totally irrelevant under the"significant relationship" rule"[1]

The second solution, known as the "place of acting" theory, sought to identify the place of tort with the place where the first act of the defendant resulted in the tort or the chain of reactions leading to the tort. The idea behind the theory is that it is always difficult to determine where the last even took place or damage is suffered, because these things may occur in a plurality of states, and in certain instances they may occur by accidental causation. This theory is accepted in many continental jurisditions.

The last solution is of German origin, and is known as the" lective concurrence rule "[2]

1. Restatement(second)(1971) S.145.
2. It was first applied by the German Reichsgrericht(1889).

According to this rule a tort is committed in both the place where the actor engages in his conduct and the place where the effects of his conduct occur. The injured person may sue under any of the laws of these places, in each case the chosen law will be applied in its entirety on the whole facts so as to determine all requirements of the cause of action and its effects[1].

In general however, despite the above salutions, the determination of the place of tort in England, Australia, Nigeria and America, does not follow any general formulae, but is dependant in majority of cases on the type of tort that the court is dealing with. In that respect the approach of the courts seem to differ as to whether the action for tort is one concerning negligence, defamation, conversion etc.

3.1 Negligence

England, Australia and Nigeria have very few decisions with regard to the issue of determining the place of the tort of negligence.

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1. The Rule is followed in Italy and Switzerland.

In that regard the decisions of other courts of Commonwealth countries, especially Canada and Scotland, might be helpful. The general approach of the courts seem to favour the "place of acting" theory, which in essence means that the place where a tort of negligence is committed is the place where the defendant conducted himself in the way that resulted to the tort.

In the leading English case of George Monroe Limited. V. American Cynamid and Chemical Corp.[1] The plaintiff who carried on business in England entered into a contract with the defendant Company, an organisation which carried on business in New York to purchase some rat poison from the defendants. The contract provided that the property should pass in New York and that both the construction of the contract and the determination of the parties' rights should be governed by New York Law(which the court of appeal took to mean "should be litigated in New York"). The plaintiff shipped the goods to England and resold them. Eventually damage was suffered by a farmer when his farm was deratted with the poison. The plaintiff sought to serve the defendant out of jurisdiction under the R.S.C. order 11 r.I.[2]

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1. (1944) K.B.432(C.A)In Kroch V. Russell(1937) All E.R. 725, the problem was raised, but never discussed by the House of Lords.
2. Similar to the Nigeria High Court rules(N.S.)ord. 9.r.14 and Australian rules (S.C. of Victoria) ord. 11 r.I.

in order to recover the damages it had had to pay. The alledged tort was that the defendant had manufactured and sold to the plaintiff a dangerous substance without giving any warning concerning its dangerous nature. The Court of Appeal refused leave on the ground that the tort was not committed in England. This decision is criticised on the ground that until damage is suffered no tort could have been said to be committed and since from the facts, damage was suffered in England, leave should have been granted, by holding that the tort was committed in England.[1] Despite this criticism the case was the only English case dealing with the problem of the ascertainment of the place of the tort of negligence in English Law.

The Australian and Nigerian courts didn't have the opportunity of pronouncing on this matter, however, the approach in Canada which is a federation may shed some light on the likely, orientation that the courts of the two countries may adopt.

In the Canadian case of Anderson V. Nobels Explosive Co.,[2] The plaintiff was a Labourer

1. See Cowen Z,"The locus delicti in English Private International Law"in(1948)25N.Y.I.L394.
2. (1906) 12 D.L.R.644 (Ontario Div. Court).

employed on certain blasting operations in the province of Ontario. In the course of his employment he was severely injured by a premature explosion of dynamite, which had a defective fuse. The fuse was manufactured and sold in Glasgow, Scotland by the defendant company. The defendant company had in fact done nothing in Ontario. Leave having been granted to serve the company with a writ of summons out of jurisdiction(under a rule similar to the English, Australian and Nigerian rules) the company sought to have the order set aside. The court held that the tort was committed in Scotland. The reasoning of the court was set out in the judgement by Anglin J:

> "The manufacture and the sale by the defendants, negligence in both of which the plaintiff alleges as the tort or wrong committed by the defendants must, in the absence of any contrary allegation be deemed to have taken place in Scotland where the defendants carry on business. If these alleged negligent acts constitute the wrong done by the defendant, though a result of that wrong-perhaps a more direct or indirect result-may have been injury sustained by the plaintiff in this province, it seems to me impossible to maintain that such wrong or tort was committed in Ontario or elsewhere than Scotland.1

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1. Ibid. at PP.650-651.

In Paul V. Chandler and Fisher Ltd.[1] dealing with wrongful death, the court followed the reasoning in Andersons case, and refused to allow service out of jurisdiction.

From these various cases it seems, therefore, that the courts are in favour of holding the place of acting as the place where the tort of negligence is committed, rather than the place where damage occured.

In America on the other hand, when the Lex Loci delicti was the governing choice of law approach, the tendency of the courts was to apply the place where damage was suffered. This American approach seems to favour the last event rule. The view of the courts, therefore, is that the tort of negligence is located at the place where the plaintiff first suffered the harm. In Darks V Scudders Gale Grocer Co.[2] a Missauri drug wholesaler sent some ginger extract to a grocer in Oklahoma. The ginger extract was represented as being medicinally good. The grocer drank a bottle of it and fell ill. After having been removed to Missauri, he died on account of the ginger containing poisonous materials.

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1. (1924) 2D.L.R. 479(Ontario S.C.)
2. (1910) 146 Mo. App. 246.

It was held that the Oklahoma wrongful death statute was applicable for it was in that state that the grocer drank the extract.

Also in Connecticut Valley Lumber Company V. Maine Central RY[1] sparks from a locomotive of the defendants which was being operated in Quebec, Canada, set light to a bridge between the state of New Hampshire in the United States and the province of Quebec. As regards the half of the bridge situated in America, the court held that the law of Quebec as the place of acting did not govern, but the law of New Hampshire governs in as:

> If one while in one jurisdiction performs a negligent act which is the proximate cause of damage to property in another jurisdiction, the totality of the act is deemed at common law to be the same as that damage.2

The American courts came to the conclusion that it is damage that creates the right to sue, and in consequence of this obvious fact, it will be quite wrong to hold any place other than the place where damage is sufferdd as the place of tort. This argument was succinctly restated

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1. (1918 78 N.H 553

2, Ibid at 558.

by McClellan J. in the old case of Alabama S.R.R. Co. V. Carrol.[1] In the case, a brakeman on the appellants railway suffered injury in Mississippi on account of a broken coupling between two trucks in a freight train of the appellants. The coupling was defective when the train left Alabama, and it could well have been that the appellants employees were negligent in failing to inspect the coupling there. The court refused to hold Alabama as the place of wrong. The judge stated:

> It is admitted, or at least cannot be denied that negligence of duty, unproductive of damnifying results will not authorise or support recovery. Up to the time this train passed out of Alabama, no injury has resulted. For all that occurred in Alabama therefore no cause of action arose, the fact which created the right to sue, the injury without which confessedly no action will lie anywhere transpired in the state of Mississippi. It was in that state therefore necessarily that the cause of action if any arose; and wether a cause of action arose or existed at all or not must in all reason be determined by the law which obtained at the time and place when and where the fact which is relied on to justify recovery transpired.2

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1. (1892) 97 Ala. 126.
2. Ibid. per McClellan J. at 133.

3.2 Defamation of Character

In this area too there are no known judicial authorities as far as the Australian and Nigerian jurisdictions are concerned. However, the approach adopted by the English and Canadian Courts will be helpful in percieving the direction the courts will take when faced with the issue.

The English approach towards resolving the issue of determing the place of tort on issues of defamation of character is of very recent origin. The English and Canadian courts accepted the last event rule or the rule applicable to libel cases. This approach is quite different from the one taken in respect of negligence.

In Bata V. Bata[1] the appellant claimed damages for libel arising out of a publication of a circular letter written by the respondents copies of which the respondents have caused to be posted in Zurich to three persons in England. Leave to serve the respondents with writ of summons out of jurisdiction was granted. The Court of Appeal upheld the decision to grant leave holding that as copies of the letter were addressed to and were received by

1. (1948) W.N. 366

persons in England, the alleged libel was published in England. The court tried to reconcile this decision and its earlier decision in the Monroe case by stating that in the Monroe case there was sufficient evidence of negligent acts or defaults within the jurisdiction by the American Company while in the present case, publication which was an essential element of libel took place in England.

Writers on the conflict of laws have pointed out that the decision was unjustified, Since publication can only take place after receipt of the letter, it is the threat of damage that may give rise to the actionability of the libel.[1]

The Court of Appeal's decision in Bata V. Bata was in totality influenced by the Scottish case of Joseph Evans and Sons V. John J. Stein and Co. in which Lord M'Laren stated:

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1. See Webb P.H. and North P.M., "Thaythta on the place of commission of non-statutory tort" in(1968) 14 I.C.C.Q.1314.

> It appears to me that it is of the essence of an injury of the nature of defamation that the defamatory charges should reach its destination, or should at least become known to someone. While the letters complained of were in transit ....they could not injure the persuers, because their contents were as secret and as completely protected from disclosure as if they have been locked up in the defenders desk. It was only when the letters were delivered... that damage was done.1

The Canadian courts have accepted and followed the decision in Bata V. Bata without any modification. In Jenner V. Sun Oil Co.[2] an action was brought against owners of a Radio Station who were alleged to have defamed the plaintiff by remarks broad in the United States and heard in Ontario. The Ontario High Court granted leave holding that an alleged tort had been committed in Ontario on the principles laid down in Bata V. Bata.?(a)

In America, on the other hand, a completely different approach obtains. While still oriented to the mechanical attitude of holding the place of injury as been synonymous with the place where a tort is committed, the courts evolved a much more flexible approach. In determining the place of harm, they have held that the place of harm in a defamation suit ought to be determined by an

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1. (1904) 12 SLT 462 at 463.
2. (1952)2 D.L.R. 526.

2(a) The case was followed in the Australian case of Carton V. Australian Broadcasting Division (1974)2 N.L.R. 181.

easily applicable conflict rule which should lead the court to the law of the place where the defamation did the most harm.[1]

A well known example of the application of this rule is the classical case Dale System Inc, V. Time Inc.[2] In the case, the plaintiffs company was incorporated in Connecticut and its principal place of business was there. Its business consisted of furnishing services for the testing of the efficiency and honesty of employees of its clients, which were retail stores operating in Connecticut, New York, Massachusetts, Rhodes Island and New Jersey. Thrir complaint was that the defendants 'Time' and "Willmark" both New York Corporations caused to be published in "Life" magazine an article giving detailed description of Willmark's business(which is the same as that of the plaintiffs) and asserting falsely and maliciously that Willmark was "Unique" and the "only company of its kind". The plaintiff further alleged that the "Life" article had been reproduced at the instance of the defendants in a number of "Readers Digest" magazines in which it was claimed that "Willmark" was "the only company of its kind in the world."

1. See Rheinstein-M., "The place of wrong: A study in the method of case law"(1944)19 Tulane L. Rev. 4. and 164.

Thirdly, the plaintiffs also alleged that the defendants had caused to be broadcasted over the Radio a summary of the "Readers Digest" article. The facts of the case were further complicated by the further facts that the text of the "Life" magazine was prepared in New York on the basis of information supplied by Willmark to " "Time"; the plates of the said article were made in Ilinois; the printing took place in Pennsylvania and California; the broadcast took place in a New York Studio while the actual transmitter was situated in New Jersey; the broadcast can be heard from Massachusetts to Georgia covering all of the plaintiffs places of business; the Readers Digest articles was edited in New Hampshire and foreign editions were printed in various foreign countries.

These complications make the ascertainment of the place of tort under the lex loci delicti approach to choice of law very difficult. The court nevertheless solved the problem by holding that the place of tort was the domicile of the plaintiff company, i.e. Connecticut. The reason the court gave for this is that he is better known there:

> After all the plaintiff's repute, is his character and personality in the eyes of others. It thus comprises myriad relationships in all of which the plaintiffs individuality is the focus. Thus viewed, the concept of status which traditionally is determined by the law of domicile. The same compelling reasons for applying the law of domicile to the determination of ones status, require that the law of the domicile should determine ones right to his good repute: In cases of multi state libel generally, the greatest harm to repute will occur in the state of domicile.1

The court also realised that cases might arise where a corporation might be harmed more in places where it was more active than in the place where it was incorporated and thus functionally domiciled. It suggested that in such a case the place of harm might be located in the state of its principal office, which in the instant case would have also been Connecticut.

3.3 Other Cases

Not much could be got from the practice of courts in the Commonwealth countries as far as other areas of tort is concerned. The only decision on that point seem to indicate that the tort of conversion takes place at the place where

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1. Per Hinkes J. at 529.

the inconsistent dealing with property in question takes place.[1] The American courts consider the place of the tort as the place where the owner resides.[2]

In all others areas, the American courts are consistent in refering to the place where damage had been suffered as the place of commission of the tort.[3]

In view of the inconsistent nature of English decisions with regard to the various approaches adopted towards solving different types of torts, one can hardly perceive their attitude when faced with torts on which no precedence existed on the issue of determination of the place of tort. One can, therefore, state empirically that in England, Australia and Nigeria, the determination of the place of tort in such cases will depend on what the courts feel is appropriate.

There is one other aspect of this issue that needs to be restated as far as its application in the Nigerian context is concerned. The issue of nigligence proceeding may in many instances represent the confluence of civil and

1. Mourk V. Wiedenbach(1901)1 D.L.R 581.
2. See Webb and North op.cit. p. 1345-1346
3. See Webb and North Ibid .

criminal proceeding and so long as this is so, the act of determination of the place where the tort is committed will have to be affected by the criminal jurisdiction of the court trying the criminal aspects of the tort. For example S.4 of the Penal Code of the Northern States of Nigeria,[1] provides:

> S.4(2) Where any(such)offence comprises general elements and any acts omissions or events occur which, if they all occured in Northern Nigeria would constitute an offence, and any of such acts, omissions or events occur in Northern Nigeria. Although the other acts, omissions or events which if they occured in Northern Nigeria would be elements of the offence occur elsewhere than in Northern Nigerian then -
>
> (a) if the act or omission, which in the case of an offence committed wholly in Northern Nigeria would be the initial element of the offence, occurs in Northern Nigeria, the person who does that act or makes that omission is guilty of an offence of the same kind and is liable to the same punishment as if all the subsequent elements of the offence occured in Northern Nigeria and;
>
> (b) if that act or omission occurs elsewhere than in Northern Nigeria, and the person who does that act or makes that omission afterwards enters Northern Nigeria, he is by such entery guilty of an offence of the same kind and is liable to the same punishment, as if that act or omission had occured in Northern Nigeria and he had been in Northern Nigeria when it occured.

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1. The Penal Code Law (cap 89) Laws of Northern Nigeria.

Though the section lays a presumption, and jurisdiction with regard to criminal cases, still it seems quite logical if the place of tort under the conflict of laws concurs with that provided by the penal code, and as far as interstate conflict of laws is concerned this view appears quite logical as it affords the plaintiff the right to base his claim on the law of the forum rather than a foreign law, by holding that it is there that the accident occured. Furthermore, the criminal proceedings also ensure the availability of the defendant within the forum. The incomplete nature of the "place of acting" approach adopted in England justifies acceptance of the penal Code position which gives the plaintiff the right to sue in all situatins.

