

**AN APPRAISAL OF THE ASCERTAINMENT OF APPLICABLE
LAW OF TORTS IN CONFLICT OF LAWS**

BY

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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 never been presented in any previous research work for the award of Master of Laws Degree, LL.M. All quotations and references are indicated with specific acknowledgements.

Abubakar Zainab Abdulsalam

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CERTIFICATION

This Thesis entitled, *'an appraisal on The Ascertainment of Applicable Law of Torts in Conflict of Laws'* meets the regulations governing the award of Master of Laws LL.M Degree of Ahmadu Bello University, Zaria and is approved for its contribution to legal knowledge and literary presentation.

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DEDICATION

With sincere gratitude to Almighty *Allah Subhanahu Wa-Ta-Ala* the most High and Exalted, who gave me life, strength, means and ample opportunity up to this moment, I dedicated this thesis to my parents, Late Abdul-Salam Abubakar and Hajara Lukman (Late). May ALLAH in His eminent Mercy Shower His Blessings on them and grant them Al-Jannah, Amin.

Abubakar Zainab Abdulsalam

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ABBREVIATIONS

A.C	-	Appeal Cases
All E.R.	-	All English Reports
All N.L.R.	-	All Nigerian Law Reports
Cap	-	Chapter
CRFN	-	Constitution of the Federal Republic of Nigeria
Harv L. Rev.		Harvard Law Review
I.C.L.Q	-	International and Comparative Law Quarterly
LFN	-	Laws of the Federation of Nigeria
LFN	-	Laws of Northern Nigeria
LWN	-	Laws of Western Nigeria
NLR	-	Nigerian Law Reports
NWLR	-	Nigerian Weekly Law Reports
Q.B.	-	Queen's Bench
U.K	-	United Kingdom
U.S	-	United States
WACA	-	West African Court of Appeal
WRL	-	Western Region Law Report

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ABSTRACT

This thesis entitled, "An Appraisal of the Ascertainment of Applicable Law of Torts in Conflict of Laws" aimed at ascertaining the applicable law of torts in conflict of laws situation in Nigeria by examining various rules that have been perfected to take care of such processes based on choice of law approach, among the various rules. Traditionally, most of the rules governing the ascertainment of applicable law of tort in conflict of laws were more theoretical in nature, based mainly on the application of the Lex Fori, Lex Loci delicti, the proper law of the tort, characterization, and modern theories. Thus, against this backdrop, the objective of this research is to identify the major aspects of torts in the conflict of laws that formed the core of choice of law, with particular reference to Nigeria and to further identify challenges involved there in. However, a major finding of this research is that there are certain areas of conflict of laws where the application of the rule in Phillips vs. Eyre (as the prevailing choice of law rule in Nigeria) is unsuitable to the Nigerian circumstances. It is noted that the rules in Phillip vs. Eyre and Boys vs Chaplin were designed or rather adopted when human interactions, productions, means of communication and science and technology were not advanced as today. In the comparative evaluation of the rules in the commonwealth countries and in America, the writer laid more emphasis on the view point that have practical relevance to each jurisdiction in order to satisfy the yearnings of a balanced determination of conflicts emanating from frictions arising out of the natural contact between individuals and interests. Obviously, the statement of problem of this thesis therefore suggested that there is uncertainty of the applicability of law of tort in conflict of laws situation in Nigeria. In other words, where there is a case of tort involving foreign element in Nigeria, the court in Nigeria is faced with the problem of which law is applicable? For example, is it the forum law or the foreign law of torts that will apply? This uncertainty is caused by the fact that there are several factors to be considered in order to arrive at a choice of the applicable law. It is the existence of this problem that motivated this work. On this note, the researcher concluded by recommending (among others) that, the Nigerian legislatures, both the National Assembly and States Assemblies, should enact a law that will take care of jurisdiction and ascertainment of applicable law when the cause or matter has a foreign element. The sources of information relied upon here are doctrinal method of acquiring data and information was used, thereby, combining several documents, ranging from text books, journals, statutes and other relevant treaties to accomplish this work.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 INTRODUCTION

In Nigeria, as well as other jurisdictions, for example, United States of America, United Kingdom, France, Germany, Ghana, South Africa, East Africa, just to mention but a few, there are many laws that are applicable to various subject matters or business. For example, we have criminal law, constitutional law, commercial law, law of evidence, company law etc. Conflict of law is one of such laws in the country that is taught just like it is taught in any of the countries we mentioned above.

Conflict of laws unlike the other kind of laws we mentioned above, is an aspect of international law. In other words, the laws we mentioned above are principally considered as municipal laws or local laws¹. Conflict of laws is a stoke of international law. In other words, it is a subsidiary of the international law. This is why it is called private international law².

Conflict of laws comes into play or becomes applicable when the issue of jurisdiction is in question. For example, if Mr. Z enters into contract for hiring of Mr. Y's Peugeot station wagon to carry persons from Zaria to Lagos, on reaching Jeba, the car tumbled and as a result three persons out of the seven persons in the car died. Four other persons sustained serious injuries and they were rushed to Jeba General Hospital and given first

¹ Graveson, Private International Law (1974), Antom, private international law (1967), West lake, private international law etc. deals with principally choice of jurisdictions choice of law, and recognition and enforcement of foreign judgments.

² Agbede, I.O. Themes on Conflict of Laws, Sheheson Publishers, Ibadan, (1989) p. 3.

aid treatment. They were later taken to Lagos their hometown. Some few days after they were taken to Lagos, their injuries worsened and consequently they died also. The driver and the hirer of the car were sued in Lagos by heirs of the deceased persons for compensation under the Fatal Accident Law of Lagos³.

Under this circumstance, there may be two separate sets of cases. Firstly, the claim of compensation for the first three persons who died in Jebba at the sport where the accident took place, secondly, the Lagos' case. In all the two cases, the issue of jurisdiction may be germane and need to be settled before the substantive case for claiming of compensation is heard. For the example, with respect to the case filed in Lagos, the counsel to the hirer and driver may raise the issue that though the four persons died in Lagos, the place of accident was Jebba. Or, he may argue that the correct court where the case may be instituted is the place where the contract of carriage was entered into. These and many other arguments could take place in the court until the court resolves on the issue of jurisdiction before the substantive issues is heard. For the first hypothesis, i.e. in respect of the three persons that died in the accident, though, this may be easier than the second one, it also may raise jurisdictional problem. In this regard, which court will hear and determine the issue of compensation, the court in Jebba or the court in Zaria where the contract was entered for carrying the deceased persons to Lagos? These issues may need to be determined before the substantial case is heard.

³ Fatal Accident Law of Lagos, Cap. F1, L.F.N. 2004

As we have already said above, one of the preliminary issues to be determined is which law to be applied in cases where there are two laws bordering different legal system, In other words, a foreign law. For example, in the hypothetical case of motor accident, if the law of one jurisdiction is not as favourable as the law in another jurisdiction, the persons claiming compensations may argue for the application of the law which is more favourable to them. The Lagos law or the Jebba law?, The Jebba law or Zaria law? All these problems need to be settled before the court goes into the substance of the case. Another issue connected with the preliminary issues is the enforcement of foreign judgment.

All these above scenarios (and many others which could not be exhausted in this thesis) constitute the statement of problem of this research which is lack of certainty of the applicability of law of tort in conflict of laws situation in Nigeria. Indeed, the feature of conflict of laws could be present in all substantive branches of law. That is to say, every substantive law has its own conflict of laws questions or jurisprudence. Thus, the laws of torts, crime, contract, family and bankruptcy, to mention but a few, have their conflict of laws.

Against this backdrop, therefore, the objective of this research identified the major aspects of torts in the conflict of laws that formed the core of choice of law, with particular reference to Nigeria and further identified challenges involved there in. However, the major finding of this research was that there are certain areas of conflict of laws where the application of the rule in *Phillips vs. Ayre* (as the prevailing choice of law rule in Nigeria) is unsuitable to the Nigerian circumstances. In the comparative

evaluation of the rules in the commonwealth countries and in America, the writer laid more emphasis on the view point that have practical relevance to each jurisdiction in order to satisfy the yearnings of a balanced determination of conflicts emanating from frictions arising out of the natural contact between individuals and interests.

1.2 STATEMENT OF THE PROBLEM

The topic of this thesis as reinstated here is an Appraisal of the Ascertainment of Applicable Laws of Tort in Conflict of Laws Situations in Nigeria. The import of this topic suggests that there is uncertainty of the applicability of laws of tort in conflict of laws situation in Nigeria. In other words, when there is a case of tort involving foreign element in Nigeria, the court in Nigeria always face the problem of which law is applicable. Furthermore, the courts are always uncertain which of the laws of conflict would apply i.e. Is it the forum law or the foreign law of torts that would apply? This uncertainty is caused by the fact that there are several factors to be considered in order to arrive at a choice of the applicable law. It is the existence or presence of various features that made the choice of applicable law ascertained. This is why this thesis is the appraisal of the ascertainment of the applicable laws of torts in conflict of laws in this country, Nigeria. The problem of ascertainment of applicable laws of tort in conflict laws situation can be grouped or classified as follows.

In conflict of laws or private international law proper, one of the problems which dominate every case with foreign element is *jurisdiction*. This is because in a case where there is a foreign element, it means there is more than one territorial area involved by the

facts of the case. That is to say, the facts of the case took place in two or more places i.e. territorial areas or geographical areas. For example, in the hypothetical case of accident involving passengers in a station wagon, traveling from Zaria to Lagos which tumbled at Jebba where some passengers died on the spot at Jebba and some died few days later; there are two or more territorial or geographical areas involved in the facts of the case. Firstly, there is Zaria where the contract to carry the passengers to Lagos was entered into. Secondly, there is Jebba where the car was involved in an accident as a result of which three passengers died. Thirdly, Lagos, where more passengers eventually died again. If we take it that the accident took place in Nigeria, but because of the federal system of government where the country is divided into states, each of the states where the accident or the facts of the cases occurred is an independent and separate state. Therefore, the jurisdictional problem comes into play. In this case, which court is competent to hear and determine cases involving claims for damages/compensation? Is it the court situated at Zaria or Jebba or Lagos? Each of these courts would claim that one fact or another took place in its jurisdiction. This may pose a problem for a court.

One of the problems that is commonly available or faced in cases with foreign elements is the one usually relating to the *Choice of applicable law*. In other words, where there is more than one applicable law. If there is more than one applicable law, which law would be chosen for the purpose of application and determination of the case? In our hypothetical case above, if the applicable law in Zaria, Jebba and Lagos are different, which law would be chosen for application in order to enable the court award or disallow the payment of compensation? Is it the law of Kaduna State, Lagos State or Kwara State?

In the case of *Phillips vs. Eyre*⁴, an action was brought in England against the governor of Jamaica for false imprisonment committed against the plaintiff in that Island. The defence was that a subsequent act of the local legislature had indemnified the defendant. Most of the argument was concerned with the competence of the Jamaican legislature to pass a retrospective legislation. The court of first instance held that the local legislature was competent and gave judgment for the defendant. This decision was affirmed on appeal to the Exchequer Chamber, Judge Willes, stated as follows:

As a general rule in order to found a suit in England for a wrong alleged to have become 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.

These two statements above are very confusing. This is because, in the first statement, the judge was making reference to jurisdictional issues. However, in the second statement, the judge was talking of the choice of law. To further adumbrate these two problems, is to say that, if an action is actionable in the place where it was committed and also actionable in the place where the court was asked to try and determine it, the problem is that of a double character. One character refers to jurisdiction and another refers to choice of law. However, the pendulum, in our view, is tilted very much in favour of jurisdiction. That is to say that, though the case is that of jurisdiction, it can equally be considered to be a problem of choice of law. However, the second statement is more pointed toward the problem of choice of law. This is because of the existence of the word justifiable. This means that if the law of the place where the action took place has justified it, and the law

⁴ [1890] L.R. 6 Q. B1

of the place where the court that is trying the case does not justify it, but criminalized it or it is a base for awarding liability, then the court asked to award the liability may have to consider the problem of applying its law which exonerate liability and the law of the place where the action took place, which exonerates the dependent from liability. This is a proper case of choice of law. It therefore poses a problem i.e. is it a choice of law or a case of jurisdiction? Only a very critical mind with immense knowledge of law and advocacy would be capable enough to unknot this strong knot. In our mind, this is a serious concern in matters of conflict of laws involving torts in this country. For example, what will be the caliber of judges and counsels involved in order to separate the chaffs from the husk very accurately? Secondly, what would be the time and energy that would be used in these types of cases in order to seeing that justice is done to the case and indeed to the litigants involved in such a case(s)? All these are problems of this research.