3.4 Relevance of the place of tort under the Proper Law of the tort concept

In America, under the lex loci delicit approach to choice of law, the determin tion of the place of tort is important because it is the law of the place that is to be applied to the issue before the court. In most of the states that apply the "proper law of the tort" approach

to choice of law, the place of tort has become irrelevant in that the law to be applied to any issue is the law that has the most significant relationship with the parties and the occurence after due consideration of all the factors leading to the tort. To that extent there was no emphasis on the place of tort. Consequently, the Second Restatement completely failed to provide any rule towards its determination.

3.5 Comparison

Generally, therefore, the determination of the place of tort has very limited function under the double barrelled choice of law rule in Phillips V. Eyre than it has under the American choice of law rule constituted by the lex loci delicti. The differences between the two requirements arise because, the American courts emphasised the application of the lex loci delicti, while the English, Australian and Nigerian courts' approach were dominated by the lex fori.

Like other aspects of this study, the proper law of the tort approach to choice of law renders the whole question of the determination of the place of wrong unnecessary. The place of wrong has only a minor significance which is not essential to any tort proceeding.

Generally, therefore, the differences in choice of law approaches determine the essence and emphasis laid in determining the place where a tort is committed. The English, Australian and Nigerian law apply the double actionability rule in Phillips V. Eyre which among other things stipulates that the act or omission resulting in the tort should not be justifiable by the place where the tort is committed. Basically therefore, a case cannot be determined without an enquiry as to where the tort was committed. Apart from this, we have also seen that the English, Australian, and Nigerian rules with regard to the jurisdiction empowers the court to order service of writ of summons abroad in situations where the tort was committed within jurisdiction.

In America on the other hand, the application of the lex loci delicti approach to choice of law is completely dependant on the application of the law of the place of tort because it is the law of that place that applies in toto to the whole issue.

Apart from this differences with regard to the reasons for the necessity for the determination of the place of tort between the English, Australian

and Nigerian laws on one hand, and the American law on the other, the approach of the courts as to the mode of determination also differ, the English, Australianand Nigerian approach is not uniform, and virtually depends on the type of tort under consideration. The American courts, however,were consistent in applying the "last event" rule to all cases subject only to the need for flexibility in cases where the place where damage is suffered cannot be extracted from the many legal systems connected with the tort.

The attitude of the English, Australian and Nigerian law is not helpful, Sometimes it appears, as if the few decisions were based on some empirical grounds, quite divorced from the considerations relating to the various aspects that constitute a tort. Both the decisions in the Monroe case and Bata V. Bata appear abstract in nature and quite inconsistent with each other.[1]

If the Nigerian Courts will have to continue to follow the double barrelled choice of law principle in Phillips V. Eyre, it is advisable if they adopt a consistent policy towards the determination of the place of tort rather than the bizarre approach of the courts of the Commonwealth countries.

1. See also Carton V. Australian Broadcasting Division (Supra).

CHAPTER FOUR

DETERMINATION OF THE PROPER PARTIES

The determination of the proper parties to a tort action is as important as the question of choice of law. The problem will be looked at under this chapter in three dimensions. First is the mode of identifying the parties under the double barrel principle of Phillips V. Eyre[1] which is the dominant choice of law rule in England, Nigeria and Australia; the second is under the old lex loci delicti principle, generally accepted in American in the recent past, and now discarded in all but few states; lastly, under the proper law of the tort approach, as of now, the most impactful of choice of law rules in America.

4.1 The Proper Plaintiff

There are two questions involved in deciding as to who is a proper plaintiff to a tort action in the Conflict of laws. The first is whether the particular plaintiff has the capacity to litigate. This issue is under the English, Nigerian, Australian and American laws categorised as procedural and accordingly is determined in accordance with the law of the forum.

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1. (1870) L.R. 6 QB.I.

It follows, therefore, that where the lex fori does not recognise the right of the plaintiff to act as such, he will not have the capacity to litigate even where the applicable foreign law had given him such a status.[1]

The second question is as to whether the particular plaintiff is the person in whom the suit vests. This issue only arises where the plaintiff is found to have capacity to litigate. Here also the legal requirements are different according to whether the tort vests on the litigant as a plaintiff ab initio, or it was originally vested in another person but was subsequently transfered to him. The acquisition of the right to litigate is not a procedural matter and as such whether a right dies with the person entitled to it or not should always be a subject of inquiry.

Where the plaintiff has been vested with the rights ab initio, no difficulty arises because his legal rights will be recognised and enforced with very little need for additional inquiry.

Where the right of action was however transmitted or transferred to the plaintiff,

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1. See Webb D.P.H. and Brownlie D.C., "Survival of actions in tort in the conflict of Laws". In(1965) 14 I.C.L.Q.I.

the question as to what law governs this legal rights or the transmissibility of such right is a contentius one.

The pausity of judicial decisions in England, Australia and Nigeria on this point has prevented the development of the law. However, like most other aspects of tort actions in the three jurisdictions the rule in Phillips V. Eyre[1] would have to be adhered to. The plaintiff must show that the right which he claims, vests in him in accordance with the lex loci delicti as well as the lex fori. This was specifically pointed out by the Australian High Court in Koop V. Bebb,[2] where it was stated that it is the co-existence of the statutes of the lex fori and that of the lex loci delicit that gives the the right of action. In that respect, if the plaintiff has no right of action under the lex loci delicti, he will not suceed under the lex fori whatever the laws may say.[3]

Because of the lack of sufficient decisions on the issue, writers have tried to suggest different modes of determining the legal rights of the plaintiff other than relating it to the forum biased rule in Phillips V. Eyre.

1. Supra.
2. (1951) 84 C.L.R. 629.
3. See Dicey and Morris, The Conflict of Laws 9th ed. p. 957.

Dicey and Morris are of the opinion that the question as to what law applies to the question of transmissibility of a right of action on death should be governed by the law applicable to the Administration of the deceased's movable estate (i.e. The law of the country from which the personal representative derives his authority to collect letters of Administration), and where the estate is administered in two or more countries, the law governing the principal Administration of the estate should apply.[1]

In the United States, under the old lex loci delicti approach there was no uniform rule with regard to the issue of transmissibility of a right of action. This is mainly because of the functional utilisation of the process of classification. Nevertheless, there was a tendency to treat survival statutes permitting suit in respect of a deceased's cause of action as substantive rules and, therefore, governed by the lex loci delicti.[2]

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1. Dicey and Morris op.cit. Ibid.
2. See United States Nat. Bank V. Bartges 120 Colo 317(1949).

4.2 The Proper Defendant

In the matter of determination of the proper defendant too, the English, Australian and Nigerian law expects the requirement of Phillips V. Eyre to be stisfied. In that respect, both the lex loci delicti and the lex fori must have identified him as the person to defend the action, though the tort may have been classified in a different category of civil liability under the lex loci delicti.[1]

As far as the capacity of the defendant is concerned, the question whether he has capacity to commit the tort (i.e. in consideration of his mental stability or age) will be resolved in his favour, so long as by the law of the place of commission he has no capacity. This is so notwithstanding the fact that by the law of his domicile or residence he has such capacity. This rule is of universal application.[2]

Secondly, the capacity of juristic persons e.g. a corporation is governed by the personal law of the corporation(i.e. its place of incorporation). There is one exception under the

1. Phillips V. Eyre 1870 L.R. QB.I
2. See Rabel E. The Conflict of laws: A comparative Study Vol.II P.255. (1958)

English, Nigerian and Australian law,however, i.e. with regard to the ultra vires torts of the corporations it cannot be sued if by the lex loci delicti the tort is ultra vires, irrespective of the provisions of its personal law or the lex fori.[1]

4.2.1 *Vicarius Liability*

In the area of vicarius liability, the English, Australian, and Nigerian law demands that for the master to be liable for the acts of his servants, he should be liable both by the lex loci delicti and the lex fori. Where he is not so liable under either law within the principles of vicarius liability,he is not a proper defendant to the action.[2] The quantum of the master's liability is determined according to the lex fori; any excess liability imposed by the lex loci delicti is not enforceable.[3]

In America, the first restatement applying the lex loci delicti approach to choice of law provided:

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1. See Dicey and Morris op.cit. at 959.
2. The Halley(1869) L.R. 2 P.C. 193.
3. See Dicey and Morris op. cit. at 959.

> When a person authorises another to act for him in any state and the other does so act, whether he is liable for the tort of the other is determined by the law of the place of wrong.

An explanation to this was given by way of the comment to the section that:

> in order that the law of the state of wrong may apply to indicate liability against the absentee defendant, he must in some way have submitted himself to the law of that state. It is sufficient if he has authorised or permitted another to act for him in the state where the other's conduct occurs or where it takes effect.1(a)

Scheer V. Rockne motors corp.,[2] provides an example of the application of this provision. In the case, an employee of the New York defendant corporation drove a company car to Ontario where he negligently injured the plaintiff. It was not established at the trial whether the employee was authorised to drive to Ontario. On the absence of this authorisation, the court ruled that Ontario law which affixed liability on owners for negligence of persons driving without express authority could not apply to the case.

4.2.2 *Spouses, Parents and Children*

The question as to what law governs the rights of husband and wife, and parents and children to sue

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1(a) S. 37.

2 68 F. 2d 942 (1934).

each other under English law is also not settled. There are no judicial authorities in England itself. However, Dicey and Morris have suggested that the rights of Husband and wife to make each other liable in tort should be categorised as matters of substantive law and should not be governed by the lex fori. This is because it is intimately connected with the effect of marriage on the proprietory relationship between the spouses. They suggested that it should be governed by the law of their domicile at the time of the alledged tort.[1] In the case of antenuptial torts, their view is that the question husband's domicile at the time of the marriage should be the decisive factor.[2]

Dicey and Morris also suggested that the question whether tort liability can exist between parents and children should also be answered according to the parent's domicile at the time of the tort.[3]

While there is absence of Nigerian decisions on this point, in Australia the courts have pronounced on it, and expectedly they have held that there should be a confluence of the rights,

1. See Dicey and Morris, The Conflict of Laws 9th ed. P. 959. (1974)
2. Ibid, at P. 960.
3. Ibid.

as far as the right of spouses to sue each other is concerned, and consequently it has to exist under both the lex loci delicti, and the lex fori. The parties in accordance with the principle of choice of law must be able to sue each other in accordance with the lex loci delicit as well as the lex fori. On the issue of the right of children and parents, however, there is no judicial pronouncement.

In America, on the other hand, the application of the law to this question gradually came to be regulated by the law of domicile.[1] Initially, because of the existence of "non-liability" statutes of spouses, all over the states, the American courts didn't pronounce on the matter. The abrogation of these statutes by most states ushered in a new found need under the lex loci delicti approach to choice of law, for the courts to apply the law of domicile to such situations. Emery V. Emery[2] represents one of the situations where the law of domicile was given controlling effect. In the case, two minors domiciled in California were injured in an automobile accident

1. See Ehrenzweigh A. A. A Treatise on the Conflict of laws (1962) P.587; Rabel op.cit. Ibid.
2. 45 cal. 2d 421.

when driving through the state of Idaho. Their brother with their fathers direction was driving the car. In a negligence action by the two against their father and brother, the California Supreme Court refused to accept the immunity rule advanced by the plaintiff which they claimed prevailed in the state of Idaho, which was the place of wrong. The court held that the rights, duties, disabilities and immunities conferred or imposed by the family relationship should not constantly change as members of the family cross boundaries during temporary absences from their home.

4.2.3 Liability of a deceased person's Estate

There is no judicial pronouncement on this point by the English, Australia and Nigerian courts. It has been suggested, however, that the question should be treated in the same way as the issue of admissibility of a decedents debts in the administration of his estate, and as such should be governed by the law of the country from which the administrator derives his letters of administration.[1]

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1. Dicey and Morris op. cit. at P.960.

In the United States, at one time, the lex loci delicti was held to be applicable to the question, subject only to the forum's public policy. This was the decision in Orr V. Ahern.[1] In the case, the action was for damages for personal injuries suffered by the plaintiff as a result of the conduct of the defendant deceased in New York. The suit was brought in Connecticut whose statute provides for the survival of action against the deceaseds executors and administrators and provides that the action shall not abate. The law of New York had however, retained the old common law rule with regard to personal injuries, so that the action abates on the death of the tort-feasor, if the suit was instituted after the death. It was unanimously held that the law of New York applies, so that the right of action of the plaintiff was extinguished.

According to Wheeler J.:

> New York created the right of action for this wrong. The power which gave the right could take it away. When by its law the death of the injuring person abated the right of action for this wrong, the right no longer existed in that jurisdiction, nor thereafter in any other jurisdiction."2

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1. 107 Conn 174 (1926).
2. Ibid, at P. 178.

The American Courts have however shifted from this strict attitude, by heavy reliance on the process of classification. In many instances they came to apply the law of domicile rather than the lex loci delicti. By way of classification, the courts treated survivability as pertaining to the distribution of the deceased's estate, which is governed by the lex domicilii. In Grant V. McAulliffe,[1] the plaintiff and two other persons all of them domiciled and resident in California were injured in Arizona owing to the negligent driving of the deceased who had been domiciled and resident in California. By the law of Arizona, an action in tort had to be commenced before the death of the tort-feasor, if it was to survive against his estate. No such action was instituted against the deceased in his life time. The California Supreme Court held that the plaintiff's cause of action survived. In the judgment, Traynor J. explained:

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1. 41 Cal. 2nd 859 (1953).

> "when as in the present case, all of the parties were residents of this state, and the estate of the deceased tort feasor is administered in this state, plaintiffs right to prosecute their causes of action is governed by the laws of this state relating to administration of estate."[1]

4.3 Determination of the Proper Parties Under the Proper Law of the Tort Approach.

Under the proper law of the tort, the mode of determing the legal rights of the parties to a tort action is, like many other aspects of the tort, dependant on the law that on policy grounds has the most significant relationship to the parties and the occurrence.

The Restatement, second, has put this in perspective, when it made survival of actions,[2] Intra family immunity,[3] and vicarius liability[4] all dependant on the outcome of the choice of law process indicated under S.145. The section provides that the rights and liabilities of the parties with respect to any issue in tort is to be determined by the local law of the state which with respect to that issue has the most significant relationship with the parties and the occurrence.

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1. Ibid
2. S. 167
3. S. 146
4. S. 174

With regard to the capacity of the person acting as a representative[1], however, the Restatement provides that the representative designated in the wrongful death statute of the state selected by the application of the local law of the state where the injury occured, should govern unless some other state has a more significant connection to the parties and the occurrence.

4.4 Comparisons

Generally the choice of law approaches of the various jurisdictions affects the methods of determining the proper parties to the action. As we have seen, there has been a strict and rigid application of the double barreled choice of law rules enunciated in Phillips V. Eyre in England and to some extent in Australia. Because of lack of judicial authorities, not much can be said of Nigeria except that by virtue of the High Court rules English law is applicable to the matter.

In America, though the lex loci delicti approach has influenced the determination of the rights of the parties to prosecute or defend, the courts have not been rigid in their approach,

1. S. 179.

and have applied the legal requirements of different systems of law rather than exclusively the lex loci delicti, through reliance in most instances on the process of classification.

Basically, it is hard, in the light of the non-availability of judicial decisions, to state with certainty, the application of the principles in Phillips V. Eyre to all aspects of the problems so far discussed. The issue of transmissibility of a cause of action is one area where the Australian case of Koop V. Bebb clarified matters, and expectedly it favoured a strict application of the principles in Phillips V. Eyre. In view of this, one can positively assert that if the opportunity presents itself, Phillips V. Eyre will still prevail in the resolution of all other issues. The suggestions of Dicey and Morris, though ideal do not reflect the reality of accepting Phillips V. Eyre as a choice of law rule. In any discussion of issues connected with the plaintiff's right to act as such, and the defendant's obligation to defend, the influence of Phillips V. Eyre has to be contended with, and in that regard the rights and obligations must be available under both the lex fori and the Lex loci delicti before they can sustain a claim.

In America, on the other hand, even a rigid mechanical formula - the lex loci delicti, did not deter the courts from percieving the results of individual cases and invoking mitigating rules, especially classification, to ameliorate any injustice that might follow. The lex loci delicti was never allowed to control each and every issue.

If the "proper law of the tort" is to apply the very essence of the rights and obligations is made dependant on the provisions of the law that has the most significant relation to the parties and the occurrence. The approach does not admit of rigidity, so that under it any law that may have relation to the tort, or the issue, may be applicable, after due assessment and analysis of the relative interests of the laws of other affected states.

Generally, therefore, the basic reasons for the differences between the lex loci delicti as applied to problems by the American courts, and Phillips V. Eyre can be traced to the inflexible stance of the courts applying the latter. Obviously, these aspects of a tort proceedings call for greater flexibility in the way enounciated by the second Restatement, because it carries with it the inherent vice of denying one party his rights and unnecessarily protecting the defendant. It is better if the courts adapt the simple attitude of bending backwards if that is justifiable.

CHAPTER FIVE

CHOICE OF LAW

There are various rules that have been perfected to take care of the process of determining the applicable law in tort proceedings in the conflict of laws. Traditionally most of the rules were mechanical in character, based mainly on the application of the lex loci delicti, or the lex fori. The proper law of the tort however broke the monopoly by calling for the application of the law that has the most significant connection with the parties and the occurrence. This type of approach is novel in character, and cannot be rooted on any particular relation of the tort to a legal system unless an analysis has been made of the various interest laws that may have any connection with the parties, and the issues.

In this chapter, the choice of law rules applicable in England, Australia, Nigeria and America will be analysed with a view to understanding their defects and advantages.

5.1 The Common Law Rule::Phillips V. Eyre.

Under the common law prevailing in England Australia and Nigeria, choice of law in tort cases in the conflict of laws is rooted in the dictum

of Willes J, in his judgement in Phillips v. Eyre.[1] The facts of the case are that the plaintiff brought an action against the defendant in the court of Queens Bench, on counts of assault and false imprisonment. The acts complained of in respect of which the proceedings was brought were done at the instance of the defendant who was then Governor of Jamaica to suppress a riot in that colony. The defendant pleaded an Act of indemnity later passed by the Jamaican parliament. The court of Queen's Bench ruled in favour of the defendant, and the decision was later confirmed by the court of exchequer. In his judgement in the latter court, Willes J. stated:

> 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.2

This statement came to lay down the famous double barrelled approach to choice of law in respect of foreign torts followed in all commonwealth countries.

Justice Willes' first proposition that "the wrong must be of such a character that it would be

1. 1870 L.R. 6 QB.I
2. Ibid at pp.28-29.

actionable if committed in England" was derived from The Halley[1] a case decided by the court of Admiralty. In the case foreign ship owners sued the owners of a British Steamer to recover compensation in respect of a collision caused by the negligent navigation of the Steamer in Belgian waters. The defendants pleaded that at the time of the collision their Steamer was under the charge of a pilot whom they were compelled by Belgian law to employ and that they were not liable according to English domestic law for the negligence of this compulsory pilot. The plaintiffs replied that by Belgian law an owner is liable for faulty navigation even though due to the negligence of a compulsory pilot. The privy Council dismissed the action. Selwyn L.J. in his judgement laid down a dictum which Willes J. was later to rely on ih Phillips V. Eyre. He stated:

> It is in their lordships opinion alike contrary to principle and to authority to hold that an English court of justice will enforce a Foreign municipal law, and will give remedy in the shape of damages in respect of an act which according to its own principle imposes no liability on the person from whom damages are claimed.[2]

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1. (1868) L.R. 2 P.X 193
2. Ibid. at 204.

This dictum, and its influence on Phillips V. Eyre, has been subjected to criticisms by writers on the Conflict of Laws. The criticisms were for three major reasons. First that it is too wide, and may lead to the closure of the doors of the forum to even cases based on contract, secondly that it places an unnecessary burden on the plaintiff, and gives undue advantage to the defendant, and thirdly, that it is parochial in nature, preventing recovery for wrongful conduct except ones recognised by the domestic law.

One of its most virulent critics observed:

> It is difficult to think of any principle more inimical to international harmony than this, and it is also very difficult to understand why the English courts should apply such a doctrine to dilictual liability, if one considers that they do not hestitate in other branches of the law (e.g. in the law of contract) to apply foreign rules giving rise to a cause of action unknown to English law.1

According to Cheshire, the most probable reason for the decision may be the desire, in the opinion of the Privy Council, to enforce English legislative policies which must not be sacrificed merely because a contrary policy prevailed in the locus delicti. He however added:

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1 Kahn - Freund, (1974) Recuel des cours III 147 at 287.

> If this is what convinced their lordships, it is a further illustration of the fatal tendency to attribute extra territorial effect to an English rule solely on the ground that it is contained in a statute.[1]

Despite all the shortcomings, the Halley through the instrumentality of Phillips V. Eyre, came to be a basis of choice of law rules in tort under the common law.

With regard to the second limb of the choice of law principles in Phillips V. Eyre Willes J. formulated it, after considering an objection that since the local legislature of Jamaica had no power to pass a law having extra-territorial effect, the Act of indemnity could not take away the plaintiffs right of action in England. On this he observed:

> The objection is founded upon a misconception of the true character of a civil or legal obligation and the corresponding right of action. The obligation is the principal to which a right of action in whatever court is only an accessory and such accessory according to the Maxim of law follows the principal and must stand or fall. Therewith...the civil liability arising out of a wrong derives its birth from the law of the place and its character is determined by that law. Therefore an act committed abroad, if valid and unquestionable by the law of the place cannot so far as civil liability(is concerned) be drawn in question elsewhere.[2]

1. Cheshire and North, Private International Law 10th ed. P. 267. (1961)
2. (1870) L.R. 6 QB. 231.

This point of view set the tone of his second proposition that "the act must not have been justifiable by the law of the place where it was done". Clearly, the word "justifiable" is a bit ambigious and capable of misinterpretation. The opinion was that "actionable" would have been a more appropriate word. As Cheshire noted:

> "Actionable"is an intelligible word in common use, but "justifiable" is ambigous and the danger is that it may be interpreted in such a way as to warrant the grant of a remedy in England when none is obtainable in the place of wrong.1

That,however, was exactly what happened in Machado V. Fontes[2] decided by the Court of Appeals. In the case, an action was brought to recover damages for an alledged libel contained in a pamphlet alleged to have been published by the defendant in Brazil. The defendant in his defence denied the alleged libel and later took out summons to amend his statement of defence by adding an additional plea that if the pamphlet was published in Brazil, then by Brazilian law the publication thereof could not have been a ground of legal proceedings in Brazil in which damages could be recovered, or in the alternative, could not be the gound for legal proceedings in Brazil in which

1. Cheshire and North, Op. Cit at p. 273.

2. (1897) 2 QB. 231.

the plaintiff could recover general damages for any injury to his credit, character or feelings.

The Court of Appeals allowed an appeal against the additional plea on the ground that the plea did not state that the publication was not criminal by Brazilian law. The court based its decision on Willes' J. dictum in Phillips V. Eyre. The reasoning of the court was expressed by Rigby L.J., in the following words:

> ... When you consider the care with which the learned Judge (Willes J.) prepared the propositions that he was about to enunciate, I cannot doubt that the change from "actionable" in the first branch of the rule, to "justifiable" in the second of it was deliberate... Though an action may be brought here, it does not follow that it will succeed here, for when it was committed in a foreign country, it may turn out to be a perfectly innocent act according to the law of that country; and if the act is shown by law of that country to be an innocent act, we pay such respect to the law of other countries that we will not allow an action to be brought upon it here. The innocency of the act in the foreign country is an answer to the action.[1]

This reasoning of the court has drawn a lot of criticism. According to Dicey and Morris justice Willes could not have possibly intended the word "justifiable" to be equated

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1. Ibid at 235.

with "authorised" or "innocent" or "excusable", but that he was using the word while dealing with a statute of indemnity and was therefore not referring to the nature of the act but to the legal effect attached to it by the lex loci delicti. "The relevance of the locus delicti is not whether at the time of the action it attaches a moral stigma to the defendants conduct, but wether it imposes upon him an obligation to compensate the plaintiff".[1]

There are however opinions to the effect that Machado V. Fontes was correctly decided, and the interpretation of justice Willes' proposition was correct. It was contended that:

> If the facts in that case are regarded in a realistic way, it is impossible to contend that the defendants conduct was innocent or that he had committed an excusable act. It would be a strange result if an Englishman who in a foreign country publishes a libel concerning another English man can thereby save his pocket from the payment of damage.2

According to Clarence Smith, in a situation such as displayed by the case, the absence of civil remedy in the locus delicti may be for

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1. Dicey and Morris op.cit. P.923.
2. Gutteridge H.,"A new approach to private international law" in (1936) 6 Camb.L.J.16 at 20.

reasons of public policy and not that the plaintiff had suffered no wrong and in that respect it will be right for the court to equate justifiable with innocent.[1]

5.1.1 Phillips V. Eyre in the English Courts

The principles of Phillips V. Eyre as interpreted in Machado V. Fontes came up for review in the House of lords in the case of Boys V. Chaplin.[2] The facts of the case are that the plaintiff was seriously injured in Malta through the negligence of the defendant. Both parties were domiciled in England at the time of the accident. The trial judge found that under English law the plaintiff should be awarded £2,250, but that under Maltese law he could recover only £53. Maltese law allowed nothing for pain and suffering. He then considered himself bound by the judgement in Machado V. Fontes and decided that the plaintiff was entitled to recover the same damages as he would have recovered if the tort had been committed in England.

1. See Clarence Smith "Machado V. Fontes revisited" in (1956) 5 I.C.L.Q. 466 ar 470.
2. (1971) A.C. 356;(1969) 3 W.L.R. 322.

The case went on appeal to the House of Lords on the question of the head of damages to be awarded by the English court in the particular context of the case. The lords were divided in their approaches to the issue, which makes the ratio of the case difficult to extract.[1] However, the lords made two things clear. First, they unanimously endorsed the first limb of the proposition in Phillips V. Eyre,(i.e. that the conduct must be actionable as a tort in England)

On the second limb, (i.e. that the act must be not be justifiable by the lex loci delicti), the majority of the law lords were unanimous that the decision of the Court of Appeal in Machado V. Fontes was wrong. Lord Hodson stated:

> If the decision of Machado V. Fontes could be supported on the ground that actionability is not essential, the respondent must succeed, but in my opinion that decision is wrong and should be overuled.2

Lord Wilberforce on the other hand pointed out that the decision should be overruled since the balance of judicial opinion is decidedly against it.

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1. See Webb F. H. and North P.M., "Foreign torts and English Courts" in (1970) 19 I.C.C.Q.24.
2. (1969)3 W.L.R. 322 at 330.

The majority agreed that the second limb of the proposition requires that the conduct must give rise to civil liability in the lex loci, so that taking the two parts together there should be a double actionability.[1] According to Lord Wilberforce, the act must satisfy two conditions:

> Actionability 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.[2]

Though the House of Lords disposed of the issue before them by dismissing the defendants appeal, the reasons they gave for doing so are not reconciliable. We will have to go into it because of a third dimension introduced by that aspect into the English choice of law rules.

Some of the law lords were of the opinion that the issue of the head of damages must be governed by the "proper law of the tort" approach adopted by some American jurisdictions,[3] since the parties were more connected with England and Malta had no interest in the application of its law.[4]

1. Ibid. at 340
2. Ibid at 341.
3. Lords Hodson and Wilberforce.
4. See Morris, "the proper law of the tort" in (1951) 64 Harv L.R, 881.

The American law Institute's Restatement, second[1] was cited with approval to support this contention. To some Lords, head of damages should be classified as procedural and therefore governed by the lex fori. The two dissenting members, however, held Machado V. Fontes was rightly decided.

It was therefore the judgements of Wilberforce L.J. and Hodson L.J., that led writers to surmise that Boys V. Chaplin introduced the proper law of the tort doctrine into English law.[2] In their judgements, Lords Wilberforce and Hodson, relied on the interpretation of the opening sentence of Justice Wille's dictum in Phillips V. Eyre. Willes J. had used the expression "As a general rule". This was interpreted as giving rise to the possibility of an exception, which the Lords created by way of the "proper law of the tort" doctrine. Lord Willberforce stressed the need to differentiate between the relevant issues and consider whether the general rule or an exception ought to be applied.[3] He was in favour of a rule analogous to the significant relationship approach of the American Restatement.

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1. (2d) 1971).
2. See Cheshire op.cit. Ibid:, Dicey and Morris op. cit. Ibid.
3. (1971) A.C. 356 at 391.

If such an addition to the English choice of law rules is accepted, the choice of law rules will appear in the shape provided by Dicey and Morris:

> "(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 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."1(a)

5.1.2 Phillips V. Eyre in the Australian Courts

The Australian case that attempted to critically analyse the double barrelled principles of choice of law enunciated by Willes J. In Phillips V. Eyre was Koop V. Bebb.[2] In the case, an action was brought in the Supreme Court of Victoria in respect of the death of one Koop who died through the negligent driving of the defendant. In his defence the defendant

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1(a) See Dicey & Morris The Conflict of Laws 9th (1974) ed. P. 919.

2. (1951) 84 C.L.R. 629.

alleged that the spot where the accident took place was in New South Wales, and objected as a matter of law that the facts alleged in the statement of claim did not constitute any cause of action for the plaintiffs against the defendants, either under the laws of Victoria or otherwise or alternatively did not constitute any cause of action which was recognisable and enforceable in the Supreme Court of Victoria. The laws dealing with fatal accidents in the two jurisdictions were similar. The Victorian Supreme Court upheld the objection of the defendant on the ground that the Victorian statute applies to wrongful acts occurring in Victoria by virtue of an implied territorial limitations necessitating the addition of words "within Victoria" to the section. On appeal to the Australian High Court, the court held that the plaintiff succeeds on the ground that both the lex fori and the lex coci delicti would have given the deceased a cause of action and this should be enough for the wrongful death statutes of the lex fori to operate. In the judgement, the court criticised the interpretation of Willes J's second proposition, in Machado V. Fontes, However, their Lordships endorsed the interpretation given to the first limb.

They also held that, the word "justifiable" in the second limb should be interpreted as an inquiry into whether the act involved civil liability by the lex loci deliciti.

From the decision of Koop V. Bebb it would be noted that the interpretation of the word "justifiable" in Willes J's dictum in Phillips V. Eyre, to read "actionable" was made by the Australian Courts almost two decades before the English Courts. After Koop V. Bebb the Australian High Court continued to doubt the interpretation in Machado V. Fontes[1], and, ultimately, Australian decisions played a major part in the decision of the House of Lords in Boys V. Chaplin.