One of the problems which courts may encounter in conflict of laws situation is the *enforcement of foreign judgments*. Sometime, this may pose a serious problem.

In the past, the basis for one court to enforce a judgment of another country or jurisdiction, so to say, was mainly *cooperation between countries or nations*. That is, the courts of one country may enforce judgment of another country on the basis that its own decision may one day be taken to that another country for enforcement. Thus, this principle is like a proverb or maxim which says “scratch my back and I scratch your back”. This was a very old principle of conflict of laws.

However as time goes by, courts have moved away from this principle to a more cogent and plausible ground, i.e. *Doctrine of Obligation or duty*. For example, in the case of *Schibsby and Another vs. Western Holz and Another*⁵, the plaintiffs in this case were Danes resident in France, the defendants were also Danes resident in London and carrying on business there (London).

A written contract had been made between the plaintiffs and defendants, which was in English, and dated in London, but no distinct evidence was given as to where it was signed. By the contract, the defendants were to sling in Siredena cargo of Swedish boats on board of French or Swedish vessels for use in France, at a certain rate for all oats delivered at Caen. From the correspondence, it appeared that the plaintiffs asserted, and the defendants denied, that the delivery at Caen was short of quantity for which they had paid and that the plaintiffs made some other complaints as to the condition of the cargo, which were denied by the defendants. The plaintiffs very plainly told the defendants that, if they would not settle the claims, they would sue them in the French courts. They did issue process in manner described, and the French consulate in London served on the defendants a copy of the citation.

The defendants did not appear in the court in France. The French court gave judgment in favour of the plaintiffs against defendant for default of appearance. The plea of the action was among others, a plea of never indebted, and a special plea asserting that the defendants were not residents or domiciled in France, or in any way, subject to the jurisdiction of the French court nor did they appear, and that they were not summoned,

⁵ [1870, 40 L.J.Q. 73; L.R 6, Q.B. 155]

nor had any notice or knowledge of the pending proceedings, or any opportunity of defending themselves there from. The jury found that the defendants had notice and knowledge of the summons and the pendency of the proceedings in time to have appeared and defended the action in the French court. It was held that the judgment of a court of competent jurisdiction over the dependants to pay the sum for which judgment is given, which the courts in this country (England) are bound to enforce, and consequently, that anything which negatives that duty or forms a legal excuse for not performing it, is a defense to the action. The court, reiterated that they had declined to hold that the doctrine of comity was the main reason for enforcement of foreign judgment. This reason, the court said, was not plausible and tenable. The only reason to hold a foreigner liable is the doctrine of duty or obligation to settle his liability in a foreign jurisdiction. Notwithstanding the change from the doctrine of “comity” to the doctrine of duty and obligation, the Nigerian statutory law which was made or enacted in the year 1960 and came to force in February, 1961 still retain the ideology and philosophy of the doctrine of “comity”⁶

One of the problems engulfed by this thesis is the confusion that had set in by the decision of the English court in the case of *Schibsby and Another V. Westernholz and Another*⁷ in which the original principle of the doctrine of comity was abrogated and replaced with the doctrine of obligation/duty. Notwithstanding this change, the statutory provision which empowers Nigerian court to recognize and enforce foreign judgment is

⁶ Foreign Judgment (Reciprocal Enforcement) Act, Cap. F35, LFN, 2004.

⁷ *ibid*

still worded with the ideology and philosophy of the original doctrine of comity. In other words, the statutory provision which provided the jurisdiction for the enforcement of foreign judgment does not have slightest semblance with the doctrine of obligation and duty. This total absence of the ideology and philosophy of the doctrine obligation or duty on the part of the defendant in the statute has created confusion between the case law principle of doctrine of comity and the statutory provision of the doctrine of duty and obligation. As it is now, do we say we have two different laws on the enforcement of foreign judgment or we have one single law? If we have two laws, i.e case law and statute, which one would the court apply or use as a basis for enforcement of foreign judgment, the statute or the case law doctrine? While in the case of *Schibsby V. Western holz*⁸ the basis for enforcement of foreign judgment is obligation and duty. In the Foreign Judgments (Reciprocal Enforcement) Act⁹ the basis for assuming jurisdiction for enforcement of foreign judgment is the doctrine of comity. For clarity, the Act provides:

The Minister of Justice if he is satisfied that, in the event of the benefits conferred by this part of the Act, being extended to judgments given in the superior courts of any foreign country, substantial treatment will be assured as respects the enforcement in that foreign country of judgment given in the superior courts in Nigeria may by order direct. That this part of the act shall extend to that foreign country.

This means that if another country will be disposed to apply our own judgment, then Nigerian superior courts can equally enforce their judgment. This provision reinstates the ideology and philosophy of the doctrine of comity and not ideology and philosophy of the

⁸ *ibid*

⁹ Cap. L35, L.F.N., 2004

doctrine of obligation/ duty. This is a problem in the ascertainment of applicable laws of tort in conflict of laws situation in this country, Nigeria.

1.3 RESEARCH QUESTIONS

- i. where there exist a problem of conflict of laws, which of the laws of conflict will apply?
- ii. Is it the forum law that is applicable or the foreign law?
- iii. Why the choice of law?

1.4 AIM AND OBJECTIVES OF THE RESEARCH

The aim of the research is to ascertain the applicable law of Torts in conflicts of laws situation in Nigeria so as to achieve the following objectives:

- i) To resolve issues on multiplicity of principles of tort when ascertaining applicable laws of tort in conflict of laws situations in Nigeria.
- ii) To identify challenges on the practice and proffer possible solutions to the challenges identified.

1.5 THE SCOPE OF THE RESEARCH

By scope, we mean the territorial or geographical area covered by this research topic. Therefore, as the topic of the research has indicated or shown the research deals with a critical appraisal of the ascertainment of applicable laws of tort in conflict of laws in Nigeria. The inclusion of the word “Nigeria” indicates that this topic will be critically

analyzed, discussed or studied in relation to Nigeria only and not in relation to any other country or geographical area. However, nothing prevents us, from looking into what is tenable in some other jurisdictions so as to benefit from the advantage of comparative study. The work will cover literatures relevant to tort in conflict of laws situation.

1.6 LITERATURE REVIEW

Conflict of laws or private international law is a branch of international law which deals with situations or cases where there is element of foreign law or jurisdiction. One interesting feature of conflict of laws as a subject is that, every subject or discipline has its own conflict of laws discourse or jurisprudence. This means that subjects such as law of contract, evidence law, property law, family law, tort law, admiralty law, negotiable instrument law and legitimacy laws all have their conflict of laws attached to them.

The review of literature relating to *text books* is not an easy one. This is because of the dearth of lack of indigenous literature or text book on conflict of laws in tort situations. Nigerian academics have not found it necessary to explore this fertile area of academic pursuit. Nigerian academics are more comfortable and more familiar with subject matter such as constitutional and criminal laws, contract and company laws, criminal and civil procedural laws, public international law etc. This study of conflict of laws generally, as a discipline rarely occupies the attention of many Nigerian academicians. Therefore, the only Nigerian author on conflict of laws is Agbede. His book on conflict of laws title “Themes on Conflict of Laws” deals with issues such as the English doctrine of renvoi, foreign revenue law in the conflict of laws, public policy and justice, land transactions in

the conflict of laws. Other subjects dealt within that book include jurisdiction in personam and foreign immovables, conflict of tort laws under the received English law, conflict of tort laws, and new basis for solution and analysis of the rule in *Benson vs. Ashiru*¹⁰. This book, though will be helpful in some other respects, it has not dealt with the subject matter of this thesis directly. Since the aim and objectives of writing that book is different from our aims and objectives of writing this thesis, it is not surprising that the subject matter of this work was not captured by Agbede's book.

As we have already highlighted in the scope of this work, the thesis seeks to ascertain the applicable laws of tort in conflict of laws situations in Nigeria. Therefore, many foreign works would not have something in common with this thesis. However, the literature of many foreign authors, particularly general principles relating to jurisdiction, choice of laws, enforcement of foreign judgment in fragmented forms in various textbooks, are important.

Dicey and Morris¹¹ in their work entitled, "the Conflict of Laws" discussed the change from the doctrine of comity to the doctrine of obligation and duty as it is the practice in England. They explained the rules, principles and practice, which determine how the law of England and Wales relates to other legal systems. The authors further dealt (in volume 1) with general principles, procedure, state immunity, jurisdiction of courts, enforcement of foreign judgments and international arbitration, before covering (in volume 2) family law, property law, corporations and bankruptcy, contracts, torts, unjust enrichment and

¹⁰ [1967] N.M.L.R 363

¹¹ Dicey and Morris, (2000) *the Conflict of Laws*, 13th ed. Vol. I, Sweet and Maxwell, London 14-006, p. 419

equitable claims, and foreign currency obligations, Sets out the nature and scope of conflict of laws, the interpretation of statutes which implement international conventions and the operation of statutes in the conflict to laws¹². Though Nigeria is a part of common law jurisdiction, whether it will gladly embrace this change, is a matter of conjecture. There is no case law on this new principle in Nigeria. Their work has been very material to the current research and same is acknowledged.

Abla Mayss discussed the drawback under the common law rules in his work entitled, “Statutory Reform of Choice of Law in Tort and Delicti: A Bitter Pill or a Cure for the ill?”¹³, which according to him had been that of the distinction made between English torts on the one hand, and foreign torts on the other. In the former case, English courts consistently applied English law, irrespective of, and despite the existence of foreign elements. In the latter, however, they applied the double-actionability rule. Apart from being described as discriminatory and nationalistic in character, this distinction had the disadvantage of having to determine the place of tort, which clearly added to the complexity of proceedings.

He further states that in addition, there had been some doubts surrounding the applicable test to such instances, for such test was that normally applied to ascertain the place of tort for jurisdictional purposes. Regardless of the fact that this rule was abolished, this no longer requires such a place to be determined. This process had been questioned on the

¹² *Dicey, Morris & Collins (2012) on the Conflict of Laws*, 15th edition, Sweet & Maxwell, United Kingdom, , p. 1244

¹³ Abla Mayss, *Statutory Reform of Choice of Law in Tort and Delict: A Bitter Pill or a Cure for the Ill?* Published in *Web Journal of Current Legal Issues* in association with Blackstone Press Ltd. (1996), p. 345

ground that a decision to grant leave to serve a writ out of the jurisdiction was, and still is, discretionary. Whilst an English court might be inclined to decide that a tort had been committed in several places for the purposes of a rule of jurisdiction, it had to insist on one single place of tort for the purposes of choice of law.

He summarized the torts rule in conflict of laws thus; the state of the common law rules was far from clear. The general rule of double-actionability operated in favour of defendants. The first limb of the rule incorporated a nationalistic attitude. The nature and extent of the exception required further elaboration. The distinction made between English torts and foreign torts promoted complexity, for it necessitated the identification of the place of tort as a first step in the process of determining the applicable law. Hence, well balanced reforms were needed to remedy such shortcomings. Does the new law tackle these shortcomings? His work has also been very material to the current research and same is also acknowledged.

Cheshire and North in their work titled, “Private International Law”,¹⁴ classify the “cause of action” in order to determine the applicable conflict of laws rule. According to them, “classification of the cause of action”, means the allocation of the question raised by the factual situation before the court to its correct legal category. Its object is to reveal the relevant rule for the choice of law. The rules of any given system of law are arranged under different categories, some being concerned with status, others with succession, procedure, contract, tort and so on, and until a judge, faced with a case involving a

¹⁴ Cheshire and North, *Private International Law*, 10th ed. (1979), p. 112.

foreign element, has determined the particular category into which the question before him falls, he can make no progress, for he will not know what choice of law rule to apply. He must discover the true basis of the claim being made. He must decide, for instance, whether the question relates to the administration of assets or to succession, for in the case of movables left by a deceased person, the former is governed by the law of the forum, the latter by the law of the domicile. Whether undertaken consciously or unconsciously, this process of classification must always be performed. It is usually done automatically and without difficulty.