5.1.3 Phillips V. Eyre in the Nigerian Courts

In Benson V. Ashiru the Nigerian Supreme Court adopted Phillips V. Eyre when it held:

> The rule of the common law of England on questions of private international law apply in the High Court of Lagos. Under these rules, an action in tort will lie in Lagos for a wrong alleged to have been committed in another part of Nigeria if two conditions are fulfilled: First, the wrong must be of such a character that it would have been actionable, if it had been

1. See Anderson V. Eric Anderson Radio and T.V. RTY Ltd. (1965) 114 C.L.R. 20.

> committed in Lagos; and secondly, it must not have been justifiable by the law of that part of Nigeria where it was done.1

This statement is obviously a restatement of the principles of Phillips V. Eyre. The facts of the case were that the respondent for and on behalf of himself and the dependent relatives of the deceased brought an action against the appellants in the High Court of Lagos under the fatal accidents Act 1846 of England(a statute of general application). For damages representing the pecuniary loss sustained by the death of the deceased through the negligence of the second defendant. The court held that since the accident took place in Western Nigeria, the applicable law was the Tort Law of Western Nigeria and not the Fatal Accidents Act 1846. The respondents therefore asked for leave to amend the statement of claim by substituting the 1846 Act with the Western Nigerian law. The Supreme Court held that though the amendment may cure the alleged defect in the claim, the defect by itself does not debar the plaintiff from obtaining relief.

The decision of the Supreme Court is noted for three things: first is the unequivocal adoption of the principles in Phillips V. Eyre,

1. (1967) N.M.L.R. 363 at 365.

second is the reluctance of the court to follow the English Court of Appeal decision in Machado V. Fontes[1], and third, the reliance of the court on the Australian High Courts case of Koop V. Bebb.[2]

Apart from these notable features of the decision, there was an assertion that the decision was in conflict with another decision of the same court in Amanambu V. Okafor. The facts of the two cases were similar. In Amanambu V. Okafor, the plaintiff was the widow of the deceased who died through the negligence of the defendant in the former Northern Nigeria. The action was brought in the High Court of Eastern Nigeria under the Fatal Accidents Law of Northern Nigeria. The defendant owner of the offending vehicle was resident in Eastern Nigeria while the driver was resident in Midwestern Nigeria. When the defendants in their defence raised an objection as to the jurisdiction of the Eastern Nigeria Court to hear an action based on the Fatal Accidents Law of Northern Nigeria, the plaintiff applied for leave to amend the statement of claim substituting the Northern Region statute with the Eastern Nigeria Law. The Court however

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1. Supra.
2. Supra.
3. (1967) N.M.L.R. 118.

held that the proper thing is for them to file a fresh suit. They appealed to the Supreme Court on this ground. The Supreme Court held that the Fatal Accidents Law of Eastern Nigeria confers a right to sue for compensation in respect of Fatal Accidents which occured in Eastern Nigeria and not outside it, so that no claim could be based on the Fatal Accidents Law of Eastern Nigeria for a tort which took place outside the region.

This decision, was wrong if based on the principles of Phillips V. Eyre, Under Phillips V. Eyre the applicable law would have been the law of Eastern Nigeria, and the lex loci delicti does not have to be pleaded. One thing is however certain, that the Supreme Court did not advert its mind to the conflict of law problem in that case and seems to have decided the matter on procedural grounds.[1]

Writers on the Nigerian conflict of laws subscribe to the view that the contradiction between the two Supreme Court decisions cited above may result in confusion.[2] However, this may not be so, in the light of the fact that there was no significant pronouncement on choice of law in the case of Amanambu V. Okafor.

1. See Agbede, Essays on the Conflict of Laws (1985) P.205.
2. See Agbede op.cit. Ibid.

The Nigerian authority on choice of law, therefore, is Benson V. Ashiru, The question of interpretation of the second limb of the rule in Phillips V. Eyre was not raised in the case and,because decisions on this point by the Nigerian Courts is scanty, one could only speculate as to the possible, line the Supreme Court may adopt. In view of the later decision of the House of Lords in Boys V. Chaplin,[1] and the prominance given to the Australian decision of Koop V. Bebb in Benson V. Ashiru, it seems the Supreme Court has no alternative (if it is to continue applying Phillips V. Eyre) but to interprete the second limb in line with current authorities in England and Australia.

5.1.4 Phillips V. Eyre: Jurisdictional or Choice of Law Rule?

Writers and some judicial decisions had flirted with the idea that, either one or both of the limbs in Willes J's formulation in Phillips V. Eyre related to choice of jurisdiction rather than choice of law.

One view suggests that Justice Willes in relying on The Halley[2] never intended by the

1. Supra.
2. Supra.

first rule of his dictum, to lay down that there must be a substantive liability according to English law, and that while using the word actionable he was referring to jurisdiction, so that the first rule is no more than the assertion that you cannot sue in an English Court unless the English Court has jurisdiction according to English law.[1]

Another view is that both the first and second parts are conditions to be fulfiled before the court can have jurisdiction.[2] This view is reflected in a question posed in the Australian High Court case of Anderson V. Eric Anderson Radio and T.V. PTY Ltd. by Windeyer J. When he asked:

> But when the two conditions are fulfilled - when the act is wrongful by the law of the forum and in the place where it occurred - what then? The case is one that the court can entertain but by what law is it to judge.?3

The House of Lords had the opportunity to pronounce on this matter in Boys V. Chaplin.[4]

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1. See Yntema H.,"Dicey: An American commentry" in (1951)4 I.C.L.Q.I; and also Kahn-Freund, "Reflections on public policy in English conflict of laws" in (1953) 39 Trans. of Grot Soc. 49.
2. See Spence V.(1949) Can. B.R.661.
3. (1965) 14 C.L.R. 20 at 41.
4. (1969) W.L.R. 322.

Lord Wilberforce in a pronouncement supported by the other lords, specifically pointed out that, the rule in Phillips V. Eyre relates to choice of law and not to choice of jurisdiction.[1]

In Australia, though there was no pronouncement on this point, Windeyers J's intimation in the Anderson case remains an isolated instance in the consideration of the rules as jurisdictional. Subsequent Australian cases have applied the principles as pertaining to questions of choice of law.[2]

In Nigeria, a commentator on the Nigerian conflict of laws is of the opinion that the Supreme Court in Amanambu V. Okafor[3] might have treated the rules in Phillips V. Eyre as being jurisdictional in nature, and, therefore, choice of law would have to be dependant on the lex loci delicti.[4] This view is contestable in that, the Supreme Court had made no pronouncement on any rule of conflict of laws whether jurisdictional or otherwise. The court even

1. Ibid at pp. 337-339.
2. See Hartley V. Venn (1967) 10 F.L.R. 151; Kemp and Ors V. Piper(1971) S.A.S.R. 25; Gorton V. Australian Broadcasting Comm,(1974) 22 F.L.R. 181.
3. Supra.
4. See Agbede, op. cit. Ibid.

intimated its willingness to pronounce "on questions of private international law" had the "claim as originally based on the Fatal Accidents Law of Northern Nigeria left unamended."[1] From all indications, therefore, the Supreme Court's decision was based on purely misconcieved procedural grounds.

There is one other Nigerian case decided by the Enugu High Court in which the rule in Phillips V. Eyre was treated as jurisdictional in nature. The case was Ubanwa & ors V. Afocha & University of Nigeria.[2] In the case, the plaintiffs were the dependants of the deceased, killed in an accident in Zaria through the negligence of the first and second defendants. The plaintiffs brought the action under the Fatal Accidents Law of Northern Nigeria. Counsel for the defendants argued that the Enugu High Court had no jurisdiction to try an action based on an accident that occurred in Northern Nigeria, and that the Fatal Accident Law of Northern Nigeria has no application in Eastern Nigeria. The court held, it has jurisdiction to entertain an action based on a wrong committed in another part of Nigeria, where the wrong was such that it would have been actionable

1. (1967) N.M.L.R. 118 at 120.
2. (1974) 4 E.C.S.L.R. 308 cited by Agbede Op. Cit. at p. 250.

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if it was committed within the state and was not justifiable under the law of that part of Nigeria where it was committed. The Judge applied the lex loci delicti to the case, obviously, this decision was based on a misunderstanding of the rule in Phillips V. Eyre as accepted by the Supreme Court in Benson V. Ashiru. However, it would have to be conceded that the way in which the Supreme Court reinterated the principles in Phillips V. Eyre by way of the words:

> an action in tort will lie in Lagos for a wrong alleged to have been committed in another part of Nigeria if two conditions are fulfilled....1

allows room for the interpretation of the rules as jurisdictional. However, since the Supreme Court specifically relied on the common law, the conclusion is inescapable that Benson V. Ashiru relates to choice of law and not choice of jurisdiction.

One point remains to be settled.. The interpretation of the rule in Phillips V. Eyre as relating to jurisdiction, merely means that the rule is propounding a jurisdictional

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1. (1967) N.M.L.R. 363 at 365.

test referring to jurisdiction over the tortious act, as distinct from the in personam jurisdiction which must have been established before the proceeding is even started.[1] This, therefore, does not warrant the view that the existence of statutory rules of jurisdiction ousted the interpretation of any of the rules in Phillips V. Eyre as jurisdictional.[2]

5.2 Choice of Law in America

In America choice of law is dependant on two important approaches; the lex loci delicti approach and the proper law of the tort approach. Of these two, the lex loci delicti approach preceded the proper law approach in terms of judicial recognition. Before the adoption of the latter approach, the lex loci delicti was the governing choice of law principle all over the states of America, The proper law of the tort has however come to occupy the dominant position on questions of choice of law, in the majority of the states, and the lex loci delicti now applies to only a few states.

5.2.1 The lex loci delicti approach

The lex loci delicti approach, presupposes that tort liability should be governed by the law of the place of wrong. It came to have prevailing effect in the early 20th century through the influence of justices Holmes and

1. See Sykes E.I. & Pryles M.E. International and Inter-state conflict or laws (1975) p.540
2. See Agbede, op. cit. Ibid.

Cardozo,[1] in a number of judicial decisions, incorporating mainly the theory of "vested rights". In Slater V. Mexican RY.[2]

Holmes J. Stated:

> "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 which like other obligations follows the person and may be enforced wherever the person may be found."

And in American Banana Co. V. United Fruit Co. he Observed:

> "For another jurisdiction, if it happens to lay hold of the actor to treat him according to its own notion rather than those of the place where he did the acts... would be unjust.3

Under the approach, the American courts were contented in applying the law of the place of wrong because the rights and liabilities of the parties were seen as governed by the place of wrong from where the cause of action arose.

The most important reasons advanced for the application of the lex loci delicti was

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1. See Western Union telegrap Co. V. Brown(1914) 234 U.S. 42 Loucks V. Standard Oil Co. 224 N.Y. 99.
2. (194)U.S. 120 (1904)
3. 213 U.S. 347 (1909)

that it is always in consonance with the legitimate expectations of the litigants, in that they can reasonably foresee the risks of their contemplated conduct, and be able to safeguard themselves against liability arising therefrom whenever necessary.

Commentators on the working of the lex loci delicti have however found fault with it in many respects. First is that the locus delicti is in many cases fertuitous, more especially in the world of today where technological advancement has made mobility of people and goods quite easy. Second is that the parties do not agree on the place of tort before the liability arises.[1] Third is that through the supposition that the lex loci delicti is in accord with the expectation of the parties, the doctrine unduly favours the defendant, because the expectation encouraged and protected is that of the tortfeasor rather than the victim. There is also the need for the protection of the victim's legitimate expectation to rely on the law reasonable related to the tort, and which may adequately protect his interest, and not exclusively the lex loci delicti.[2]

1. See Morris J.H.C., Conflict of Laws 3rd Ed. P. 304. (1984)
2. See Kahn - Freund O,"Dilictual liability and the conflict of laws "in (1968) Recuel des cours.6.

The lex loci delicti is very difficult to apply in cases of multi-state torts where the tort has significant connection with more than one system of law. The American courts in order to avoid the hardships occasioned by the problem, always apply the lex domicilii, instead of trying to find out in which state the tort was committed.[1]

The rampant use of classification[2] in order to avoid absurd results is a manifest example of the mechanical nature of the doctrine. In this way the American courts have clearly shown that the lex loci delicti does not meet the ends of justice in some cases.

The lex loci delicti approach was the guiding principle of choice of law under the Restatement, first[3] and despite its mechanical nature and the inherent injustice its application entails, it remains the choice of law rule in some states in America.

5.2.2 The Proper Law of the Tort Approach

The concept of the proper law of the tort was introduced into the choice of law process by Morris in 1951. He drew analogy from the operation of the "proper law of the contract"

1. See Dale System Inc. Y. Time Incorp.(1953) 116 F. Supp. 527.
2. See Classification(Chap. II) Supra.
3. (1934) paragraph 377.

in English law and after observing that its application to contracts has yielded much more reasonable and just results than any other choice of law rule, he suggested that the same concept can be applied in a different context to the ascertainment of the applicable law in torts.

According to him:

> "English courts have reached results which on the whole seem commercially convenient and sound by applying the proper law doctrine to the question whether the defendant is liable for breach of contract; why should we not reach results which are socially convenient and sound by applying the proper law doctrine to the question whether the defendant is liable in tort?"[1]

In a later work he explained that while in most situations there will be no need for the court to look beyond the place of wrong, a conflict rule ought to be developed flexible enough to take care of the exceptional situations as well as the normal ones, otherwise the results will continue to offend our common sense.[2] The proper law of the tort according to him is the law which on policy grounds seems to have the

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1. See Morris J.C. "The Proper Law of the Tort" (1951) 64 Harv. L.R. 881 at 883.
2. See Morris J.C., Conflict of Laws 3rd Ed. P. 304. (1984)

most significant connection with the chain of acts and consequence in a particular situation before the court.[1]

The application of the "proper law" to tort liability will however take different factors into consideration from its application to contracts. Under the "Proper law of the contract" the express or implied intention of the parties with regard to choice of law is given precedence over the law of the place which has the most significant connection to the transaction. The issue of intention cannot be applicable to tort liability. Under the proper law of the tort, therefore,what is given precedence are policy considerations relative to the facts constituting the tort which are given controlling effect in the determination of what system of law may be applicable to a particular case.

Secondly, the proper law of the tort has never been considered as one whole event in the same sense as there usually is a single proper law of the contract, instead the American courts have refered to the law applicable to a particular

1. See (1951) Harv. L.R. 881 at 888.

issue arising in a tort.[1] The concept is merely a generic one signifying a rejection of orthodox mechanical rules existing all over the world.[2] In keeping with the spirit of the doctrine, courts are required to make very little attempt at defining the limit of its flexibility and fluidity.

The proper law of tort provided the foundation which the American Courts utilised to develop the most appropriate methods of selecting the applicable law. It received its first judicial recognition in Babcock V. Jackson,[3] a case decided by the New York Court of Appeals. In the case, the Jacksons who were domiciled and resident in New York, gave a lift to the plaintiff to Ontario, Canada where she was injured due to the negligence of the defendant. She sued for damages in New York. The vehicle used during the trip was registered, insured and garaged in New York. By the law of New York, the plaintiff

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1. See Babcock V. Jackson(1963) 191 N.E. 2d 279.
2. See Nygh, J."some thoughts on the proper law of the tort" in Contemporary problems in the Conflict of Laws: Essays in honour of J.H.C. Morris (1978) P. 232; also in (1977)26 I.C.L.Q. 799.
3. 191 N.E. 2d 279.

could recover damages, but Ontario, where the accident took place, had a statute which barred gratuitous passengers from recovering damages from their host drivers. The Court of Appeals allowed recovery. In his Judgment Fuld J. stated:

> "Justice, Fairnes, and the best practicable result may be best achieved by giving controlling effect to the law of the jurisdiction which because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation".

Three reasons influenced the decision of the court. First was the contention that the grouping of contacts or centre of gravity principles which was adopted by the court with regard to contracts was also applicable to torts. Second was that the Ontario statute could not apply to the case because its object is to protect Ontario insurance companies. And third was that New York had far more concern with the outcome of the litigation than Ontario had, because the parties were all New Yorkers and the place of accident was merely fortuitous.

Later, the American courts resorted to the use of different principles, all aimed at achieving the same objective, under the banner

of the proper law of the tort. Some of these principles were extensively criticised because of the prospects of their abuse coupled with the fact that the adoption of the proper law doctrine gives some measure of discretion to the court to deviate from laid down precedents. Here are some of the adopted principles as applied by the courts.

The "contact" or "centre of gravity" approach: This principle which was derived from analogy with contract was first cited by Fuld J. in Babcock V. Jackson.[1] The principle makes choice of law dependent on the number of contacts, the parties, the events and the issues have with several jurisdictions involved in the incident and gives controlling effect to the jurisdiction with the most contacts and in which the "centre of gravity" of the tort is said to lie. In Babcock V. Jackson, however, the court did not decide the case on that basis alone, but went on to analyse the policies underlying the various rules of law. Critics have pointed out that choice of law on mere contacts alone, is clearly inconsistent with the proper law of the tort, and is capable

1. Supra.

developing into a mechanical formular.[1]

The "interest analysis" approach: This approach seeks to discover the policies underlying the substantive laws which are in conflict. This can be achieved only when there is a correct construction of the statutes. The approach is said to be consonant with Morris view of choosing a law which on policy grounds seems to have the "most significant connection" with the tort. Most American courts have favoured it.[2] The weakness in the approach lies in the difficulty, more especially with regard to international conflicts, in objectively and effectively interpreting and inquiring into the policies of a statute of a foreign jurisdiction.

The "better law" approach: This approach extensively propounded by Leflar[3] was adopted by the New Hampshire Supreme Court in Clark V. Clark. In the case Kenison C.J. stated:

> "we prefer to apply the better rule in conflict cases, when the choice is open to us. If the law of some other state is out moded, an unrepealed remnant of a by gone age, a drag on the coat tails of civilisation, we will try to see our way clear to apply our own law instead. If it is our own law that is absol te or senseless(and it could be) we will try to apply the other states law. Courts have always done this in conflict cases but have usually covered

1. See Miller V. Miller (1968) 237 N.E. 2nd 277.
2. See Miller V. Miller, Supra; Reich V. Purcell 432 P. 2d 394(1967)(California S.C.)Prau V. Trent Aluminium Co. 263)A.2d 129(1970)(N.J.S.C)
3. (1966)54 Cal. L.R. 1584.

> up what they have done by employing manipulative techiques such as characterisation and renvoi."[1]

One critic has aptly observed, with regard to this approach that it is not the function of the courts to reform the laws of other countries or even their own by giving it a narrow interpretation or refusing to apply it.[2] It remains to be stated, that Clark V. Clark remains the only isolated instance of the application of this approach.

The "Comparative impairement" approach: This approach is closely related to the "interest analysis" approach, it was adopted and maintained by the California Courts. Under the approach, the court applies the law of the state whose interest is likely to be more impaired after weighing the interests of the two states, In Offsh re Rental Co. V. Continental Oil Co. The California Supreme Court stated the principles upon which the approach works thus:

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1. Morris, Op. Cit. P. 521.
2. (1978) 22 Cal. 3d 313 at 332.

> Once preliminary analysis has identified a true conflict of the governmental interest involved, as applied to the parties under the particular circumstances of the case, the (application of) "comparative impairement" approach to the resolution of such conflict seeks to determine which states interest will be more impaired if its policy were sub ordinated to the policy of the other state.1

The same criticism against the "interest analysis" approach may be proffered against this approach also. That is the possibility of misconstruing a foreign statute.

5.2.3 The Restatement, Second

The Restatement, second, of the American law Institute adopted "the proper law of the tort" doctrine as its working guideline. It set down its own principles of choice of law in S.145(1) which provides:

> 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.

The Restatement went on to provide the factors to be taken into account in arriving at the applicable law. These include the domicile,

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1. (1971) 2d, The Restatement, is a statement of the laws of the U.S.A. it has no binding authority and is merely persuanine.

residence, nationality place of incorporation and place of business of the parties, and the place where the relationship if any between the parties are centered. All the factors are to be evaluated in relation to the particular issue. However, the list of factors is not exhaustive and the courts are allowed to take into consideration further factors that are relevant to the issue before them.

Under S.6, the Restatement also laid down general choice of law principles for all conflict cases, intended to guide the court to the choice of the applicable law. These principles are intended by the wordings and cross references of the Restatement to work as a complementary guide to the provisions in S.145. The provisions of this latter section are also not exhaustive and from the scheme of the Restatement S. 6 is the point from which all choice of law analysis should commence.[1] The practice, however, is for the courts to apply these provisions in isolation of each other.[2]

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1. See Leflar R. A. "The tort provisions of the Restatement, second, "In (1972) 72 Col. L.R. 267.
2. See First National Bank of Fort Collins V. Rostek(1973) 514 P. 2d 314.

Under S. 6, the court is expected to be guided by certain policies relevant to the choice of the applicable law, which includes, the need of the interstate and international system; 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 issues; the protection of justified expectations; the basic policies underlying the particular field of law, certainty, predictability and uniformity of result, and ease in the determination and application of the law to be applied.

5.2.4 Critical Review of the working of the proper Law Doctrine

The proper law of the tort is criticised on two important grounds. First, that the analogy with contract cannot be maintained in most situations because parties to a contract have the opportunity through various means of choosing the law to govern their liability to each other which is not the case with regard to torts. Secondly while the application

of the proper law to contracts, had ensured choice of law rules that are certain prodictable and uniform these features cannot be obtained in the application of the concept to torts.[1]

Basically, the issue of certainty, predictability and uniformity of results has been the bane of the proper law doctrine, which resulted in the suspicion with which it is regarded in many legal systems. In Boys V. Chaplin Lord Hodson voiced this suspicion when he stated:

> rules of law should be defined and adhered to as closely as possible lest they lose themselves in a field of judicial discr tion where no secure foot hold is to be found by litigants or their advisers.

The American experience, shows that certainty predictability and uniformity of result is very difficult to maintain under the proper law of the tort doctrine. The experience of the New York courts which came to have the largest number of contradicting decisions[2] led a commentator to acknowledge that the decisions:

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1. See Ehrenzweigh A,"The not so proper law of the tort: A pandoras box" (1968) 17 I.C.L.Q.I.
2. See Babcock V. Jackson(supra); Miller V. Miller(supra); Neumier V. Kuehner(1965) 16 N.Y. 2d 120 Tooker V. Lopez 2 (1969) 24 N.Y.2d 289.

> have been awesome to behold; dissents, shifting doctrines, results not easily reconciliable. In short a law professors delight but a practitioners and judges nightmare.1

Ordinarily, it would have been expected that, the Restatement would have provided some measure of certainty, predictability and uniformity in the application of the proper law doctrine. This however is not so. Apart from the fact that the courts treat the choice influencing considerations of S.6 and the significant relationship principles of S. 145 as alternative rules[2], the provision of the Restatement itself is not exhaustive and coupled with the non binding nature of the document nothing prevents the courts from deviating from its providions. The result is that the principles of the Restatement are ineffective in providing any tangible certainty, uniformity or harmony of judicial decisions. The difficulty in balancing the need for non mechanical principles of choice of law and the need for certainty and predictability of judicial decisions, brings to light the fragile nature of the proper law of the tort doctrine. The provisions of the Restatement

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1. Weintraub, "The future of choice of law for torts: what principles should be prefered" in(1977) Law and contemp. Problems 146.
2. See Offshore Rental Co. V. Continental Oil Co. (Supra).

itself is stated to be contradictory without any possibility of an application that may satisfy all the principles set down under S.6 and that the principles themselves cannot work in harmony because of their inherent relation to opposing values. In First National Bank of Fort Collins V. Rostek, it was stated:

> The relevant choice influencing considerations had to be reduced to a manageable number and identity if they are to be used as practical basis for actual decisions in choice of law cases. The availability of a long catalogue of policy factors is not of much help to lawyers and judges working on specific cases.1

Morris himself has acknowledged the difficulties faced by the American courts in the application of the proper law of the tort doctrine.

He sought to defend it by asserting that:

> Any breach with tradition as dramatic as this is bound for a time to produce some uncertainty. Any revolutionary new doctrine is sure to develop teething troubles until its rationale and scope have been clarified by judicial decisions. This is especially true if the new doctrine won the day in the teeth of powerful dissent.

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1. Supra, Ibid.

5.3 Comparisons

From the discussions in this chapter, we can see that the basic foundation and application of the three choice of law rules are substantially different. The application of the double barrelled choice of law rule under the principles in Phillips V. Eyre, is not only biased towards the forum in its requirements, but also leads to the application of the law of the forum even in situations where to do so will be highly unreasonable, and may lead to gross injustice. The application of the doctrine by the English Courts has resulted in controversial decisions,[1] The attempt at retaining the principle in Boys V. Chaplin led to the evolution of a grotesque and uncertain decision which left writers and practitioners grappling with the problem of fishing out the ratio of the case [2] due to the uncertainties created by the divergent opinions of the Lords. Though many writers have reluctantly accepted that the House of Lords created an exception to the general rule of the applicability of the double barrelled choice of law rule, many

1. See Machado V. Fontes. Supra
2. Karsten, Chaplin V. Boys: Another analysis (1970) 19 I.C.L.Q. 35; Webb & North, "Foreign torts and English Courts" (1970) 19 I.C.L.Q 24.

others held the view that Boys V. Chaplin, neither took the English Law forward, nor backward; that no one can be satisfied or dissatisfied with the case because there is every thing for every one and nothing for all. The opinion is that throughout the decision their lordships had continuosly given with one hand what they had taken with the other.[1]

Conflict cases had not fared well in both Australia and Nigeria, though the Australian courts criticised Machado V. Fontes, no constructive attempt was made to solve the other problems created by the rule in Phillips V. Eyre. The Nigerian courts also dogmatically adopted the principle, and it later proved too much. The confusion pervading the Nigerian courts from Amanambu V. Okafor to Ubanwa V. Afocha, is created mainly because of the cumbersome effects of the principle in Phillips V. Eyre.

In America on the other hand, not much can be based on the lex loci delicti approach. It is gradually losing ground to the proper law doctrine. Its defects were practically revealed through almost a century of case law, in the majority of which the courts had to invoke mitigating doctrines

1. See Karsten op. cit.

in order to avoid the realisation of abs rd decisions. Today, the doctrine has no support in academic cycles and very little support even in judicial circles. In vogue is the proper law of the tort approach, which calls for a lot of flexibility and analysis of all relative factors in a tort case. The proper law of the tort is a versatile and effective formular of choice of law. Its major defect,however, is the lack of certainty, predictability and uniformity in the structure of judicial precedents. As has been shown, this is also relative to the type of approach chosen by the court. Certain jurisdictions have maintained stable and predictable choice of law principles that helped in removing some of these defects.[1]

In general, one could hardly compare the proper law of the tort approach with what obtains in England, Australia and Nigeria.The approach in the latter countries can hardly be justified as a rule of private International law, because of its parochial nature. It is quite baffling, and many writers have expressed similar sentiments[2] as to the reason for the retention of the

1. See for instance the decisions of the California Courts.
2. See Cheshire G.C. & North P.M: Op. Cit. P.267; Kahn Freund(1974) Recuel des Cours III 147 at 287.

Phillips V. Eyre principle in modern times. In Boys V. Chaplin itself there is ample evidence showing that the House of Lords appreciated the injustices of the principle. For instance, in trying to justify the application of the English law with regard to damages, Lord Welberforce stated:

> This Maltese law cannot be simply rejected on grounds of public policy or some general conception of Justice. For it is one thing to say or presume that the domestic rule is a just rule, but quite another in a case where a foreign element is involved to reject a foreign rule on any such general ground.1

While still accepting this point of view he nevertheless went on to restate that the principle in Phillips V. Eyre was applicable to the case, subject only to a weird exception justifying the application of English law to the issue of assessment of damages.

Can Phillips V. Eyre be justified on any ground? The Nigerian courts never went into any analysis in all the cases that came before them. The Australian courts were also reluctant in jettisoning the principle. It will be worthwhile if the courts in those countries analyse

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1. (1971) A.C. 356 at 392.

the various point of views based on the opinion of the Lords in Boys V. Chaplin Lord Wilberforce's judgement was unpretentious, forthright, and illuminating. At one instance he expressed his dissatisfaction with the rule in Phillips V. Eyre by stating:

> Is this a satisfactory rule?...it may be admitted that it bears a parochial appearance: That it rests on no secure doctrinal principle: That outside the world of the English speaking common law it is hardly to be found. But can any better general rule be devised or is the existing rule, with perhaps some adjustments the best suited to our system?

No amount of adjustments can rectify the defective nature of the principles of Phillips V. Eyre. While it is accepted that a rule of law may be modified wherever it harbours the trait of injustice, such modification can hardly be attempted where the nature of the defect is not only that it is unworkable when faced with certain problems, but that the foundation on which it was designed was itself anachronistic and parochial. The rule in Phillips V. Eyre was designed when the effect of technology on human interaction was minimal; to serve a society which was, provincial, parochial and quite antagonistic and contemptious of all foreign norms.

The Nigerian courts should accept the fact that blind adherence to a principle without any attempt at analysing it will only lead to the development of a barren legal system. They should adopt a rule of choice of law that draws its effectiveness from the ability to analyse, assess and discriminate legal rules according to their relative closeness to any tort issue. The proper law of the tort will provide, a blanket doctrine for the adoption of any such rule, as it has done in America. The argument that courts should restrict themselves to the interpretation of the laws of only their own states does not address itself to the peculiar nature of tort liability in the conflict of laws. Furthermore, much as it may be denied, the functions of the court has always extended beyond that boundary. As Justice Holman stated in Erwin V. Thomas,1

> It may well be that determining what interests or policies are behind the laws of a particular state is far from exact science and is something about which there can be legitimate disagreement. But on the other hand, it is the ind of exercise, for better or for worse which courts do every day and therefore feel secure in doing.

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1. (1973) 264 Ore. 454 at 458.

CHAPTER SIX

EXCLUSION OF FOREIGN LAW ON GROUNDS OF PUBLIC POLICY

Public policy is utilised to exclude foreign law from applying mainly because of the lack of uniformity of legal concepts and institutions arising from the differences in laws, practices, institutions and standards of justice and fairness existing between legal systems. Under the common law, the doctrine is essentially a judicial creation, and exists to ensure that the general policy of municipal laws is not ignored.