Albert Ehrenzweig, the author of the leading contemporary treatise in English, on the conflict of laws¹⁵, takes the position that the whole search for general rules for the solution of conflict of laws, problems, in unsettled areas of the law has proceeded on the wrong basis. Ehrenzweig contends that all a priori approaches are bound to be deceptive because courts in practice will not be bound by overly abstract and mechanistic rules of reference that direct them to apply a certain legal system for a given class of cases (for example, the law of the place of making for contracts, the law of the place of injury for torts, and the law of the *situs* for real property), but will use manipulative devices to promote the just outcome of particular disputes or to give preference to local as against foreign interests. The real indicators of how a conflict problem will be solved, then, arise not from the doctrinal language used by a court to explain its decision but from the

¹⁵ Ehrenzweig, Albert A. (1962) *A Treatise on the Conflict of Laws*. St. Paul, Minn.: West. pp. 234-236

awareness of the sense of justice or bias that underlines the doctrinal explanation. Ehrenzweig thus sets for himself, the very ambitious task of finding “true rules “the living law, as distinct from the enunciated law and asserts that only by this search can the pattern of judicial decision be made intelligible and predictable standards of result be obtained. The most fundamental rule Ehrenzweig finds is that a court will tend to apply its own law to a controversy in those situations in which it is one of several plausibly applicable laws. Thus all instances of reference to foreign law are derogations from this underlying “true rule.” Ehrenzweig's approach is based both on a critique of judicial practice (cutting through the technical or legalistic explanation to the real one) and upon an acceptance of its authoritative status (the role of a scholar is not to supply higher criteria but to analyze judicial practice so as to discover the operative criteria).

What for Ehrenzweig is a matter of pervasive methodology becomes for Brainerd Currie,¹⁶ a matter of pervasive ideology. Currie is less interested in what courts do than in developing an approach leading to what they should do, although his jurisprudential strategy is to proceed by way of very close analysis of particular cases. He believes, to overstate it some, that a court should always apply local law when the forum has a governmental interest in the outcome of the controversy and that foreign law is appropriately applied only when the forum is disinterested in the outcome. In this regard he opposes the recent tendency of courts to balance the interests of various potentially applicable legal systems and to choose the law of that legal system which has the greatest

¹⁶ Currie, Brainerd (1963) *Selected Essays on the Conflict of Laws*, Duke Univ. Press, Durham, N.C, pp. 121-125

interest in the particular case. Such balancing is for Currie inappropriately undertaken by courts and is more properly a matter for legislative determination.

Currie and Ehrenzweig repudiate the traditional search in the conflict of laws for allocation criteria posited in advance, and both affirm the fundamental governance of controversies by local law. In consequence, they renounce the ideal of uniformity of result. Currie, not only denies the duty to refer to foreign law, but also argues that courts should not defer except when they affirm both jurisdiction and disinterest. In the rare cases that satisfy these two conditions, the courts cannot reach a proper decision and might just as well apply local law, or flip a coin, or dismiss the cases.

The review of literature in this subject matter should not be limited to what authors have said in their various books. Review of literature cuts across text books to *case laws*. In this regard, since we have already said that enforcement of foreign judgment is one of the problems encompassed in this thesis, it may not be out of place to review the only statute directly connected with this thesis, namely, Foreign Judgment (Reciprocal Enforcement) Act¹⁷. This Act, though contains the doctrine of comity, has not dealt with the doctrine of obligation/duty which is said to be the main basis of examining jurisdiction in conflict of laws in tort situations¹⁸

Secondly, though the Act, talks of the competence of the court that originally gave the judgment, the statute is silence about the doctrine of obligation / duty which is said to be

¹⁷ Cap. F. 3, L.FN, 2004.

¹⁸ Schisbby case op cit. pp. 344-348

the main basis of assuming jurisdiction in conflict of laws in tort situations. Therefore, the statute which was enacted in 1960 was oblivious of the doctrine of obligation / duty which was first formulated in 1870 in the Queen's Bench in England. In other words, the Act did not take into cognizance, the change that took place some ninety (90) years, then before it was enacted.

In relation to *case law review*, as far as this thesis is concerned, it may be worthy of note to make reference to the case of *Philips vs. Eyre*¹⁹ which is one of the *locus classicus* on jurisdictional problems. In this case, we have discovered that two issues of great importance were discussed, namely jurisdiction and choice of law. That is to say, the fact revealed that the court could assume the hearing of a case based on jurisdiction. Similarly, the facts of the case discussed that the court could as well assume jurisdiction on the ground of choice of applicable law. This is not too good a case or authority, on the ground that a novice judge is vulnerable to err very quickly on cases with thin edges, like this. With this kind of judgment, one is likely to commit miscarriage of justice at a very slightest opportunity. The better thing is that the court, in this case, should have formulated a more concrete, easily discernible doctrine, but not an easily misleading judgment like the one contained in this case²⁰. It is hoped that at the end of this thesis, we would be able to formulate easier and reliable doctrine to be applied in all cases of tort law in matters where there are foreign elements.

¹⁹Philips vs. Eyre [1970] L.R. 6, Q.B.I

²⁰ *ibid*

1.7 METHODOLOGY

The doctrinal method of research was, therefore, used, using primary and secondary sources such as library materials like books, articles, journals, periodicals, seminar papers, as well as internet/websites, etc. to wit.

- a. Primary sources which consisted statutes and case laws.
- b. Secondary sources which consisted relevant information from leading authorities, textbooks on tax laws and practices, writings and articles of scholars, magazines, opinions of jurists, journals, periodicals, seminar papers, as well as internet/websites, etc..

1.8 JUSTIFICATION

There is no gainsaying that a lot of time would be spent, energy would be spent, and no doubt some money would be spent in the course of writing this thesis. The question that would be asked is; what is the justification for all these? The answer is that this work would be of great importance to its readers such as judges, justices and all members of the bar. It will help lawyers who are practicing international law, particularly, private international law or conflict of laws. This work will be of great help to lecturers and students of private international law in this country. Practitioners of private international law would find this thesis indispensable.

1.9 ORGANIZATIONAL LAYOUT

This thesis was constructed upon five chapters. The first chapter dealt with the general background of the topic entitled, “the Ascertainment of Applicable Law of Torts in Conflict of Laws Situation”. It also dealt with the aims and objective of the research work, scope and limitations as well as the statement of research problems. It further highlighted the literature review, jurisdiction, research methods adopted and the layout of the whole work.

Chapter two of this work comprised the general concepts of conflict of laws. Under it the nature and scope of conflict of laws, its reasons and basis are all discussed. It also comprised the conflict of laws issues in Nigerian situation as well as how English laws and cases are received and applied in Nigeria. Nigerian legislation and decisions of Nigerian courts in relation to torts cases decided in Nigeria having foreign elements are also discussed in this chapter.

Chapter three looked into the ascertainment of applicable laws of torts in conflict of laws situations. Under it, the development of interstate and interpersonal conflicts is discussed. *Renvoi*, internal law solution and general considerations are also highlighted. Still under chapter three, partial or single *Renvoi* theory and total or double *Renvio* theory are discussed, in relation to research. Furthermore, characterization, *Lex Fori*, *Causea*, *Lex Loci delicti* and incidental questions in choice of tort law in conflict of laws situation are also discussed.

Chapter four of this work centered on the theories of choice of law in torts in conflict of laws situations. These theories includes the theory of *Lex Fori*, its development and application, *Lex Loci delicti* its development and application, and the proper law theory, its development and application.

Finally, chapter five of this work gave the summary of the whole work, the author made observations and proffered suggestions and recommendations at how the issue of ascertaining the applicable law of torts in conflict of laws situation should be adequately tackled.

CHAPTER TWO

CONCEPTUAL CLARIFICATION OF RELEVANT KEY TERMS AND GENERAL CONCEPT OF CONFLICTS OF LAWS

2.1 INTRODUCTION

This chapter dealt with definition and clarification of the relevant concepts like conflict of laws, *lex fori*, *lex loci delicti*, *lex domicile*, proper law, etc. it further discussed the general concept of conflict of laws, nature and basis for the application of conflict of laws, as well as, the sources of the conflict of laws, particularly, in regard to Nigerian legal system, where many clouded issues in conflict of tort laws, were highlighted.

2.2 DEFINITION OF CONFLICT OF LAWS

Conflict of laws is that part of private law of a country which deals with cases having a foreign element. This means a country coming into conflict with some system of laws other than its domestic laws. For instance, where a tort or contract was committed somewhere or a contract entered at a foreign country and there was a breach in the forum country and the forum country is the place where the case is instituted, then conflict of laws could be resorted to, to resolve the dispute. However, if an action is brought in the Nigerian court for a tort committed in Nigeria between two Nigerians, there is no foreign element, particularly, if the tort was committed in the same jurisdiction. The case here is not that of conflict of laws. But, if the tort was committed, say, in South Africa between two South African nationals, and the case was instituted in the Nigerian court, then the

case would be a case of conflict of laws and a Nigerian court would apply the South African law. This is a situation of conflict of laws.

Conflict of laws, therefore is the law which comes into play wherever an issue before the court contains a foreign element²¹. Therefore, once there are foreign and local elements in a case, conflict of laws as a subject, is always invoked to solve the problem. That is to determine which of the two laws foreign or local law would be chosen for application in order to determine the case. Furthermore, according to Graveson, private international law in other words, known as conflict of laws, is that branch of law which deals with cases in which some relevant facts have a connection with the system of law on either territorial or personal grounds, and may, on that account, raise a question as to the application of one's own law or the appropriate alternative law to the determination of the issue, or as to the exercise of jurisdiction by courts of the forum or court of another country²². According to this definition given by Graveson, issues in which conflict of laws may arise will include one's personal law. That is, the law which one carries with him to wherever he goes. For example, it is a well settled Islamic law principle that a Muslim carries his law with him to where ever he goes. For example, if a Muslim leaves Nigeria to United Kingdom, United States of America or Japan; he carries all Islamic law relevant to his conduct of personal life with him. In other words, if he dies in UK or U.S.A, it is his personal law that will regulate the sharing of his movable assets such as

²¹ Agbede, I.O., op cit p. 2

²² Graveson, R.H, Conflict of laws: Private international law, sweet and Maxwell, London, (1974) p.3

car, radio, television and raw cash left behind. Private international law operates to resolve conflict in this area.

Another area that is connected with the definition of Graveson, is the issue of territorial jurisdiction. This is the aspect which our hypothetical case had already touched, that is the local or the foreign court? All those would be discussed in details in the relevant places.

2.3 The *Lex Fori* (The Law of the Place Where the Court Is).

The *lex fori* has been defined by Bryan A. Garner²³ as the law of the forum or the court where the suit was brought. According to him, “it is the positive law of the state, country, or jurisdiction of whose legal system the court where the suit is brought or remedy sought is an integral part”²⁴. Tetley also gave similar definition of the concept²⁵, in his recent work²⁶. The position that the *lex fori* determines the connecting factors has two aspects. The first is that, the *lex fori* defines what it means, e.g. by domicile at common law. The second is that, it also determines whether the connecting factor links a given issue with one legal system or with another²⁷.

²³ Bryan A. G., The Black’s Law Dictionary, (9th Edition), Thompson Business, United States of America, (2004), p. 993.

²⁴ *ibid*

²⁵ Tetley, *infra*, pp. 306-308

²⁶ Tetley, A. Canadian Looks at American Conflicts of Law Theory and Practice, Especially in the Light of the American Legal and Social Systems, (1999) 38, No. 2, Columbia Journals of Transnational Law, pp. 309-310.

²⁷ Dicey and Morris, *op cit*, p. 30; See Civil Jurisdiction and Judgment Act, 1982, Sched. 1, Art. 52.

2.4 The *lex loci* (The Law of the Place.)

This has been defined as the law of the place where rights were acquired or liabilities incurred²⁸. It identifies the *contractus, delicti, domicili, solutionis, cerebrationis*, etc.

2.5 The *Lex Loci Domicili* (The Law of the Place Where the Party is Domicile)

This connotes the law of the place of domicile of a legal home. A place where a man has his true, fixed and permanent home and principal establishment and to which whenever he is absent he has the intention of returning. The *lex domicile* of a person is given much more weight in a question of succession, than in a question of contract²⁹. In conflict of laws, the law of one's domicile is applied in choice of law questions. For example, if a Nigerian who hails from Kaduna State died and left behind a wife, children, father and mother and movable and immovable properties. The question is which law would regulate his movable and immovable properties. In a conflict of law situation, the problem is to be solved by way of determining the connecting factor(s). In this regard the connecting factor in the *lex domicili*. This means that the law governing the distribution of his estate, movable or immovable would be governed by *lex domicile*. This is done by reference to Kaduna State and in Kaduna State recourse would be had to his local government e.g Jaba Local Govt. Area. In Jaba Local Govt. Area further recourse would be had to the village or tribe where the deceased belonged. The laws

²⁸ Bryan A. G. op cit.