Winfield defined it as:

> a principle of judicial legislation or interpretation founded on the current needs of the community.[1]

In England it was pointed out that "an English Court will refuse to apply a law which outrages its sense of justice and decency."[2]

Judges have been extremely reluctant to invoke the doctrine of public policy because of its inherent tendency of denying a remedy to the litigant and the possibility of parochial, or biased interpretation of foreign law. As Nussbaum stated, public policy is:

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1. Winfield, P. "public policy in the English Common Law" in (1928) 42 Harv. L.R. 72 at 92.
2. In the Estate of Fould No.3 (1968) P. 675 per scarman J.

> an enigmatic monster which shows no desire of being analysed and which defies the concerted attack of professors, daring thesis writers, and treaty makers.1

Another writer clarified the problem involved in its application, by stating that:

> in its samewhat cavalier dismissal of foreign law, it dispenses with the necessity for close analysis, for an informative appraisal of the situation upon which judgment must be raised.2

Public policy is an exception to the normal application of the general rules of private international law, and where foreign law is excluded through it the result is either the application of lex fori or the total dismissal of the plaintiff's case.

Most writers are agreed that while public policy is a necessary tool and in some cases necessary to be invoked, the lack of any defined limit as to its use, is one of its fundamental weakness. According to Dicey and Morris, "the reservation of public policy in the conflict of laws is a necessary one, but no attempt to define these limits has ever been attempted."3

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1. Nussboum, "Public Policy and the political crisis in the Conflict of Laws" (1940)49 Yale L. J. 1027.
2. Cavers, 47 Harv. L.R. 184.
3. See Dicey and Morris, The Conflict of Laws 9th Ed. P. 74.

The opinion is generally held that no practical policy in the conflict of laws can be safe so long as the boundaries of public policy remains undefined and unattended. According to Poulsen and Sovern:

> the principal vice of the public policy concept is that they provide a substitute for analysis. The concept stands in the way of careful thought, of discriminating distinctions and of true policy development in the conflict of laws.1

6.1 Public Policy And The Principles in Phillips V. Eyre

Public policy is virtually irrelevant in the area of tort liability, under the choice of law principles enounciated in Phillips V. Eyre[2] which is the prevailing choice of law rule in England, Australia and Nigeria. Under these principles, an action in tort will lie only when it is both actionable as a tort under the lex loci delicti and the lex fori. In that regard, a foreign cause of action or rule of law has to conform to the requirement of the lex fori before any claim can be based on it. This choice of law rule was derived from an old common law case, The Halley, where the Privy Council stated the proposition:

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1. See Poulsen C. and Sovern S.E. "Public Policy" in the Conflict of Laws" (1956) 56 Columbia L.R. 969.
2. (1870) L.R. 6 QBI.

> It is in their lordships opinion alike contrary to principle and to authority to hold that an English court of justice will enforce a foreign municipal law, and will give remedy in the shape of damages in respect of an act which according to its own principle imposes no liability on persons from whom damages are claimed.

The choice of law principles in Phillips V. Eyre, therefore, came to be applied to all tort proceedings and other issues arising therefrom, based on foreign claims. The issues are determined in accordance with the substantive principles, and since the choice of law rule calls for the application of a conbination of the lex fori and the lex loci delicti with the lex fori in a dominant position, foreign rules of law that are repugnant to the lex fori, or otherwise against the public policy of the forum and, therefore, not recognised under its laws are excluded by virtue of the choice of law rule.

6.2 The Lex Loci Delicti

The American courts while applying the lex loci delicti approach to choice of law, did not utilise public policy to exclude the application of foreign law merely on the empirical ground that it is repugnant to the policy of the forum, but they have gone further to utilise the doctrine on what is described as "positive terms" to give remedy to the plaintiff where the foreign rule

has the tendency of unfairly denying him a remedy. This judicial attitude is derived mainly from the mechanical nature of the choice of law rule and the differences in the statutes of the various states.

Incompatability between the policies of the forum and those behind the foreign law has long been looked as a ground for excluding foreign law from having effect within the forum. As early as 1827, a Lousinia court is reported to have remarked that in the conflict of laws, it must often be a matter of doubt as to which should prevail and that whenever that doubt does exist the court which decides will prefer the law of its own country to that of the stranger.[1]

The mood of the courts applying the lex loci deliciti was to exclude foreign law from applying by either refusing to recognise the action or by the application of the lex fori to the whole issue.[2] However, the courts did not follow any general policy in excluding foreign law, and like its utilisation in other branches of conflict cases, does not follow

1. Saul V. His Creditors 5 Martin R(N.S.)569.
2. See Ehrenzweith A. A Treatise on the Conflict of Laws (1962)P. 343.

any particular pattern. Because of this, American judges have often times warned themselves of the dangers of closing the doors of the forum courts to all foreign concepts and laws not recognised by the lex fori. In Loucks V. Standard Oil Co.[1] Lardozo J. counseled against the parochial use of the public policy exception when he stated; that courts should not close their doors against foreign law unless the application of foreign law "would violate some fundamental principle of justice, same prevalent conception of good morals, some deep rooted tradition of the common Weal."

Some aspects of the use of public policy to exclude foreign law by the courts, that has attracted some comments by writers, is its utilisation to favour the plaintiff. In Kilberg V. North East Airlines Inc.[2] the deceased, a New Yorker was killed in Massachusetts on a flight originating in New York. The defendant, a Massachusetts Corporation, invoked Massachusetts law with regard to limitation of damages for wrongful death. In holding for the plaintiff, the New York Court of Appeal relied on public policy as one ground, because a provision of New

1. 224 N.Y. 99 at 11.
2. 9 N.Y. 2d 34 (1961)

York's Constitution prohibits damage limitations in statutes within New York. The court was in the case obviously influenced by the necessity to reach a fair result. However, writers have argued that concern for fairness to the local plaintiff does not address the question of fairness to the defendant to whom the decision denied a defence available under lex loci delicti.[1]

6.3 Public Policy and the Proper Law of the Tort Approach

There is not much discussion of the effect of public policy on the operation of the proper law of the tort approach to choice of law. This may be because the doctrine is of recent origin and judicial decisions dealing with the matter have not been as forthcoming as those dealing with the substantive issue of choice of law. Secondly, it may be because of the inherent difficulty of the concept of public policy in terms of analysis, especially under a doctrine, (as the proper law of the tort) whose effectiveness lies in discouraging dogmatic and mechanical approaches to conflicts resolution.

The Restatement, second.[2] has given

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1. See Scoles E. and Hay S., Conflict of Laws (1982) p. 564.
2. 2d (1971).

recognition to the exclusion of foreign law on the grounds of public policy when it provided in S.90 that:

> No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum.

By way of comments it was further stated that the rule of the section has a narrow scope of application, and will apply only to situations where the forum refuses to entertain the suit on the ground that the cause of action is contrary to the strong local public policy. It does not apply to situations where the forum has decided on the controversy and on an assumed "public policy" applies the laws of the forum.

The Restatement,second also explained that, the section should not justify striking down a defence, good under the otherwise applicable foreign law, on the ground that the defense is contrary to the strong public policy of the forum.[1] The provision does not also justify a treatment of a rule of a state as contrary to public policy merely because of the differences between the two local rules.[2] It was explained that to come within the scope of the section, the local policy must be sufficiently strong as to outweigh

1. Ibid, See Comment(a)
2. Ibid, See comment(b)

a state's natural desire to open the doors of its courts to suits involving foreign facts.[1]

6.4 Comparison

Public policy as an exception to the application of foreign law appears from the above analysis to present the same problems as in other aspects of the conflict of laws. While it may have no relevance under the rule in Phillips V. Eyre, the discretionary aspects of that rule in terms of allowing foreign claims within the forum, makes it necessary for the court to advise itself correctly, before rejecting a foreign claim that is not actionable as a tort under the lex fori.

Under both the lex loci delicti and the proper law approaches, the problem, with regard to the issue of exclusion of foreign law on grounds of public policy are the same, and what is important is the issue of determining as to when foreign law is contrary to the public policy of the forum.

One may suggest here that public policy should be limited in terms of its application to

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1. Ibid, see comment (c)

the three situations enunciated by Cheshire.[1] These situations are:

1. where the forums conception of deep seated morality has been infringed.
ii. where the action is borne out of a transaction which prejudices the interest of the forum, or the forum's relation with other countries.
iii. where the action offends the forum's conception of human liberty or freedom of action.

Obviously, an application that disregards the importance of guidelines in the exercise of the court's power to exclude foreign law because of its incompatiability with the lex fori points towards the maintenance of public policy as an unruly horse capable of distroying many of the gains of private international law.

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1. See Cheshire ... Private International Law 8th Edition P. 182-184. (1981)

CHAPTER SEVEN

DEFENCES

The issue as to what defences, under what law, may be available to the defendant is in a way tied down to the question of what law is to apply to the tort, the subject of the proceedings. Despite this,however, there are certain defences that are not dependent on the applicable law, and whose availability may generally depend on the choice of law principle utilised in choosing the applicable law.

In that respect, this chapter will be looking into the methods of determining what defences may be available to the defendant, and under what system of law. There is no difference on this point as between English, Australia and Nigerian law, since, all three jurisdictions apply the double barrelled actionability rule formulated in Phillips V. Eyre.[1] In America, this issue can be looked at differently under the two approaches to choice of law prevailing in that country: The lex loci delicti approach, and the proper law of the tort approach.

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1. (1870) L.R. 2 QB.I

7.1 Defences Under The Principles In Phillips V. Eyre

Under the principles in Phillips V. Eyre, the general rule is that, any defence available and valid under the law of the forum will be available to the defendent although it is not recognised by the lex fori. This is borne out by the requirement that the act must be actionable as a tort by the lex fori, Dicey and Morris, however suggest in addition to this, that a defence available to the defendant under the lex loci delicti should also be recognised notwithstanding the fact that the lex fori contains no similar defence.[1] This contention is however not supported by judicial decision.

Generally, therefore, the lex fori appears to be in control of what defences may be available to the defendant under the rules in Phillips V. Eyre. Two types of defences, however, present some difficulties with regard to this issue. These are contributory negligence, and contract as a tort defence. In many instances the general rule is modified in some respects as far as these two are concerned.

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1. See Dicey and Morris The Conflict of Laws (1974) 9th ed. P. 961.

7.1.1 Contributory Negligence

Under the common law of torts, contributory negligence raises questions of causation and is therefore a complete defence to liability. Statutory reforms in England,[1] Australia[2] and Nigeria[3] have resulted in apportionment or reduction of liability wherever contributory negligence is raised as a defence. Notwithstanding these reforms, the issue whether the plaintiff has been contributorily negligent has remained primarily one of causation. Once it is established that the plaintiff had contributed to the alleged negligence it may be a question of law as to whether in the factual context of the case he was liable for such an act and also whether his action is a substantial cause of the negligence. Therefore in both the forum and the locus delicti, it is necessary to decide as to what consequences of the act the parties are to be made responsible. In this regard, it has been suggested by Webb and Brownlie that in the conflict of laws, causation should not be regarded as a mere question of

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1. See the law . . reforms contributory Negligence Act(1945) of England.
2. See for example, law reform(misc. prov)ordinance (1955) of the Australian capital territory.
3. See law reforms torts law(cap.67)of Lagos;(cap 125)Eastern states;(cap 122)western state. In the Northern States the old common law rule prevails.

procedure, but rather a question to be decided by the law governing the existence of the obligation, which means the lex loci delicti. They argued that failure to allow the lex loci delicti to control, will lead to an unreasonable control of the action by the lex fori.[1] Dicey and Morris share a different view, According to them, contributory negligence should be allowed as a defence if it is available under the lex fori even if it is not recognised by the lex loci delicti. They also favour the denial of the defence in a forum where the common law rule on contributory negligence has been modified by statutes that provide for apportionment[2], if under the lex loci delicti the defence is not available.

If one is to apply the views of Dicey and Morris to the Nigerian interstate situation we find that where an action is brought in any of the Northern states in which the common law rule prevails and contributory negligence is a complete defence, for a tort committed in any of the Southern states where statutory provisions have modified the common law rule to allow for recovery, the defendant may rely

1. See Webb P.H. and Brownlie D.L.,"Contributory Negligence and the rule in Phillips V. Eyre" in(1968) 40 Can. B.R. P. 1314 at 1319.
2. See Dicey and Morris, the Conflict of Laws (1974) 9th ed. P. 961.

on the common law rule notwithstanding the statutes of the Southern states; and in the converse case, i.e. where the tort took place in any of the Northern states, and the action was brought in any of the Southern states, the defence will be denied, and the statutes of the Southern States will be given effect to.

Notwithstanding the absurd results in the above illustration, the courts in Australia which had the chance to pronounce on the matter, have followed it. In Anderson V. Eric Anderson Radio & T.V. PTY Ltd.[1] The plaintiff's vehicle was damaged by a vehicle driven by the defendants in Camberra in the Australian capital territory. Both the plaintiffs and the defendants reside in New South Wales where the action was brought and the jury found that the plaintiff contributed to the injury he suffered. Under the law of the capital territory contributory negligence is not a bar to an action, while the common law rule applied in New South Wales where contributory negligence was a complete defence. The High Court of Australia held that the law of New South Wales prevails. The High Court seems to have given the lex fori a control-

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1. (1966) A.C. 423.

ling function with regard to the two issues involved,i.e. by what law was the contributory negligence to be identified, and secondly the law that will determine the issue.

Also in Brown V. Poland, and Emerson Motors, Ltd,[1] an action arose out of a collision between the plaintiff's and the defendant's vehicles in Montana in circumstances in which contributory negligence against both drivers was proved. Montana had retained the common law rule, under which contributory negligence is a complete defence. The plaintiff brought an action in Alberta claiming damages in respect of loss of wages, storage of the trailer for repairs and for damage done to it. It was found that in the circumstances both arms of the rule in Phillips V. Eyre were satisfied. Alberta however had modified the common law rule to allow for apportionment of damages. The court applied the law of Alberta with the result that the plaintiff's claim was allowed but damages reduced by 50% because of the contributory negligence.

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10. (1952) 6 W.N.L.R(W.S.) 328.

Though there are no English and Nigerian decisions on the point, the courts of the two countries might follow the Australian and other pmmonwealth courts as they normally do on other aspects of the conflict of laws.[1]

7.1.2 Contract as a tort defence

The availability of an existing contract as a defence to a tort action arises from the interelation of contract and tort. The main issue is as to how far a tort claim may be defeated by a contractual defence. There are three separate aspects of this issue: The effect of the existence of a contract as a defence to a tort claim; the effect of a contractual exemption clause on a tort claim; and the effect of contractual waiver or release from tortious liability.[2]

Generally, questions of contract, are governed in England, Australia and Nigeria, by the proper law of the contract, while questions of tort under the principles in Phillips V. Eyre are governed by a combination of the lex fori and the lex loci delicti.

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1. See North P.M., 'Contributory Negligence in the Conflict of Laws" in(1967) 16 I.C.L.Q.379.
2. See North,"contract as a tort defence in the Conflict of Laws" in Contemporary Problems in the Conflict of Laws: Essays in Honour of J.H.C. Morris(1978).