²⁹ Abla Mayss, J. op cit p. 3.

governing the distribution of movable and immovable properties of the deceased village or tribe would be the laws which would govern the distribution of his estates movable and immovable properties.

2.6 The *lex loci celebrationis*

Another connecting factor in conflict of law situation is the *lex loci celebrationis*. This means the law of the place where the marriage was made or celebrated. It may mean the law of the place where a marriage contract was celebrated i.e. *lex loci celebrationis*. In this regard, if the validity of a marriage is in question under conflict of laws, the question is determined by recourse to the connecting factor of the place where the marriage was celebrated. For example, if a *Gbaguji* man from *Kakau* in Kaduna South Local Govt. Area contract a marriage under native law and custom and the validity of that marriage is in question in a court in U.S.A. the validity of that marriage would be determined by recourse to *lex loci celebrationis* of the parties. In the circumstance, the personal law of the parties in *Kakau* village of Kaduna State of Nigeria would be resorted to in order to determine the validity of their marriage in U.S.A. It is not the law of the state in U.S.A. where the matter is, that will determine the validity of the marriage.

2.7 The General Concept of Conflict of Laws

Private International Law, otherwise known as conflict of laws, is a department of law, which arises from the fact that there are in the world, different territorial jurisdictions

applying different laws³⁰. Its purpose is to protect and ensure the peaceful intercourse of private persons in different countries³¹. In this regard Graveson states that;

The development over the course of several centuries of an ever increasing social and commercial intercourse among men of different nations has presented a continuous problem of organization. The advancement in technology in modern times has provided such better means of transport and communication that the distant lands have become our neighbour³².

He further observed,

We live in an age in which state and to a lesser extent, national boundary lines, no longer have much importance in our every day life. We conduct our social and business affairs without regard to them, but such lines do have legal significance³³.

In consideration of the above facts, conflict of laws is, therefore, understood as that part of the private law of a country which deals with cases having foreign elements. It is that department of law which comes to play, whenever there are issues before a court that contains foreign element. By foreign element, it is meant that adopting some system of laws by the national courts other than the domestic or internal laws to adjudicate on a matter having foreign element. The function of the national court in this regard is to ascertain which of the several applicable laws must be chosen for effective determination of that issue before it. For example James, L. J. observed that;

Can it be possible that a Dutch father stepping on board a steamer at Riterdam with his dear and lawful son should on his arrival at the port

³⁰ Agbede, Themes on Conflict of Laws, Stevenson C. I. Ltd, Lagos (1989), pp. 1-2

³¹ Ibid p. 2

³² Graveson, R. H. The Conflict of Laws, Sixth Edition, Sweet & Maxwell, London, (1974), p. 67

³³ Ibid p. 67.

of London find that the child has become a stranger in blood and in law, and a bastard filii nullius? (Because the law of marriage in London does not accept the marriage law of the Dutch people³⁴.

Thus, international trade or transaction would be impossible, if there did not exist a law, which has for this purpose to promote international extension of human activities. In fact, it would be contrary to the international rule of comity to deny legal effect to an interaction or legal relation on the ground only that it took place in another jurisdiction³⁵. Therefore, conflict of laws becomes part of the law of every country, because different countries have different legal systems containing different legal rules³⁶.

2.8 The Nature of Conflict of Laws

By its nature, conflict of laws governs the choice of law to apply when there are conflicts in the domestic law of different countries related to private transactions. This means that where there is a dispute that involves a question of what jurisdiction applies choice of law to apply or recognition or enforcement of a foreign judgment, the questions which may arise are; does that court have jurisdiction to determine the case? If so, what law is it to apply to decide the matter before it? Will the internal or domestic court recognize and enforce a foreign law purporting to determine the issue between the parties? For example, when an issue which has a foreign element is before a particular court, of course, the later

³⁴ Re Goodmann's Trust (1981) 17 Ch. p. 298.

³⁵ Morris, J. H. C. The Conflict of Laws, Steven & Sons, London (1984), p. 3

³⁶ Ibid p. 4.

question can only arise when there is a foreign law and not on every case³⁷. But, the first two questions can arise in every case with foreign elements³⁸.

It should be added with more emphasis that conflict of laws arises in Nigeria not only at the Federal level but equally at the state and local levels. Most of the cases decided by Nigerian courts that are of interstate or interpersonal nature are decided by the inferior courts whose decisions are mostly not reported³⁹. Therefore, it is considered necessary to designate the totality of conflict of laws situations as “conflict of laws” and limit the term “private international law” to problems of conflict of law of international dimensions⁴⁰. It is of relevant importance to point out that conflict of laws is not in one sense a separate branch of law. It is almost a cross-section of the whole law, a sort of out growth on the various branches of municipal laws. For example, conflict of laws applies in succession, legitimacy, property law, contract, tort, family law, etc. The most interesting feature of conflict of laws is that it is concerned with almost every branch of private law⁴¹. This is the nature of conflict of laws. In fact, that is what makes it notoriously difficult to apply⁴². Cardozo J. Said,

it is one of the most baffling subjects of legal science, the average judge, when confronted by a problem in the conflict of laws, feels almost completely lost, and, like a drowning man, will grasp at a straw⁴³.

³⁷ Morris J. H. C. op. cit. p. 4

³⁸ Oluwole Agbede op. cit. pp. 4 – 8

³⁹ This is the Personal research of the current author that most decisions of the lower courts in Nigeria like Customary, Magistrate and Sharia Courts are not reported.

⁴⁰ Oluwole Agbede op. cit. pp. 4 – 8.

⁴¹ Ibid

⁴² Cardozo J, Paradoxes of Legal Science p. 67

⁴³ Ibid

It is also very controversial because even judges differ and so socially do jurists in perception. According to Prosser:

It may be spring like a mine in a plain common law action, in administrative proceedings in equality, or in a divorce, tort or a matter of criminal procedure The most trivial action May be suddenly interrupted by the appearance of a not to be united only by conflict of laws⁴⁴

The current researcher shares the same view with the learned judges above and agrees that conflict of laws is very difficult and controversial in terms of its ascertainment and application by our national judges.

Nevertheless, conflict of laws must be regarded in another sense as a distinct unit of law; as it is always concerned with choice of jurisdiction, choice of law and recognition and enforcement of foreign judgments³⁴.

2.9 Basis for Application of Conflict of Laws

One might ask, what is the justification in applying a foreign law whenever it comes to the ascertainment of the applicable law of tort in conflict of laws situations? The basis for the application of conflict of laws could therefore said to be that it implements and promotes the reasonable and legitimate expectations of the parties to a particular transaction or an occurrence⁴⁵.

Cheshire and North put the basis of conflict of laws this way:

There is no sacred principle that pervades all decisions but, when the circumstances indicate that the internal law of a foreign country will

⁴⁴ Mich. L. Rev., (1953) 51. 959, 971.

⁴⁵ Dicey and Morris, The Conflict of Laws,(Lawrence Collins, eds.), vol. 1, Sweet & Maxwell, London,2000; pp.4-5

*provide a solution more just, more convenient and more in accord with the expectations of the parties than the internal law of England, the English Judge does not hesitate to give effect to the foreign rules*⁴⁶.

According to the above proposition, it could be understood that the basis of conflict of laws is to serve the interest of the parties to the case and achieve justice where the application of forum laws would place injustice on the parties. On the other hand, Lord Diplock made the following remarks,

*that a great injustice might be done to a foreigner, who is abroad and who has not agreed to submit to the English Court a dispute arising from a transaction which is unconnected with England, by summoning him before that Court and so placing him in a dilemma that either he has to incur the inconvenience and expenses of coming here to defend his interest or he has to run the risk of a judgment being given against him in his absence...*⁴⁷

Hence, where foreigners instituted an action at a forum court and forum laws are applied in their case in a transaction unconnected to that forum country, this will place injustice on them. Therefore the basis of conflict of laws is to protect the interest of those foreigners and achieve justice on them, by ascertaining the applicable law in respect of their case. This is because, if the parties to a dispute have selected a foreign law to govern their rights and liabilities under it, and have regulated their positions on the assumption that it does govern, it would in most cases be wrong for a domestic court to impose different rights and duties on them by applying municipal law of that country⁴⁸. Thus, the basis of conflict of laws is summed up under the sub-headings below;

⁴⁶ Cheshire and North; Private International Law, 8th edition, Butterworth, London, (1977); p. 9

⁴⁷ In *Amin Rasheed Shipping Corporation vs. Kuwait Insurance Co.* (1984) A. C. 50 at pp. 67 -68

⁴⁸ Morris, op cit p. 3

2.9.1 More Just

If the parties to a dispute who are foreigners in a forum country have selected a foreign law to govern their rights and liabilities under it, it would in most cases be wrong for a forum court to impose different rights and duties on them by applying domestic law of that country in determining their dispute. For example, it would be just to treat, parties married in France in accordance with the formalities prescribed by French law, but not in accordance with the formalities prescribed by English law. If English court applies English law to the validity of their marriage, they will be treated as not married and all the children they begotten from that marriage will be considered illegitimate. Therefore, it will be more just if the French law is applied.

2.9.2 More Convenient

Where the forum law does not recognize a particular issue brought before a forum court, which issue has a foreign element, it would be more convenient for the forum courts to ascertain the applicable foreign law and apply it to arrive at just and proper determination of that issue. In any given case, the ascertainment of the applicable law in conflict of laws depends on considerations of reason, convenience and utility.

2.9.3 The Transaction Was Not Connected With the Forum Laws

Where an action arises between two foreigners in a forum country, it will be absurd if not unjust for the forum court to apply the forum laws in disregard of the foreign laws that will best guide their transaction. This is because the transaction is not connected with the

forum country. For example, where a transaction has been made between two Chinese people in China, then the case would be a case in conflict of laws and a Nigerian court would apply Chinese law in dispute before it, because the transaction is not connected to Nigeria. It would be absurd for Nigerian court to send them back to China to lodge their case, hear it and determine it before they come back to Nigeria. It is convenient for Nigerian court to accept the case, hear it and determine it here in Nigeria. It would be absurd for Nigerian court to send them back to China to lodge their case, hear it and determine it before they come back to Nigeria. It is convenient for Nigerian court to accept the case, hear it and determine it here in Nigeria.

2.9.4 Based on Comity of Nations

Comity connotes courtesy or the need for reciprocity. It is a sufficient basis for application of conflict of laws⁴⁹. In the United States of America, recognition of foreign judgment is based on considerations of comity and reciprocity⁵⁰. The concept of comity is used in common law countries. English courts have for long emphasized that in the application of the rules for service out of the jurisdiction, special care is needed to avoid conflict with international comity. It is also invoked in those areas of conflict of laws which touch on the foreign relations of the United Kingdom, to justify restraint in the application of English law or policy⁵¹. The old theory that comity is the main foundation of the conflict of laws had faded away. However, its impact cannot be excluded altogether.

⁴⁹ Dicey and Morris, op cit, p.5

⁵⁰ Morguard Investments Ltd. vs. De Savoye (1990) 3 S.C.R. 1077, 1096-1097 (Sup. Ct. Can)

⁵¹ Dicey and Morris, op cit, p.5

This is because even at this material time, references to the rule of comity are sometimes, found in recent judgments. However, it is the general principle of conflict of laws that rule of foreign law, which would otherwise be applicable under the *lex causea* may be disregarded, if its application would be contrary to public policy³⁷. This is necessary in the context of conflict of laws.

2.9.5 Public Policy Consideration

The doctrine of public policy in conflict of laws situation is very necessary, though its boundaries cannot be easily defined. However, consideration of instances in which it was invoked to invalidate the enforcement of rights arising under foreign laws indicates that in general, it has been applied in cases involving foreign contracts and those involving foreign status⁵². It is therefore imperative that the uniform conflict rules should be adopted in Nigeria.

The current writer concurs with the later view.

2.9.6 Stated applicable Law to regulate parties' transaction

The parties to a contractual transaction are bound to obey what they have agreed upon in their agreement. Therefore, when the parties expressed a clear intention in their terms of the contract, there is rebuttable presumption that in default, the agreed law is the proper law to determine their problem. This is because, it reflects their freedom of contract and produce certainty of the outcome of their contract, hence the applicable law.

⁵² Abla Mayss, J. op cit, p. 5

2.10 SOURCES OF NIGERIAN CONFLICT OF LAWS

The sources of Nigerian conflict of laws are the Nigerian legislation, customary law, Islamic law, case laws, the received English laws, which includes the common law, the doctrines of equity and statutes of general application in force before 1st day of January, 1900, international law and treaties. There are other sources of conflict of laws in Nigeria, i.e., the statutes of subsidiary legislation on specified matters made before October 1, 1960, as well as the opinion of jurists⁵³. These sources would be discussed under sub-headings below.

2.10.1 NIGERIAN LEGISLATION

The Nigerian local legislation is the most important source of the conflict of laws as it is the primary source of the Nigerian laws. It consists of the constitution of the Federal Republic of Nigeria⁵⁴, federal and states laws, Acts, decrees, edicts, subsidiary legislations, e. t. c. The 1999 Constitution (as amended) is the grund-norm of the Nigerian source of conflict of laws. Section 1(1), (2) and (3) of the Constitution provides:

- (1) *This constitution is Supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria*⁵⁵
- (2) *The Federal Republic of Nigeria shall not be governed, of the government of Nigeria or any part thereof, except in accordance with the provisions of this constitution*⁵⁶

⁵³ (1953) 51, Mich. L. rev. 959, 971

⁵⁴ 2010 as amended

⁵⁵ Section 1 (1) of the 1999 Nigerian Constitution, 2010 as Amended,

⁵⁶ Sub-section (2)

- (3) *If any other law is inconsistent with the provisions of this constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void*⁵⁷.

It was also held in the case of *Att. Gen. Abia State vs. Att. Gen. Federation* that,

*“The constitution is what is called the ground-num and the fundamental law of the land. All other legislation in the land takes their hierarchy from the provisions of the constitution. By the provisions of the constitution, the laws made by the National Assembly come next to the Constitution; followed by those made by the House of Assembly of a State and bye laws take the rear”*⁵⁸,

As such, any law whether Federal or State law, or even Customary law, which is inconsistent with the provisions of the Constitution is null, void and to no effect whatsoever, to the extent of that inconsistency.

Generally, Nigerian legislation consists of Statutes. Statutes, on the other hand, are laws enacted by the legislative houses, i.e. National Assembly, States Houses of Assembly and Local Governments. They consists of Ordinances passed by the Nigerian Central legislature before October 1, 1954, Acts which are enactments made by the Federal Legislature in a region or having effect as if made by that legislature of a any subordinate legislation, decrees made by military government, edicts made by military administrator of the states during military regime, or other subsidiary legislation in the exercise of powers given by the constitution or any other statute.

⁵⁷ Sub-section (3) *ibid*

⁵⁸ (2002) FWLR, Pt. 101, p. 1419, at p. 1476-7; (2003) 4, NWLR, pt. 809, p. 124 at 166; see also *Yusuf v. Obasanjo* (2004) 5 SCNJ 1

It should be noted that a local legislation can repeal any part of the received English law currently in force within the jurisdiction and can as well abolish its application, or even rules of customary law.

The division of legislative powers between the Federal and States legislatures, it is noted, affects the exclusive rules of conflict of laws in Nigeria. This is because within the exclusive jurisdiction of the Federal legislature, interstate conflicts of laws cases do exist. However, it is the state legislation that provides most of the internal conflict of laws rules, particularly, in relation to jurisdiction of customary rules and Islamic law the choice of law between systems of customary law, and between general laws of the land and other existing laws.

2.10.2 The Received English Law.

The received English law consists of the bulk of the rules of conflict of laws in force in Nigeria, in one way or another. The three main received English law that gained some force and effect and which are relevant in determination of conflict of laws in Nigeria are; (i) The common law, the doctrines of equity and statutes of general application in force in England on January 1, 1900, (ii) Imperial legislation passed prior to independence that were extended to Nigeria; and (iii) Reception of current English law on particular topics⁵⁹. As noted above, English law was first received into Lagos in 1863 and into other parts of Nigeria in 1900⁶⁰.

⁵⁹ Agbede op cit pp. 8-9

⁶⁰ Ibid, p.9

2.10.2 (a) The Common Law

The common law of England, originally known as commune, is that part of the law of England that was formulated, developed and administered by the old common law Courts, i. e., the Court of Exchequer, the Court of Common Pleas, and the Court of King's or Queen's Bench. It was originally based on the common custom of the realm, which was largely not written but judge-made⁶¹. This body of laws was developed through the application of the doctrine of judicial precedent. In the past, and even till today, when a decision was made by any of the common law courts, the case or the decision was kept for future application. Therefore, when a case arose with similar facts and circumstance with the previous case is expounded and applied to the facts and circumstance of the present case. This was the practice with the common law courts. Even today, in jurisdictions known as common "law jurisdictions" the practice and culture is still maintained very actively and vigorously. Through this method, there eventually arose voluminous cases built up by common law courts through the system called judicial precedent or stare decisis. This means let the law that has been settled not be disturbed.

In modern times, the phrase judicial precedent is referred to as judicial activation, so to say. This is to say, the activities of the superior courts of records are themselves laws via the vehicle of judicial precedence.

⁶¹ Essien, J.O. Introduction to Nigerian Legal System, Ababa Press Ltd., 2nd Edition, Surulere, Lagos, Nigeria, 2005, p. 102

In Nigeria currently, the reception of common law as a source of the Nigerian conflict of laws is contained for example, in section 28(a) of the Kaduna State High Court Law of 1991⁶².

It provides as follows:

*Subject to the provisions of any written law and in particular of this section and of sections 26, 33 and 35 of this law, the common law shall in so far as it relates to any matter in respect of which the state is for the time being competent to make Laws, be in force within the jurisdiction of the court*⁶³.

By this provision i.e. section 28(a) of the Kaduna State High Court Laws, 1991, conflict of law cases decided on principle of common law are applicable in Nigerian courts in so far as there are no relevant local cases.

In the case of *Okolie V. Ibo*⁶⁴ the parties both reside in Jos, Plateau State. The Plaintiff/Respondent went and sued in the Senior Alkali Court, Jos and got judgement against the defendant, who then went on appeal. The Court held that, not minding that the parties belong to the same ethnic group, that having regard to their respective occupations, the nature of the transaction and the product involved, it could be inferred that they intended their rights and obligations to be governed by English law.

According to the court, “it could be inferred that the parties intended that their rights and obligations to be governed by English law”. The question here is: What kind of English law? Is it common law, the doctrine of equity or statute of general application? The answer is that since the case was in relation to sale of petrol, the contract was that of

⁶² Cap. 67, Laws of Kaduna State, 1991, vol. 2, p. 779

⁶³ This provision is similar to the provisions of all the High Court Laws of all the states in the federation.

⁶⁴(1958) NRNLR 89

the nature or type of common law. Therefore, in the absence of any customary law to regulate the sale of petrol, the preferable law in the circumstance was the common law of contract.

Judicial precedent or case law consists of law found in judicial decisions. The Judicial Committee of the Privy Council which was the final Court of Appeal for Nigeria up to 1963 did not allow itself, as a highest organ, to be enslaved by the precedent, despite the fact that some of the law Lords doubled as members of non judicial bodies. That notwithstanding, the doctrine of judicial precedent or case law is not alien to the Nigerian legal system and, therefore, forms part of the sources of Nigerian legal system. The only requirement for it to be applicable being that the case under consideration and the one being urged as authority for a particular principle or rule of law should agree on legal material facts even if, as is often the case, not on points of details⁶⁵. The Supreme Court in the case of *Abu v. Adegbo*⁶⁶ held that for the judgement of the Superior Court to be binding, the facts and issues pronounced upon must be on all forms with the case under consideration by the lower court.

Under the case law/judicial precedent, the Privy Council which was the then apex court for Nigeria had decided several cases on conflict of laws, which decisions up to date, constitutes the authoritative source of Nigeria conflict of laws. In so many instances, appeals from WACA have gone to the Privy Council. In *Bangbose v. Daniel*,⁶⁷ the Privy Council held that under English law, legitimacy of a child is governed by the lex domicile

⁶⁵ Essien, J.O. Introduction to Nigerian Legal System, Ababa Press Ltd., 2nd Edition, Surulere, Lagos, Nigeria, 2005 p. 75

⁶⁶ (2001) 41 WRN 1

⁶⁷ (1955) A.C. 107

of the father. The Court also overruled the decision of WACA in the case of *Goodings v. Martins*⁶⁸. In that case, the deceased had first contracted a Christian marriage during the course of which the Plaintiff was born. After the death of his first wife, the deceased married under native law. The defendants were the children of this marriage. The West African Court of Appeal was asked to decide whether the defendants were to have any share in the deceased's estate. The Court held that the defendants had no claim. Here, the Court ruled in accordance with the English municipal law excluding its conflict of law rules which would have referred the issues of legitimacy to the *lex domicili* of the father at the time of the child's birth. This decision was a bad one given in order to propagate colonialism. The customary marriage was recognized by private law. The children of that marriage were entitled to inherit since the marriage was valid under customary law.

The West African Court of Appeal on the other hand, played a very significant role in the field of the Nigerian conflict of laws. It entertained appeals from Nigerian Courts up to 1954. Its decision is now part of Nigerian sources of conflict of laws. Therefore, the Court had made considerable contribution to the resolution of conflicts between the general law and customary law and between the foreign laws and the Nigerian laws in respect of issues of conflict of laws in Nigeria. Examples of the Courts decision on issues of Nigerian conflict of laws can be found on succession matters, right of children born or polygamous marriage contracted before the conclusion of after the termination of a Christian marriage, or even on purely civil transactions. For example, in *Koney v. Union*

⁶⁸ (1942) WACA 108

*Trading Company Limited*⁶⁹ the West African Court of Appeal held that English law and the statute of limitation applied. Further, in the case of *Griffin v. Talabi*⁷⁰ where the Plaintiff/Appellant claimed possession of a property he had bought from a seller who had earlier bought it at a sale in execution of court order. The Defendant/Respondent claimed possession under a purchase receipt from another party who sold to him. Verity CJ, on resolving the issue of the ascertainment of applicable law held that, English law applied. Hence, the decisions of WACA constituted the source of Nigerian conflict of laws.

Currently, however, the hierarchy of the Nigerian courts consists of the Supreme Court, the Court of Appeal, the Sharia Court of Appeal, the Customary Court of Appeal, the Federal High Court, the States High Courts, and such other inferior Courts. These courts always resolve many issues on conflict of laws. In Nigeria, it is not uncommon for one law or system of law to clash with another. In the case of *Olowu v. Olowu*⁷¹ the Supreme Court held that although Nigeria is one country, its multi ethnic, multi-lingual and multi-customary laws made the problem of conflict of laws unavoidable.

The Nigerian courts have well relied so much on the decisions of foreign Courts to the extent that they formed locus classicus which the Nigerian Courts most of the times make reference to, particularly when dealing with issues of conflict of laws.

⁶⁹ (1934) 2 WACA 188

⁷⁰ (1948) 12 WACA 371

⁷¹ (1985) 3 NWLR Pt. 13, p. 372 S.C.

2.10.2 (b) The Doctrine of Equity

The doctrine of equity is one of the sources of the Nigerian law of conflict of laws. It is one of the received English laws in Nigeria, our great country. To many students of Nigerian Legal System, the word equity means what is fair and just.

The doctrine of equity permeates through all branches of law Nigeria. It is applicable in land matters, mortgages, contracts, company law, law of tort and commercial law, just to mention but a few. The doctrine of equity applies frequently in cases where there are foreign elements i.e conflict of laws or private international law, so called in another perspective.

In Kaduna state, for example, the reception of the doctrine of equity as a source of conflict of laws was affected by section 28 (b) of the Kaduna State High Court Law which provides as follows:

Subject to the provisions of any written law and in particular of this section and of sections 26, 33 and 35 of this law:- (b) the doctrines of equity shall in so far as it relates to any matter in respect of which the state is for the time being competent to make laws, be in force within the jurisdiction of the court⁷²

The West African Court of Appeal on the other hand, played a very significant role in the field of the Nigerian conflict of laws. It entertained Appeals from Nigerian Courts upto 1954. Its decisions are now part of Nigerian sources of conflict of laws. By this provision, which is similar to the provisions of all other states of the federation, principles of the doctrine of equity which relate to conflict of laws in this country and of course,

⁷² Cap. 67, laws of Kaduna State, 1991

England are applicable in our courts. At this juncture, it is not out of place to briefly highlight the nature of the doctrines of equity as it existed in England, those days.