If the lex loci delicti and the proper law of the contract are themselves in conflict, it raises the question whether the liability is excluded or modified by the contract. A serious problem arises where the contract is governed by a system of law other than that of the place where the tort was committed. In this situation, it is possible that the defence may be valid by the proper law of the contract, but invalid by the lex loci delicti; or it may be invalid by the proper law of the contract but valid as a defence under the lex loci delicti. The English, Australian and Nigerians rules as to pleadings are sufficiently flexible to allow the plaintiff to choose as to whether his claim is to be in contract or in tort where there is concurrent remedies provided by the law. However, the incidental question of whether there are concurrent remedies should be a procedural matter to be governed by the law of the forum.[1]

Where there is a contract between the parties, the existence or terms of which deprive the defendant's action or omission of its tortius character, i.e. not merely a clause exempting

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1. Collins also suggested this approach, See Collins, "Exemption clauses, employment contracts and the conflict of laws". in (1972) 16 I.C.L.Q 103 at 112.

liability of an envisaged tort, the issue of liability in tort is dependent on the contractual agreement, which in essence makes it dependant on the proper law of the contract.[1]

Where the issue concerns an exemption clause, i.e. the effect of contractual exemption clause as a defence to liability in tort, two related problems arise . First, is the admissibility of the excemption clause as a defence to a liability in tort. This has been classified as an issue in tort and is,therefore,governed by tort choice of law principles. The second is whether the exemption clause itself is valid,this is classified as a matter of contract to be governed by the proper law of the contract. Both problems are,therefore,to be solved by way of different choice of law rules.[2] Where the lex loci delicti does not recognise the contractual exemption, writers have suggested two ways of solving the problem. According to Dicey and Morris, the contractual exemption can be successfully pleaded as a defence to an action even though the exemption is void or not otherwise available under the lex loci delicti.[3]

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1. See North, op. cit. Ibid.
2. See Kahn-Freund,O."Dilictual liability in the Conflict of Laws" in(1968) II Recuel descours I at 142-145. See also North op.cit. Ibid.
3. See Dicey and Morris, The Conflict of Laws (1974) 9th ed. P. 963.

Collins gives a different opinion altogether. According to him, to allow the lex fori to control in such situations involves an unwarranted extension of the rule in Phillips V. Eyre. He suggests that the defence should not be recognised unless it is recognised by the lex loci delicti, since lack of recognition means that the act is clearly not justifiable under the law of the place of commission.[1]

There is hardly any Australian, or Nigerian case where these issues were discussed. However, the English courts and Canadian and Scottish courts had the opportunity of examining and pronouncing on some of the issues.

In Sayers V. International drilling Co. N.V.[2] the plaintiff was an Englishman, who entered into a contract of employment with the defendants, a Dutch Oil Company. The plaintiff worked for the defendants on an Oil rig in Nigeria where he was injured by the negligence of his fellow employees. The employment contract contained an exemption clause under which the plaintiff agreed to accept benefit under a compensation scheme set up by the defendants, but he was precluded from any

1. See Collins op.cit. at p.3.
2. (1971) 1 WLR 1176.

compensation accruing to him under English law. The exemption clause was valid under Dutch law, which was the proper law of the contract, but void under English law, the lex fori. The plaintiff claimed damages for his injuries in England. A majority of the Court of Appeal held that the law of Holland applied, and so the exemption clause affords a defence to the defendant.

In the Canadian Pacific Railway V. Parent[1], on the other hand, the deceased domiciled in Quebec was employed as a stockman in Manitoba to transport cattle between the two Canadian provinces of Winnipeg and Montreal. The cattle were consigned to the defendants railway by the deceased's employer under a contractual provision that if a man was allowed to travel with the cattle at less than full fare, the defendant railway should be exempted from liability for death, injury or damage whether or not due to their fault. The deceased signed a personal pass which did not exempt the defendants from liability for death but did exclude liability for accident or damage to person or property. The deceased was killed through the negligence of the defendants when the train was passing through the province

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1. (1973) S.L.T. 198.

of Ontario. His widow brought an action for damages in Quebec. Under the law of Quebec, the widow had an independent right of action for her loss, Under the law of Manitoba and Onterio, the right of action of the widow depended on the right of action of the deceased, and will be lost if he had validly contracted away such a right. The Privy Council held that the deceased assented to the agreement in the pass. Essentially, this meant that the defendant railway had contractually excluded their liability to the deceased by means of a contract entered into in his behalf by his employers. Under the law of Ontario, as the lex loci delicti, there was no right of action at the suit of the dependants, because the deceased himself could not have sued. The court also concluded that under the law of Quebec, there was no right of action because the right claimed by the widow under the law of Quebec only applies to acts committed within Quebec. In effect, the tort is not actionable in Quebec, the lex fori, because the accident happened in Ontario, Secondly, the contract provided a good defence under the law of Ontario. In this case, the court did not determine the validity of the contract, or its effect under the law of Ontario because of the fact that no action

will lie under the lex fori i.e Quebec. Moreover, the contract is also valid under the law of Ontario.

Obviously the approach in the latter case is different from that of the English court of Appeals decision in Sayers V. International Drilling Co. In Sayers case, the court seems to have come to the conclusion that both the availability and the validity of an exemption clause as a defence depended on the proper law of the contract. In the Canadian Pacific Railways case, however, there was an attempt at allowing the lex loci delicti to govern the right of the parties rather than the proper law of the contract. In that regard, writers have criticised the decision in the Sayers case on the ground that it seems to trivialise the tort aspect of the case,[1] Obviously the proposition that the availability or admissibility of an exemption clause as a defence is a matter of tort law, and that only the validity of the exemption is a matter of contract is completely negated by the case.

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1. See North, op.cit. P.225.

With regard to the question of how far a contract may constitute a release or Waiver from tort liability, both the law that govern the validity of the release, and the effect of the release are determined by the law applicable to the action, and the lex loci delicti should be allowed to prevail in cases where, the lex fori and lex loci delicti differ.[1]

7.2 Defences Under The Lex Loci Delicti Approach

Under the lex loci delicti approach to choice of law, the issue of determing what defences are available to the defendant and under which law, does not pose the same problem as it does under the double barrel approach to choice of law prevailing in England, Australia and Nigeria. The American courts, applying the approach generally accepted the rule that any substantive defence available to the defendant by the lex loci delicti may be pleaded, subject to the public policy of the forum. Nevertheless, the American courts through the process of classification, have allowed plaintiffs to recover even where the lex loci delicti has provided the defendant with a defence.

1. See North, op.cit. Ibid.

With regard to contributory negligence for example some American states have retained the common law rule which affords a complete defence to the defendants, while others have modified it by statutes, providing for apportionment of damages the courts had classified the common law rule and the statutes in such a way as to allow for recovery even where the lex loci delicti exempts the defendant completely from liability. In Fitzpatrick V. International RY Co,[1] the New York Court of Appeals applied Ontario contributory negligence statute which favoured apportionment, in order to favour the plaintiff, though under the lex loci delicti they would not have recovered.

On the issue of contracts as a defence to tort liability, the American courts had held that any clause in a contract exempting a party of potential liability is governed by the rules that govern contracts,[2] and in that regard the parties have the choice of choosing a contractual clause recognisable by the law of the place of possible tort. Where the law governing the contract, the locus delicti, and the forum are different claims based on the contract are

1. (1929) 252 N.Y. 127.
2. See Ardicta V. Young(1965) 256 N.Y.S 2d 189 Caronillas

segregated and governed by the law of contract, while those of torts are governed by the place of tort.[1]

7.3 *Defences Under The Proper Law Of The Tort Approach*

The issue of defences is much more simpler to resolve under the proper law of the tort approach. The defendant is generally entitled to those substantive defences available to him under the proper law of the tort determined after due analysis of the relevant factors that are connected to the tort, according to the principle chosen by the court.

Under the Restatement, second, S.161 provides:

> The law selected by the application of the rule of S.145(i.e. the choice of law principles for torts) determines what defences to the plaintiffs claim may be raised on the merits.2

Virtually, whether the plaintiff is harred from recovery by the fact that at the time of the injury, he was violating a statute of the state whose local law governs the tort will be decided by this law.[3]

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1. See Ehrenzweig/"some principles of private transnational law" in(1968) Recuel des cours II P. 167 at 319.
2. See Restatement, second, Conflicts of Laws 2d
3. Ibid. See explanation(b) See also S.170, which makes the same provision on issues relating to waiver or releases from tort liability.

As pointed out earlier, S.145 of the Restatement provides 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 with respect to that issue has the most significant relationship to the occurrence and the parties, which is determined by taking certain factors into consideration which include, the domicile, nationality, place of incorporation and place of business of the parties, and the place where the relationship if any between the parties are centred. All these factors have to be evaluated in order to determine the issue as to wether the defendant can have recourse to a defence under any law. For instance, where it is found that the defence available to defendant under his lex domicilii, is not available under another law which may be related to the tort, both laws will be analysed as to their relation to the tort, and the one which has the most significant relationship with the whole incident will apply to the issue of defences in preference to the other.

This process applies, wether it is that the provisions of the Restatement applies to the case, or any of the independent principles evolved by the court, e.g. the interest analysis, comparative impairement, or even the "contact" or centre of

gravity principles, the result will be the same.[1] Unlike under the two approaches, there are no difficulties associated with this approach as far as defences are concerned.

7.4 Comparisons

The analysis with regard to defences that may be available to the defendant in a tort case in the conflict of laws, shows that it entails a complicated process under the rule in Phillips V. Eyre, practiced in the English, Australian and Nigerian courts than under any of the two approaches prevailing in American jurisdictions. The complications and lack of uniformity in that regard under the Commonwealth rule is not justified, and will only distract the court from its fundamental objectives.

As we have seen, the tendency under the rule in Phillips V. Eyre is to apply the lex fori in most situations where the rights of the defendant to defences that are available to him is called to question. Apart from the isolated instance in the case of the Canadian Pacific RY V. Parent, the courts in applying

1. See Babcock V. Jackson(1963)191 N.E. 2d 279; Miller V. Miller(1968)237 N.E. 2nd 277: Reich V Purcell 432 P.2d 394(1967); Pfau V. Trent Aluminium Co. 263 A. 2d 129(1970); Offshore Rental Co. V. Continental Oil Co.(1978)583 P.2d 721.

the double barrelled rule to the issue were as rigid as they were in the treatment of other issues. The lex fori has always retained a dominant position. This has caused unnecessary problems and difficulties on issues of contract as a tort defences and contributory negligence. It will be noted that the two other choice of law approaches do not admit of such difficulties and generally there is no separate treatment of the defences regarding contract and contributory negligence because the two are resolved according to the general rule applicable to the problems under both the lex loci delicti and the proper law of the tort approaches. The mechanical nature of the lex loci delicti approach would have resulted in the control of the issues by the law of the place of tort. However, resort to the public policy exception, and classification has ensured that the harmful effects of the approach are minimised.

It is now certain that determination of the issue of defences is much more satisfactory under the proper law of the tort approach than under the other two approaches. The application of a law out of a number of laws related to the issue calls for an analysis of relative factors, rather than a predetermined and inflexible attitude.

For example, the determination of wether a plaintiff is contributarily negligent, wether the contributary negligence affords a defence to the defendant, the problems connected with the interrelation of contract and tort, and all other questions relating to the availability of a defence to the defendant should all be solved in the same basic manner. One can argue that the intricacies of the double barrelled rule in Phillips V. Eyre call for its abandonment; but untill it is abandoned by the English, Australian and Nigerian courts the problems necessitate a determination of wether a defence is available under both the lex fori and the lex loci delicti.

CHAPTER EIGHT

DAMAGE AND MEASURE OF DAMAGES

Damage refers to loss or harm, physical or economic resulting from a wrongful act and generally leading to the award of damages. Damages on the other hand refer to the courts estimated compensation in money for detriment or injury sustained by the plaintiff as a result of the defendent's conduct.[1] The payment of damages depends on the condition that the damage suffered by the plaintiff is not too remote. The rules for the measure of damages is a mere rule of calculation that operates only after injury or loss in question has been found to be free from the vice of remoteness.

In this chapter, an attempt will be made to look into the modes of determination of the issue of remoteness, and the assessment of damages under the three choice of law approaches prevailing in the four jurisdictions under study.

8.1 The Rule in Phillips V. Eyre

The issues of both remoteness of damage and assessments of damages under the rule in Phillips V. Eyre has generally remained obscure

1. See Curzon L.B., A Dictionary of Law (1979) P. 88.

due to the non availability of judicial authorities on the point. The segregation between questions of remoteness of damage and measure of damages for purposes of applying different rules to each was derived from the case of D'Almeida Aravo Lda V. Becker & Co., a case involving contract where the court applied the proper law of the contract to the issue of remoteness of damage.[1]

8.1.1 Remoteness of Damage

The rule relating to damages is said to indicate what kind of loss actually resulting from the commission of a tort is actionable, and because of this it is governed by the lex causae. The justification for this was put forward by writers by way of analogy with contract and family law. Dicey and Morris drew analogy from cases where it was held that the question whether a debt carries interest depends on the proper law of the debt and also Scottish cases where it was held that no claim for solatium could be maintained in Scotland by the spouse or near relative of a person killed in a country by whose law no such claim is recognised.[2]

1. (1953) QB 329.
2. See Dicey and Morris, The Conflict of Laws (1974) 10th ed. P. 1102.

According to Cheshire and North;

> There can be no doubt at least on principle, that remoteness of damage must be governed by the proper law of the obligation that rests upon the defendant. Not only the existence but also extent of an obligation springing from the commission of a wrong, must be determined by the system of law from where it derived its source...if the proper law determines what constitutes breach, it must determine the consequences of breach.1

Kahn-Freund,however, has a different opinion, In his view the problem could be linked with the type of problems faced by the courts in determining the proper parties to the tort. According to him "the question of who can recover, and for what wrong can damage be recovered can hardly be separated." He favours the rule governing the ascertainment of the plaintiff, to govern the issue.[2] In that regard, the application of both the lex fori and the lex loci delicti determines the issues as to whether damage is remote or not.

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1. See Cheshire G.C. and North P.M., Private International Law 10th ed. P.70. (1981)

2. See Kahn-Freund O., "Dilictual Liability in the conflict of laws "in(1968) II Recuel des cours P. 61 at 121.

8.1.2 *Measure of Damages*

As we have seen, the rule for measure of damages shows the method by which compensation for a loss is calculated. Writers are unanimous in classifying the issue as procedural and holding that it should be governed by the law of the forum. The justification for this is rooted in the common law principle that damages are assessed once and for all, and that no periodical payments can be ordered by the court. This rule is so strict that even where damages could be reassessed in the light of changed circumstances it cannot be ordered.[1] Notwithstanding this, the principle only allows the plaintiff to recover damages only up to the maximum fixed by the lex fori, which is at the same time recoverable under the lex loci delicti.

Some English writers, however, justify the classification of the issue of assessment as procedural, and the fact that the plaintiff choses the forum out of many others, and since he takes advantage of the machinery provided by the forum, then it is expected that the law of the forum is to govern what he expects to recover.[2]

1. See Boys V. Chaplin (1971) A.C. 356 at 394 (the statement of Lord pearson).
2. See Cheshire and North, op.cit. P.124.

8.2 The Lex Loci Delicti Approach

The American courts applying the lex loci delicti approach to choice of law, have held that both questions of remoteness of damage and assessment is governed by the law of the place of tort. For example in Jordan V. States Maritime Corp.[1] an Oregon Court refused the claim of an Oregon citizen, who had claimed damages for loss of consortium due to her husbands injury which was allegedly caused on the high seas by the defendant, a Delaware shipowner. The court justified its decision on the ground that the lex loci, i.e. maritime law or the law of Delaware, did not provide for recovery, and the law of Oregon cannot make such a tort enforceable extra territorially on a vessel not owned by an Oregon corporation or in another state.