The common law did not always grant automatic access to court and was rigid hence; it became inadequate at the stages of its development. There was need to develop the law to deal with new cases. Litigants went away disappointed without obtaining redress in respect of their novel cases. Such litigants were compelled to petition the Crown, as fountain of justice where justice flows to exercise his prerogative. These petitions were considered by the King's Council headed by the Lord Chancellor. With time, the complaint went directly to the Lord Chancellor and the Chancellor resolved the complaint in his own court, known as Court of Chancery⁷³. Hence, the Chancery Court came to be known as a Court of Conscience and, its flexible nature of justice called equity⁷⁴.

The rules of equity were initially very simple, applying in varied instances to similar cases depending on the Lord Chancellor's view to a particular case; hence, justifying the belief, that equity varies according to the Chancellor's foot. The attainment of justice and growing importance of precedent caused equity to attain some measure of certainty and rigidity, as well.

2.10.2.(c) The Statutes of General Application

These were laws that were enacted by the British parliament for application in Britain, but because of lack of similar laws in the colonies, the application of these laws were

⁷³ Ibid, pp.104-5

⁷⁴ Ibid, p.105

extended to the statutes of general application was done by special local legislation, receiving them on giving them effect for application in the colonies. In Nigeria, the Federal Reception Clause was as follows:

45. (1) *Subject to the provisions of this section and except in so far as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall be in force in Lagos and, in so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, shall be in force elsewhere in the Federation.*
- (2) *Such Imperial laws shall be in force so far only as the limits of the local jurisdiction and local circumstances shall permit and subject to any Federal law.*
- (3) *For the purpose of facilitating the application of the said Imperial laws they shall be read with such formal verbal alterations not affecting the substance as to names, localities, courts, officers, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances.*
15. *Whenever by any Act of Parliament or Ordinance or Law any Act of Parliament is extended or applied to Nigeria or to a Region, such Act shall be read with such formal alterations as to names, localities, courts, officers, persons, moneys, penalties, and otherwise as may be necessary to make the same applicable to the circumstances.*⁷⁵

In the Northern Nigeria, the High Court Law of Northern Nigeria, No. 8 of 1955 received the statutes of General Application in the following words:

28. *Subject to the provisions of any written law and in particular of this section and of sections 26, 32 and 35 of this Law.*
 - (a) *the common law;*
 - (b) *the doctrines of equity; and*
 - (c) *the statutes of general application which were in force in England on the 1st day of January, 1900,*

⁷⁵ Interpretation Act, Cap. 89. 1990

Shall, in so far as they relate to any matter with respect to which the Legislature of the Region is for the time being competent to make laws, be in force within the jurisdiction of the court.

- 28A. (1) *All Imperial Laws declared to extend or apply to the jurisdiction of the court shall, in so far as they relate to any matter with respect to which the Legislature of the Region is for the time being competent to make laws, be in force so far only as the limits of the local jurisdiction and local circumstances permit, and subject to any existing or future local legislation.*
- (2) *For the purpose of facilitating the application of the said Imperial Laws they shall be read with such formal verbal alterations, not affecting the substance, as to names, localities, courts, officers, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances⁷⁶.*

In the past very vehement debates were held as to what was the limiting date for statute of general application. Now it has been settled beyond doubt that the limiting date for statutes of general application was 1st January, 1900. This mean that if a statute was not in force by January 1, 1900 it was not statute of general application.

In the year 1990, statutes of general application were abolished. Few of them which were found relevant were either re-enacted as Federal Law or state Laws. For example, the Sale of Goods Act was reenacted as Federal Law where the Fatal Accident Act was modified and reenacted for states. In many states High Court Laws presently, the application of statutes of general application has been omitted. For example, the present enactment relating to the reception of English Laws run as follows:

- S. 28 subject to the provision of any written law and in particular of this section and of sections 26, 32 and 35 of this law:*
- (a) *the common law*

⁷⁶ High Court Law of Northern Nigeria, No. 8 of 1955 (replaced by various high court laws of each state).

(b) *the doctrines of equity shall, in so far as they relate to any matter in respect of which the state is for the time being competent to make Laws, be in force within the jurisdiction of the court.*

This section is the testimony to show that statutes of general application have been abolished if compared with the old reception clauses as shown above.

However, interpretation contained in the old cases may be referred to in the courts if they are needed to fill gaps or lacunae or, if there is no law at all to deal with a case at hand.

The fact that statutes of general application have been abolished does not mean that the laws decided upon them have ceased to be law. They can well be cited in the court. Thus, in the case of *Bologun v. Bologun*⁷⁷, an intention to import a rule of native law and custom authorizing payment of entertainment allowance out of trust fund was read into the testator's will instead of adopting a strict application of the English rules on the powers of the trustees.

Furthermore, all received English laws are subject to local enactments. However, there are instances where received English laws were applied in the Nigerian conflict of laws situation. For example, in the case of *Adegbola vs. Folaranmi*⁷⁸ the deceased, a native of Oyo, had contracted a customary marriage before he was taken a slave to the West Indies where he subsequently went through a Christian marriage with another woman. He later returned with the second wife to Lagos where he purchased a House. On his death, the second wife continued to occupy the house until her death. She left a will by which she

⁷⁷ (1935) 2, WACA, 290

⁷⁸ (1921) 3 NLR 89

devised the House to the defendant. The plaintiff who was the issue of the customary marriage sought recovery of the house claiming that she, being the only surviving issue of the deceased, was entitled to the house according to native law. The defendant contended that as the plaintiff had contracted a Christian marriage, English law of interstate succession should govern and therefore, since the plaintiff was not issue of the Christian marriage she had no right to share the estate. The Court upheld the defendant's decision.

In the case of *Yunusa v. Adesubokan*⁷⁹ a deceased left a will in which he bequeathed a house to his child A, and another house to his child B and stated that the third child C be given €30: = : =. The third child complained that the will was a nullity because their father bequeathed more than one-third of his property. He complained that a Muslim is not supposed to bequeath his property more than 1/3 of the total of his property.

In the instance case, he complained that the two houses constituted more than 1/3 of the property of his father. He prayed that the will be declare null and void. The trial court in the former North-central state ruled that the property bequeathed was more than 1/3 of the total property owned by the deceased and held that by Islamic law, the will was a nullity. The two children appealed to the Supreme Court, praying that the court declare the will valid.

The Supreme Court held that under the Wills Act, 1837 which was a statute of general application a testator can will his property to anybody to the tone of what he wished to

⁷⁹ (1971) 1, N.B.J. 69

dispose without any limitation. The court held that the customary law (which included Islamic law) which limited the right of a testator not to bequeath more than 1/3 of his property was in conflict with the Wills Act which did not provide any limitation to the capacity of a testator to will his property. Consequently, the Supreme Court held that where there is a conflict between a statute of general application and customary law (Islamic law), the former prevailed. Therefore, the Will was valid. One of the conditions for application of customary law is that it should not be incompatible with any written law, e.g., Statutes of General Application. According to their Lordships, the principle of bequeathable third is incompatible with the Wills Act, a written law.

2.10.3 Internal Conflicts: Conflicts between Customary and Islamic Law

These are categories of laws prevalence in some community which they recognized as laws and are binding on them. They got their validity as sources of Nigerian legal system in the 1999 Nigerian Constitution⁸⁰ as amended. They play a very significant role as sources of Nigerian conflict of laws.

2.10.4 Customary Law

There is no universal definition of customary law. In fact, different terms such as “native law and custom”, “native law”, “native customary law” and “local law” have been used interchangeably to refer to this class of rules⁸¹. However, it has been described, as stated

⁸⁰ Cap. C20, L.F.N. 2004

⁸¹ Essien, J.O. op cit p. 114

above, as a body of customs and traditions which regulates various kinds of relationships between members of the community in their traditional setting. The Supreme Court in the case of *Zaidan v. Mohosen*⁸² held that it is not a law enacted by any competent legislature in Nigeria; yet it is one that is enforceable and binding within Nigeria between the parties subject to its only.

Customary law is the oldest law of Nigeria in existence within various communities and ethnic groups long before the coming of the colonial masters to Nigeria.

Obasike, JSC in the case of *Oyewanmi Agagunbade III, vs. Ogunesan*⁸³ observed:

Customary law is organic or living law of an indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of those entire subject to it.

Customary law differs, from community to community, from tribe to tribe, etc. Therefore, there are as many customary laws as there are independent traditional communities.

Islamic law was strongly argued to be a customary law received into the Northern Nigeria long before the coming of British Colonial masters into the Country as part of Islam. Unlike customary law, Islamic law is codified and its main sources are the Holy Qur'an, the Sunnah, the Ijma and Qiyas.

⁸² (1973) 11 F.S.C. 1

⁸³ (1990) 3 NWLR 182, p. 207

Customary laws form part of the sources of Nigerian conflict of laws. In country like Nigeria, where both English law and customary law apply, it has led to a dispute as to which of the two systems of laws should apply where there is a conflict. Sometimes, customary law applies, particularly in matters of marriage, local transaction, etc. But sometimes, also, English law applies in matters of a foreign contract, Christian marriage, or will under the Act. For example, in the case of *Labinjo v. Abake*,⁸⁴ where both parties are natives. The defendant who was a young girl and a minor under 21 years living with her parents was sued in the Magistrate Court for the price of goods sold and delivered to her for trading purpose in 1922 when she was seventeen or eighteen years old. The Magistrate held that the Infant Relief Act of 1874 which was in force in Nigeria applied to the case because the girl was a minor. He dismissed the action. On Appeal to the High Court the decision was reversed. The defendant appealed to WACA which held that the Infant Relief Act applied in Nigeria without modification. Combe J, in determining the matter observed,

The general rule is that, if there is a native law and custom applicable to the matter in controversy, and if such law and custom is not repugnant to natural justice, equity and good conscience or incompatible with any local ordinance, and if it shall not appear that it was intended by the parties that the obligations under the transaction should be regulated by English law, the matter in controversy shall be determined in accordance with such native law and custom.

⁸⁴ (1924) 5 NLR 33

In the case of *Tapa vs. Kuka*⁸⁵, the deceased, Abdulai Tapa, a Muslim and a native of Nupe from Bida, Niger State died, the Plaintiffs were the cousin and sister of the deceased. They applied for grant of letters of administration of the deceased's property in Lagos. The Defendant, his widow entered a caveat. It was held that the law to be applied was the personal law of the deceased which was Muslim law.

In *Adesubokan vs. Yinusa*⁸⁶ the issue was whether a Muslim and father of the parties could by a Will, made in accordance with the Will's Act 1837, validly dispose of his property in a manner inconsistent with Islamic law. Under the Maliki Law, the Islamic law applicable in Northern States, a Muslim testator could not give more than one-third of his estate to persons other than his heirs and the disposition to his male heirs must be in equal shares. The deceased in this case gave greater shares to his younger children than the elder son, who brought an action contesting the validity of the will, as the distribution is not in accordance with the Islamic law. The trial court held in his favour. However, the Supreme Court reversing the decision of the lower court held that a native could make a will under English law and validly dispose of his estate thereby.

From the foregoing, therefore, we can see how customary law and Islamic law contribute immensely in shaping the rules of conflicts of laws in Nigeria. In all these cases, Islamic Law was interpreted to include Customary law under Section 3 of the Native Court Law, 1956, which provided that customary law includes Islamic law.

⁸⁵ (1945) 18 NLR 5

⁸⁶ (1971) All NLR 97

2.10.5 International Law

In formulating rules of private international law or rules of conflict of laws, Nigerian Courts and legislatures are always aware of private international law which have set of procedural rules that determines the legal system and jurisdiction to be applied in a given dispute with foreign element. Therefore private internal law forms part of sources of Nigerian conflict of laws.

2.10.6 Treaties

Prior and after independence, Nigeria signed international treaties in its own rights. Therefore, in so far as international treaties will affect rules of conflict of laws in Nigeria, those treaties, if adopted by the Nigerian government, will form part of Nigerian legislation, hence, they forms part of the sources of Nigerian conflict of laws.

2.11 Interstate and Interpersonal Conflicts

Problems of interstate conflict in Nigeria is largely due to the fact that majority of the people of Nigeria are subject to the primacy of religion or of customary laws, at least in matters of personal relations. As such, inter-state and inter-personal conflict of laws problems arise whenever a state Court is faced with the problem of applying the law, or recognizing or even enforcing the judgment of a Court of a sister state, or when assuming jurisdiction over persons or property located in another state. Strictly speaking, the legal system of one constituent state is as much a foreign system of law as the legal system of

another country under the received rules of conflict of laws⁸⁷. According to J. H. C. Morris, *“It is necessary to be clear as to exactly what constitutes a country for the purpose of conflict of laws”*⁸⁸. He was of the view that a country in the sense of the conflict of laws needs not necessarily have a separate legislature. Thus, it could be inferred that a notorious customary rule may constitute a rule of conflict of laws in Nigeria, if it is not inconsistent with the provisions of the constitution, or is not repugnant to natural justice, equity or good conscience. That is to say it passes the validity test.

In Nigeria, there are systems of general and customary laws existing side by side in every locality. The law of the nation gives a person right to the law that will govern his personal matters. By choosing between systems of customary law, the tendency has been to choose the customary law of a party’s ethnic or religious group no matter how remote such a law may be viewed by others. It is the religion or ethnic group, which a person belongs or professes that brings about the application of the religious or customary law respectively in relation to such a person. Hence, some authors have described this problem as inter-personal conflict of laws. In this regard, the Northern Nigerian Native Courts Law⁸⁹, provides as follows:

- 20. Subject to the provisions of this Law, and in particular of section 21, a native court shall in civil causes and matters administer:-*
- (a) The native law and custom prevailing in the area of the jurisdiction of the court or binding between the parties, so far as it is not repugnant to natural justice, equity and good conscience nor*

⁸⁷ Agbede, O. op cit pp. 1 – 10

⁸⁸ Morris, J. H. C. op. cit. p. 12.

⁸⁹ Native Courts Law, No. 6 of 1956 (this law is now contained in Area Courts Edict of 1967 of all the states in the North)

incompatible either directly or by necessary implication with any written law for the time being in force.

21. (1) [Repealed]

(2) *In mixed civil causes, other than land causes, the native law and custom to be applied by a native court shall be:-*

(a) the particular native law and custom which the parties agreed or intended, or may be presumed to have agreed or intended, should regulate their obligations in connection with the transactions which are in controversy before the court; or

(b) that combination of any two or more native laws or customs which the parties agreed or intended, or may be presumed to have agreed or intended, should regulate their obligations as aforesaid; or

(c) in the absence of any such agreement or intention or presumption thereof:-

(i) such combination of any two or more native laws or customs, which it appears to the court, ought, having regard to the nature of the transaction and to all the circumstances of the case, to regulate the obligations of the parties as aforesaid. But if, in the opinion of the court, none of the paragraphs of this subsection is applicable to any particular matter in controversy, the court shall be governed by the principles of natural justice, equity and good conscience.

(3) in mixed land causes the native law and custom to be applied by a native court shall be the native law and custom in force in relation to land in the place where the land is situate:

Provided that no native law or custom prohibiting, restricting or regulating the devolution on death to any particular class of persons of the right to occupy any land shall operate to deprive any person of any beneficial interest in such land (other than the right to occupy the same) or in the proceeds of sale thereof to which he may be entitled under the rules of inheritance of any other native law and custom.

These laws have been substantially modified and re-enacted in sections 20 and 21⁹⁰ as revised in many states of the Northern Nigeria as follows:

⁹⁰ Area Courts Edict of 1967 of Northern States ,e.g. Kaduna State

- 20(1) *Subject to the provisions of this law and in particular of section 21, an Area Court shall, in civil causes and matters administer:-*
- (a) the native law and custom prevailing in the area of the jurisdiction of the court or binding between the parties;*
 - (b) the provisions of any written law which the court may be authorized to enforce by an order made under Section 24;*
 - (c) the provisions of all rules and orders made under the Native Authority Law or under any legislation repealed or superseded by the law, and the provisions of all rules, orders, and bye-laws made by a local government under any other written law, and in force in the area of the jurisdiction of the court.*
- (2) Nothing contained in this section shall be deemed to authorize the application by an Area Court of any native law or custom or part thereof in so far as it is repugnant to natural justice, equity or good conscience or incompatible either directly or by necessary implication with any written law for the time being in force.*
- (3) nothing contained in this section shall be deemed to preclude the application by an Area Court of any principle of English law which the parties to any civil case agreed or intended or may be presumed to have agreed or intended should regulate their obligations in connection with the transaction which are in controversy before the court.*

CHAPTER THREE

THE THEORIES OF ASCERTAINMENT OF APPLICABLE LAW OF TORTS IN CONFLICT OF LAWS

3.1 INTRODUCTION

The question of ascertainment of applicable law of tort in conflict of laws situation, as stated in the preceding chapters, is a very difficult and complicated one. This is because of two reasons. Firstly, the field of torts in a conflict of laws situation was a neglected topic, as discussed by Morris⁹¹. The theory is the most undeveloped area of conflict of laws⁹². Secondly, its difficulty stems from the many types of torts which exists, such as negligence, assault, defamation, etc in which a claim in relation to a particular tort may arise⁹³.

Moreover, unlike contract, where disputes can be anticipated, an ascertainment of the applicable law clause to that effect may be inserted by the parties, tort injuries, on the other hand, are mostly unexpected and parties are not likely to give future thought to any choice of applicable law⁹⁴. Under these circumstances, until injuries occur and the injured party decides to pursue a claim for compensation, the issue of the ascertainment of the applicable law in tort would not arise.

The issues of ascertainment of applicable law in tortuous wrong in conflict of laws situation becomes even more complicated from the later half of the 19th century, due to technological advances and modern means of transportation and communication. For

⁹¹ Morris, op cit p. 301

⁹² Ibid, pp. 301- 302

⁹³ Abia Mayss, Conflict of Laws, (2nd edition) Cavendish Publishing, London, (1994) p. 113

⁹⁴ Ibid, p. 113

example, the marketing of products is not restricted to national boundaries. Therefore, just as the law of contract responded to the pressure of international trade in the 19th century, so in the 20th century the law of torts has responded to these pressures.

In trying to respond to these pressures, theories have evolved for the ascertainment of the applicable law of torts in a conflict of laws situation. This chapter is, therefore, aimed at discussing those theories to see whether the purpose upon which they were evolved was achieved.

3.2 THE THEORIES OF CONFLICT OF LAWS

In the course of the development of conflict of laws, many theories evolved. As such, some of the most fundamental theories would be considered here. The old theory among those theories was that the governing law in any conflict situation should be the *lex fori*⁹⁵, this means the law of the forum or court. That is the positive law of the state, country, or jurisdiction of whose judicial system the court where the suit is brought is an integral part⁹⁶. Secondly, the *lex loci delicti*⁹⁷, law of the place where the tort was committed; and thirdly that the governing law in conflict of laws situation should be the proper law⁹⁸. From the above development of conflict of laws, it was understood that there are three fundamental stages, hence three fundamental theories emerged, namely, the *lex fori* theory, the *lex loci delicti* theory and proper law theory.

⁹⁵ Morris, op cit p. 302

⁹⁶ Suleiman, I.N. The Nigerian Law Dictionary, Tamaza, (1996) p. 190

⁹⁷ Ibid p. 302

⁹⁸ Ibid p. 302

3.2.1 The *Lex Fori* Theory

The theory was the first and oldest of the conflict of laws jurisprudence. That is to say, the law of the forum or court in which a case is tried. It was to the effect that tort liability should be governed by the law of the forum. Forum means the court which has jurisdiction. This theory is of German origin which was advocated by Savigny,⁹⁹ whose advocacy has influenced the development of English law of conflict of laws. This theory stipulates that rights and liabilities, which have foreign elements, shall be determined by the law of the forum i.e. the *lex fori* i.e. the law of the court which has jurisdiction to try the case. Beale, Cook, W. N., in his *lex fori* theory¹⁰⁰ of conflict of law, argued against the notion that any right, including a foreign right, can be vested in the *lex fori*. He contended that courts do not enforce rights created under foreign law, but rather enforce domestic rights which they themselves choose to create and enforce¹⁰¹.

The principal argument in favour of this theory are that liabilities for tort is closely akin to liability for crime, where no one doubt that foreign law is inapplicable; and that liability for tort is closely connected with the fundamental public policy of the forum and therefore, must be governed by the forum law i.e. the place where the court is situated¹⁰². For example, where a contract was inferred for transporting passengers to Lagos, at Mokwa the car was involved in an accident, and the passengers were taken to Lagos and some died there. By way of forum law, the Lagos Court has to use its court law not the

⁹⁹ In 1849

¹⁰⁰ Cook, W. N., *The Logical and Legal Bases of the Conflict of Laws*, Harvard University Press, Cambridge, 1942. pp. 9-10

¹⁰¹ *ibid*, p. 9-10

¹⁰² Morris, *op cit* p. 302

law of the place where the accident took place. This proposition cannot hold water, as torts have long been divested from criminal law. In that regard, Holmes J. States; “*The general purpose of the law of torts is to secure a man indemnity against certain forms of harm, not because they are wrong, but because they are 'harm'*”¹⁰³.

This clearly indicates that tort is quite different from criminal law both in purpose and objects. Therefore, the reason forwarded by Cook seems not convincing. Unfortunately, this theory was criticized as it was viewed that it will lead to the application of laws that will lead to injustice. Thus, another argument against the application of *lex fori* was forwarded by the opponents of this theory who was of the view that since the jurisdictional rules of the English courts are extremely liberal, the plaintiff may sometimes have a choice of forum in which to sue. Therefore, to apply this theory is an encouragement of forum shopping¹⁰⁴. Forum shopping means looking for a court which will best serve the interest of a party.

To avoid these difficulties caused by the application of the *lex fori* (place of the court) theory, some courts have proposed for the application of the *lex loci* (the law of the place of the performance of the contract or where the tort was committed), hence, the formulation of the *lex loci delicti* theory. For example, in the fact situation we have hypothesized in chapter one of this work, where a contract for transportation of passengers took place in Zaria, accident took place in Jebba, victims died in Lagos, by *lex*

¹⁰³ Holmes j. The common law, 1881, p. 144

¹⁰⁴ Morris, op cit p. 302

loci delicti, the case for compensation is supposed to be the place where the accident took place i.e. Jebba, not Lagos or Zaria.

3.2.2 The *Lex Loci Delicti* Theory

This theory of ascertainment of the applicable law in conflict of laws situation gained its prominence in the continent of Europe and the United States.

Many lawyers and writers were of the view that the law of the place where events occurred is the only law which can attribute legal consequence to them¹⁰⁵. For instance, in support of this theory, Holmes J. states that, “*The only possible law which could claim to govern liability in tort is the lex loci delicti*”¹⁰⁶.

He further maintains the view that “the theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gives rise to an action (obligation), which, like other obligations, follow the person and may be enforced whenever the person may be found¹⁰⁷”.

Another argument in favour of this theory was that its application accords with the legitimate expectations of the parties. According to the proponents of this theory, everyone should be entitled to adjust his conduct to the law of the country in which he acts. Willes, J. in the case of *Philips v. Eyre* stated that, “*The civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by*

¹⁰⁵ Ibid, p. 303

¹⁰⁶ Per Holmes J. In *Slater vs. Mexican National Ry* (1904) 194 U. S. 120, 126.

¹⁰⁷ *Western Union Telegraph Co. vs. Brown* (1914) 234 U. S. 542, 547.

that law”¹⁰⁸. This quotation in relation to our hypothetical case, it means the court in Jebba where the accident took place should have jurisdiction for compensation case.

Though the above argument seems logical, it also seems to produce difficulties in cases where the contract required each party to perform its obligations in a different country, or where the place of performance was dictated by enforceable circumstance. For instance, where an aircraft crash landed neither at the place of take off or at the expected landing country but somewhere. What will happen? This theory was supported by Professor Beale and it formed the basis of the First American Restatement of conflict of laws. The theory was also criticized thus;

1. The theory does not take into consideration the tort-feasor, the victim, the nature of the tort. These may lead to unjust result.
2. By applying the theory of the place of commission or delicti, it is always difficult to determine *lex loci delicti* commission in transport cases, especially where several elements occurs in different countries.

Hence, the proper law theory emerged, which is to the effect that the principle of conflict of laws applicable to a given legal situation should be the law having the closest and most real connection to the case¹⁰⁹.

¹⁰⁸ Philips vs. Eyre (1870) L. R. 6 Q. B. I. 28.