On the issue of assessment of damages, a California Court in Victor V. Sperry[2] accepted the limitation imposed by the law of Mexico because according to the court, the measure of damages is inseparably connected to the cause of action. The case involved an automobile accident in Mexico between two California citizens.

1. (1958) 257 F. 2d 232.
2. (1958) 166 Cal. App. 2d 518.

On this aspect too, the American courts had recourse to the process of classification and invoking public policy reasons in order to ensure that the plaintiff recovers in a situation where holding otherwise will result in an unfair decision. In Kilberg V. North East Airlines Inc.[1], the deceased a New Yorker, was killed in Massachusetts on a flight originating in New York. The defendant, a Massachusetts Corporation, invoked Massachusetts limitation of damage for wrongful death. In holding for the plaintiff, the New York Court of Appeals, listed public policy as one ground for its decision because a New York constitutional provision prohibits damag limitations. The second ground is that the measure of damages was regarded to be an issue of procedure and therefore should be governed by the law of New York. The court obviously went to this length, because the application of the law of the place of tort to the case, especially the damage limitation, will be intolerable in view of the fortuitous nature of the place of wrong.

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1. 9 N.Y. 2d 34, 1961.

8.3 The Proper Law of the Tort

Under the proper law of the tort, the law selected on policy grounds as having the most significant connection with the parties and the occurence will determine both questions of remoteness of damage and assessment of damages. This may be by way of any of the principles adopted by the courts in arriving at the applicable law.

The Restatement, second, for instance, provides that the principles of S.145 (i.e. the choice of law principles) determine the question of damages.[1] By way of comment to the section, it was stated that the law selected by the application of the rule of S.145 also determines what items of loss can be included in the damages and what limitation, if any, are imposed upon the amount of recovery. It was also pointed out that the methods of assessing damages, i.e. whether by the court or jury, and the evidence admissible to prove damage are determined by the lex fori.[2]

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1. See Restatement, second, 2nd S. 145.
2. See Comment(a), S. 145. Restatement, Second.

The commentry also provided further that the determination of the state of the applicable law should be made in the light of the choice of law principles stated under S. 6(i.e. the general choice influencing considerations of the Restatement[1]), and generally this should be the law of the state which has the dominant interest in the determination of the particular issue. It was specifically stated that the state of conduct and injury will not by reason of these contacts alone be the state that is primarily concerned with the measure of damages in a tort action, though the local law of the state may be applied unless some other state has a greater interest in the issue. The Restatement further indicated that when the plaintiff and defendant are domiciled in the same state, and,particularly,if in addition there is a special relationship between them which is centred in that state, it is most likely to be the state of the most significant relationship with respect to the issue of damage.[2]

1. See Chapter V.
2. Restatement second S. 171 Comment(b).

Furthermore, the determination of whether the plaintiff can recover interest and the rate of interest, whether the plaintiff has a right to exemplary damages; and whether damages should be apportioned are all made dependent on the law chosen through the principles in S. 145.[1]

The case of Reich V. Purcell[2] decided by the California Supreme Court provides a good example of the assessment of damages by way of the proper law of the tort doctrine using the interest analysis method. In the case, a wrongful death action was brought in California in respect of collision between two motor cars in Missouri whereby the plaintiff's wife and one of his children were killed. The defendant was resident in California, but was on his way to Illinois for a holiday. The plaintiff and his family were residents of Ohio travelling to California where they contemplated settling. The survivors of the family did eventually settle in California. The law of Missouri limits damages recoverable in an action for wrongful death totwenty five

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1. Ibid. See comments(c) and(e).
2. 67 Cal. 2d. 551(1968).

thousand dollars. No such limit existed under the laws of California and Ohio. The California Supreme Court after due analysis of the interest of the various states involved (i.e. California, Ohio, and Missauri) came to the conclusion that Ohio had a dominant interest in the application of its laws. It decided that Missouri could have no interest since none of the parties resided within its borders. California could have no interest in protecting the defendants, because its law does not afford such protection, and at the same time it cannot advance the interest of the plaintiff who was not settled in the state at the time of the accident. Ohio had interest as the domicile of the plaintiff and his family, to secure maximum compensation for its residents. The court observed:

> A defendent cannot reasonably complain when compensatory damages are assessed in accordance with his law of domicile and the plaintiffs receive no more than they would have, had they been injured at home.1

According to Traynor J. limitations of damages for wrongful death have little or nothing to do with conduct. They are concerned not with how people should behave but how survivors should be compensated.

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1. Ibid, at 556.

8.4 Comparisons

Analysis of the issue as to what damage the defendant is liable for and the assessment of damages, therefore, reveals the differences existing between the three choice of law approaches. While the English, Australian and Nigerian courts adopt the policy of allowing the lex causae to govern the issue of remoteness, academic opinion favours the classification of assessment of damages as procedural and, therefore, governed by the lex fori, The American courts applying both the lex loci delicti and the proper law of the tort do not favour the lex fori on both issues. Under the lex loci delicti approach the courts have allowed the place of tort to prevail in the determination of both issues subject only to their utilisation of public policy and classification to exclude foreign law where the result will offend common sense and reason.

Under the proper law of the tort, however, both issues depend on the applicable law, so that the court is not governed by any hard and fast rules. There seems to be an acceptation of applying rules on the basis of the circumstances surrounding each case

From a general appraisal of the advantages of all these approaches, the conclusion is that, a rigid rule as to the determination of this question cannot be justified. The American courts have proved this through the application of the lex loci delicti, Surely, the application of the lex fori to the issue of assessment of damages will not achieve any reasonable decision in most cases. The best approach in this line is to adopt a flexible approach, similar to the method espoused under the Restatement, second, and accepted by the American courts. This will ~~surely~~ make the decisions of the English, Australian and Nigeria courts much more acceptable. It is to be stated,however, that the control of the issue of assessment of damage by the lex fori is a logical consequence of the application of the double barrelled rule in Phillips V. Eyre. The House of Lords in Boys V. Chaplin is alleged to have introduced an exception to the strict application of the rule to the issue of assessment of damage. There is so far no judicial decision in which the exception was utilised. It seems the existence of such an exception is not only created through the interpretation of the decision by writers, but sustained by their anxiety

at reducing the difficulties associated with the anachronistic application of the choice of law rule. Perhaps another House of Lords decision is required to resolve the issue. It is not too much, however, to say that the Nigerian courts should discard Phillips V. Eyre alltogether.

CHAPTER NINE

CONCLUSION

> "The inn that shelters for the night is not the journey's end. The law like the traveller must be ready for the morrow. It must have principle of growth."
>
> - Cardozo, the growth of the law(1924)

It is the bane of the conflict of laws that whenever a technical legal argument becomes intellectually and academically attractive, a strong presumption arises that something is wrong with the law. The law as envisaged in the intellectually turbulent academic cycle, rarely reflects the practical working of the courts. I have in this work tried to give a picture of what obtains in the four jurisdictions covered by the study. In that regard, I stand on the same footing with Lord Asquith when he stated:

> I am not concerned with defending the existing state of the law, or contending that it is strictly logical. It clearly is not. I am merely recording what I think it is. If this relegates me to the company of "Timorous" souls, I must take the consequence with such fortitude as I can command.1

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1. Chandler V. Crane Christmas & Co.(1951) 2 K.B. 164 at 195.

The major aspects of torts in the conflict of laws that formed the core of the research is the issue of choice of law. The preceding chapters have clearly shown that other aspects of torts are also dependant on the choice of law approach. They have also highlighted those areas where the application of the rule in Phillips V. Eyre, which is the prevailing choice of law rule in Nigeria, is unsuitable. In the comparative evaluation of the rules in the commonwealth countries and in America, I have tried to lay more emphasis on the view points that have practical relevance. I justify it on the ground that law, in whatever context it is looked at, is generally meant to affect persons real or artificial. It aims at satisfying the yearnings of a balanced determination of conflicts emanating from frictions, arising out of the natural contact between individuals and interests. Academic theories are hypothetical in their reflection and appeal, and cannot be concrete basis for practical suggestions towards reforming the law.

9.1 Summary of the Problems of Jurisdiction and Choice of Law

On the issue of jurisdiction, the two unsatisfactory areas of the law are; jurisdiction by way of

service of process through the "Transient presence" rule, and the Discretionary jurisdiction of the courts to serve process on a defendant who is outside jurisdiction. The working of the transient presence rule is not satisfactory because it subjects a mere visitor to the country, to the jurisdiction of the forum. As one learned writer stated, rules of jurisdiction, especially in international situations, must "have as one of their primary objectives; the effort to achieve an equitable balance between the protection of the plaintiff against an elusive defendant and the protection of the defendant against the whims of a vindictive plaintiff." The popular view is that the rules protect the plaintiff without affording any protection to the defendant.

The rules that gives the courts the Discretionery right to order service of process out of jurisdiction is also unsatisfactory because of the possibility of its abuse. So far, it has been shown that the courts have been cautius in exercising the discretion.

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1. Agbede,I.O.Essays on the Conflict of Laws(1985)

This problem can only be rectified if Nigerian courts adopt a policy similar to the U.S. Courts whereby, the basis of jurisdiction will be dependant on the defendant's relation to the forum. Once this is done, the "transient" rule and the issue of discretionery jurisdictions will have no relevance. However, as the basis of this power of the courts is rooted in statutes, i.e. the High Court ruls, only a modification of those rules can help.

On the issue of choice of law, the advantages and disadvantages in the working of the three choice of law approaches has been clearly shown. First, we will look at the problems in the application of the principles of Phillips V. Eyre to the Nigerian context.

While the English conflict of tort rule represented by the principles of Phillips V. Eyre was meant to solve conflict problems in the international context, in Nigeria just as in Australia, it will have to apply to both international and interstate conflicts. This will entail the absurd result of one state refusing to apply the laws of a sister state. This problem had drawn a lot of criticism in Canada, a federation, where the same rule applies and the same result obtains. Hancock in referring to this had stated:

> It seems incredible that because in 1863 the Privy Council refused to enforce a particular rule of Belgian law, the courts of Canadian provinces should refuse to enforce any law of a sister province which happens to differ slightly from their own. Yet this appears to be the prevailing doctrine in Canada today. One would look far to find a more striking example of "mechanical jurisprudence", blind adherence to a verbal formula without any regard for policies or consequences.[1]

Secondly, as we have seen, the rule in Phillips V. Eyre unduly favours the lex fori on almost every issue that may from part of a tort proceeding. The application of forum law can hardly ensure justice in cases where a foreign law has a valid and dominant interest in the resolution of the matter. Such an approach is not only inimical to international harmony, but touches on the foundation of private international law itself.

Thirdly, the principle of Phillips V. Eyre is by itself complex which, as we have seen, resulted t some form of confussion in the Nigerian courts. A rule of law should not be allowed to make experimental guinea pigs out of genuine litigants.

These defects in the rule inheres not merely because of the rigidity of the approach, but because it is fundamentally defective so long as the lex fori is allowed to control all forms of action. Not even the mitigating exception,

1. Hancock, M. Torts in the Conflict of Laws, P.87. (1942)

allegedly, created by the House of Lords in Boys V. Chaplin[1] can be workable under such a situation.

9.2 The Lex Loci delicti Approach

The lex loci delicti approach to choice of law, as applied by the American Courts was shown to be defective in three major areas. First, the place of accident whose law is supposed to determine rights and obligations of the parties may be merely fortuitous having no relation with the occurrence apart from the fact that the accident happened there. Secondly because of its mechanical nature, the locus delicti becomes by itself an important issue that will have to be determined in each and every case,[2] and this adds an additional burden on the court and is a difficult exercise in multistate contact torts. Thirdly, the application of the approach is done without any reference to the parties. This has the unsavoury result of defeating their expectations at having the issue decided according to the system of law that may be common to both. This defect resulted in the change in approach to choice of law by many American states, in favour of the proper law of the tort approach.

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1. (1971) A.C. 356.
2. See Chapter III.

9.3 The Proper Law of the Tort Approach

So far the major defects with regard to the proper law of the tort approach that has been identified through its practical application is the lack of certainty, uniformity and predictability which its application entails. This is a serious defect, if looked at in the light of the fact that precedence is supposed to influence future decisions under the common law. However, it is a credit to the approach, that from the point of view of meeting the ends of justice and serving the purposes of private international law, it has not been found wanting.

9.4 Suggestions for Reform of the Nigerian Law

The significance of the historical influence of English law in the development of the Nigerian choice of law approach is not in doubt. It is only logical that English law should substantially influence Nigerian solutions to fundamental problems of judicial nature. This notwithstanding, English Law should not have absolute control in each and every case. The whole world should be viewed as a free legal market, where old idea may outgrow their functional advantages and are discarded

when those underlying advantages are found inadequate in solving emerging problems. The Nigerian law should benefit from this market by looking beyond colonial and historical ties, in percieving and implementing necessary reforms in her laws.

The present Nigerian choice of law rule, based on the principles of Phillips V. Eyre is anachronistic, cumbersome, and unjustified. Any argument for its retention can only be predicated on sentiments. It does not require a partial change but a complete one.

The most appropriate alternative is the proper law of the tort approach. The practical suitability of the approach is based on political and legal structures within the country.

While it is true that the application of the doctrine in America had turned tort proceedings involving conflict of laws, into a "game of chance", with no predictable foothold in ascertaining the outcome of decisions, this problem will not arise in the Nigerian context. In America the shift in approaches was compounded by the relative ease in which academic view points can have substantial

influence on judicial decisions. Apart from this, there are two further reasons for the lack of uniformity, certainty and predictability in the working of the proper law approach. First is the fact that the American judicial structure created through the American constitution gives the state superior courts the final say in so many areas including the conflict of laws. This has created a situation where each state takes the approach it feels most appropriate to the solution of conflict cases, and because of the existence of different approaches in different states, the outcome of cases constituted by the same facts differ from state to state.

Secondly, the fact that at the initial state of the adoption of the proper law approach the American courts were in a pioneering mood, with no precedence to rely on, and no articulate and indepth study of the concept to guide them, made certain mistakes that they tried to rectify later. The continuous search for safety valves in the working of the proper law is an exercise that continues up till today.

After due consideration of all these factors, the conclusion is that the unplatable aspects of the proper law doctrine can be avoided in Nigeria because of the existence of certain structures. First, Nigeria has a semi-unified judicial system with one supreme court and a court of appeal as the highest courts of record. Secondly, the experience of the American courts will be an eye opener as to the pit-falls in the practical working of the doctrine. Thirdly, the Restatement, second provisions on tort will provide the Nigerian courts with the necessary principles of choice of law. In determining the issue of choice of law, principles similar to the choice influencing considerations, of S.6 of the Restatement, and the choice of law rule of S. 145 of the Restatement should be evolved, as they can easily be adapted to the solution of conflict problems in both interstate and international conflicts.

These, however, should not be a final solution. Only a practical working of a rule can bring to light the defects inherent in it. The rules analogous to the Restatement, that are recommended, should only be retained

where they proved workable and justified and where they are found wanting, steps should be taken towards rectifying or changing them.

The tide of change in the conflict of law is still rising!

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