¹⁰⁹ Morris, op cit p.303

3.2.3 The *Proper Law* Theory (Closest and Real Connection)

The proper law is the main system of law applied to decide the validity of most cases of conflict of laws after objecting to the previous theories. According to this theory, the parties, for example to a valid contract, are bound to do what they have promised. So, to be consistent, the doctrine of proper law examines the parties' intention as to which law is to govern the contract. The claimed advantage of this theory is that it satisfies more abstract considerations of justice, if the parties are bound by the law they have chosen. The gist of this theory, according to Morris is that, while in many, situations, there would be no need to look beyond the place of wrong, there ought to have a conflict rule broad enough and flexible enough to take care of the exceptional situations as well as the more normal ones; otherwise, the results will begin to offend the people's common sense¹¹⁰. Hence, a proper law theory, if decisively applied, would furnished a much needed flexibility and enable different issues to be severed and thereby facilitate a more adequate analysis of the social factors involved¹¹¹. Secondly, a proper law theory, if intelligently applied, would facilitate more rational solution to the problems arising in one country and harms ensuing in another¹¹².

This theory, however, raises the question of whether the test to its application is to be subjective i.e. the law actually intended to be applied by the parties, or objective, i.e. the law will impute the intention which reasonable men in their position would probably have had. In answer to this, it cannot safely be assumed that the parties did actually

¹¹⁰ *ibid* p. 304

¹¹¹ *ibid*

¹¹² *Ibid*

consider which of the several possible applicable laws might be applied at the time they are negotiating their transaction. Therefore, although the courts would prefer the subjective approach, the objective test has gained more importance, as well. Hence, the proper law test has three stages. That is, the express selection, the implied selection and the closest and most real connection.

In **express selection** of proper law, the parties express a clear intention in a formal clause. This means that there is a rebuttable presumption that this is the proper law as it reflects the party's freedom of choice of law. It can only be rebutted when the choice is *male fide*.

Under implied selection, the parties have not used express words, but their intention is inferred from the terms and nature of their transaction. Under the closest and most real connection, the court has to impute an intention by asking, as just and reasonable person parties ought to, or would have intended to nominate, if they had thought about it when they were making the contract. In arriving at this decision, the Court uses a list of connecting factors. This theory had been adopted by the American Restatement Law Institute. Nevertheless, this theory has been criticized because it sacrifices results which are claimed to follow from the application of the *lex loci delicti*. Hence the modern English law theory evolved. But for the purpose of this work, the discussion is limited to the above mentioned theories. Morris suggested that the proper law of the tort should govern tort liability¹¹³. The gist of this theory is that, while in many situations there would be no need to look beyond the place of wrong, we ought to have a conflict rule,

¹¹³ (1951) 64 Harv. L. Rev, 881

which is broad and flexible enough to take care of the exceptional situations as well as the normal ones. Otherwise, the results will begin to offend our common sense. The proper law approach, according to him, if intelligently applied would furnish a much needed flexibility and enable different issues to be segregated and thus facilitate a more adequate analysis of the social factors involved. He, as well, suggested that the application of proper law of the tort will facilitate a more rational solution of the problems which arises when acts are done in one country and harm ensues in another¹¹⁴.

The application of the proper law to tortious liability will however take different factors into consideration from its application of torts to contracts. Under the express or implied intention of the parties with respect to the ascertainment of the applicable law is given priority over the law of the place which has the most significant connection to transaction.¹¹⁵ Whereas, the issue of intention of the party does not or rather cannot be applicable, to tortious liability. Under the proper law of the tort, therefore, what is given precedence is the policy consideration relative to the facts constituting the tort, which is given the controlling effect, in the ascertainment of which system of the law may be applicable to a particular tort, is issuance in conflict of laws situations.

Therefore, the proper law of the tort provides the foundation which the American as well as some courts in some commonwealth countries used to develop the most appropriate methods of ascertainment of the applicable law of tort in any given conflict of

¹¹⁴ Morris, op cit p. 304

¹¹⁵ Rufa'i, A.M, Tort Liability in the Anglo-Nigerian and American Conflict of Laws, an unpublished LL, M Thesis, A.B.U, Zaria, (1988) p. 108.

law situation.¹¹⁶ Recently, the America Court resorted to the use of different principles, apart from the proper law of tort rule. They all aimed at achieving the same objective, but still under the umbrella of the proper law of the tort principle.

Some of these principles were extensively criticized because of the prospects of their abuse coupled with the fact that the adoption of the proper law of tort principle gives the courts some measure of discretion to deviate from laid down precedents. These principles include the contact or centre of gravity approach, the interest analysis approach, the better law approach, the comparative improvement approach, etc. However, critics have pointed out that the ascertainment of applicable law of torts in conflict of laws is clearly inconsistent with the proper law of the tort and it is capable of developing into a mechanical formula. And that is not the function of the courts to reform the laws of other countries or to refuse to apply them.¹¹⁷

Under the Second Restatement, the American Law Institute adopted the proper law theory as its working guidance. It set down its own principles of ascertaining the applicable law of torts in conflict of law situations and went to provide the factors to be taken into account in arriving at the applicable law of torts. Section 6¹¹⁸ laid down the general principle for the ascertainment of the applicable law of torts for all conflict cases intended to guide the courts to the ascertainment of the application of tort laws which, in turn, was used by most of the common wealth countries whenever faced with the issue of ascertainment of the applicable tort law in conflict of laws.

¹¹⁶ Ibid p. 109

¹¹⁷ *Clark vs. Clark* (1978) 22 Cal. 3rd 313, 332

¹¹⁸ Second Restatement (op cit) p.254

However, the proper law of tort is criticized on many grounds. Firstly, that the analogy with contract cannot be of any benefit to tort issues because parties to a contract have the opportunity through various means of choosing the law to govern their transaction which is not the case with tort cases. Secondly, while the application of the proper law to contracts has ensured choice of law rules that are certain, predictable, and uniform, these features cannot be obtained in the application of the concept to tort cases.¹¹⁹

In our view, the debate as to what choice of law among the three laws – i.e., *lex fori delicti* and the proper law of contract and the debates pertaining to them are academic exercises bearing no immediate relationship with parties when torts really occurred. For this reason, our position is that in conflict of laws tort situations, the general rules are two, namely *lex fori* – the law of the place where the court is ... Simply, the jurisdiction of the court, secondly, the *lex fori delicti*... the law of the place where the tort took place.

In all tort conflict of laws situations, where these laws are apparent for application and there is no problem relating to their application, the need to resort to proper law of contract would not arise. In other words, where there is no difficulty in applying any of the two rules, the need to seek for the application of the proper law of tort would not arise. But where there are difficulties with the application of the two laws i.e. *lex fori or lex fori delicti*, it is then the third law of choice i.e., proper law of tort would be resorted to. That is to say, in our view and in our submission, the proper law of tort is not one of the main rules of choice of law under conflict of tort situations. It is an exception where

¹¹⁹ Ehrenweigh, A., “The Not So Proper Law of the Tort: A Pandora’s Box” (1968) 17, I. CL.Q.I

because of the difficulty of determining the *lex fori or lex fori delicti*, resort has to be made to the proper law of tort. For example, in our hypothesis of the case where a Peugeot car was contracted to carry some passengers to Lagos and at Jebba the car was involved in accident, some passengers died at the spot instantly and some were carried to Lagos where eventually some other passengers died. In this instance, the deceased relations could sue for damages in Lagos, Jebba or Zaria. There is no difficulty in determining the jurisdictional problem. Therefore either the *lex fori or lex fori delicti* could be used to determining the case. This is because, the law and the facts involved are difficult then in our view the proper law of tort would be resorted to. Therefore, the proper law of tort is exceptionally and exception.

3.2.4 Modern Approach to the Ascertainment of Applicable Law of Torts in Conflict of Laws

According to the modern approach, the choice of law rules for determining the law applicable to torts has now been placed on a statutory footing in most countries of the world. The United States of America for example, adopted or rather enacted Part 3 of the Private International Law (Miscellaneous Provisions) Act, as their statutory choice of law rules which was copied by almost all countries of the world, Nigeria inclusive, but, to some extent, with the exception of Britain and some issues of torts even in the U.S. which are to be governed by the common law rules for example, issues of defamation.

According to this new approach, acts or omissions giving rise to claims which occur in the past has no retrospective effect. New choice of law rules will not apply to

them. The new approach expressly abolished the common law choice of law rules. It gives guidance that for the issues arising in a claim as issues relating to torts is a matter for the forum courts. According to this modern theory, the characterization of a claim must be carried out by the forum. This theory is, therefore, to the effect that where an actionable tort has occurred the applicable law shall be used for determining the issues arising in a claim. For example, a cause of action may be sued upon in the English or Nigerian courts even if it would not amount to a tort by the English or Nigerian domestic laws, unless otherwise the provisions of those laws provided to the contrary.

3.3 The Connecting Factors

According to Dicey and Morris,¹²⁰ the rules of the conflict of laws are expressed in terms of judicial concepts or categories and localizing elements or connecting factors that provide the means to choose the appropriate law, applicable in a conflict of laws situation. Though these connecting factors have no independent significance, they played a vital role as a means of choosing appropriate and applicable law.

In conflict of laws, connecting factors are facts which tend to connect a transaction or occurrence with a particular law of jurisdiction, i.e. the domicile, residence, nationality or place of incorporation of the parties, the places where the tort or *delicti* was committed or where its harm was felt, the flag or country of registry of the ship, the ship owner's base of operations, etc. The connecting factors are the means taken into consideration and weighed by courts and arbitrators, in determining the proper law to apply in order to

¹²⁰ Dicey and Morris, *The Conflict of Laws*, (13th Edition), Vol. 1, Sweet & Maxwell, London, (2000), p. 29.

decide the case or the dispute.¹²¹ The determination of the connecting factors, according to Abba Mayss, is always referred to the law of the forum.¹²² He gave an example that Valerie is domiciled in France according to the rules of English law of domicile. She is domicile in England according to the rules of French law of domicile. The English court would decide this issue on the basis that Valerie is domicile in France. However, only the state in which nationality is claimed can decide whether that person is a national of that state. So, if Valerie claims French nationality, only French law can determine whether or not she is a French national.¹²³

Every person recognized by law, whether natural or artificial has a personal law regulating his status and legal capacity. But then, a fundamental problem arises whenever an issue comes up for the ascertainment of applicable law in conflict of laws situations as to whether the connecting factor should be determined by the *lex fori* or by the *lex causae*. *Lex causae* means the law of the legal system which governs the matter. According to Dicey and Morris, since the determination of the *lex causae* depends on the determination of the connecting factors; it is no longer controversial among learned writers that the connecting factor should be determined by the *lex fori*¹²⁴.

¹²¹ Ibid, pp. 195-196

¹²² Abba Mayss, Conflict of Laws, 2nd edition, Cavendish Publishing Limited, Great Britain, (1977), p. 3

¹²³ Ibid.

¹²⁴ Dicey and Morris, op cit, p. 30

CHAPTER FOUR

ASCERTAINMENT OF THE APPLICABLE LAWS OF TORTS IN CONFLICT OF LAWS

4.1 INTRODUCTION

Having dealt with the theories of ascertaining the applicable law of torts in conflict of laws, this chapter dealt with the ascertainment of the applicable law of torts in conflict of laws. The chapter dealt with two major issues. Firstly, the *forum rule*, which is the law of the place where the Court is located; Secondly, the law of the place where the tort occurred i.e. *lex loci delicti*.

This gives us a clear understanding of which of the two rules the Nigerian Court will apply should there be any case involving law of tort in conflict of laws situation before it.

Therefore, this chapter will discuss the meaning and scope of the forum rule, where the court is situate and the application of the law of the place where the tort occurred. we will exemplified each rule by citing relevant cases, and further explain the meaning of proper law of tort and see which of these rules the Nigerian court will adopt, in ascertaining the applicable law in conflict of laws situations.

4.2 The *Lex Loci Delicti* (Where the Tort Occurred)

The *lex loci delicti* has been defined as, “the law of the place where rights were acquired or liabilities incurred”¹²⁵. It identifies the *delicti i.e.*, the place of the occurrence of the tort. It postulates the rights and liabilities, which have foreign elements in relation to the

¹²⁵ Bryan, A.G. op cit, p. 995

occurrence of the tort. According to Morris,¹²⁶ the rule was of German origin which has been advocated for since 1849. According to this rule, the law of the place where the tort occurred is the only law that is applicable. Willies J. supported this view when he states, “Civil liability arising out of a wrong derives its birth from the law of the place where it occurred and its character is determined by that law”.¹²⁷ In *Western Union Tel.Co.vs.Charles*¹²⁸, the defendant telegraph company received in Virginia a message for transmission to a sailor aboard a ship in Norfolk Navy Yard. The telegraph was transmitted as far as parts month, Virginia, adjoining the Navy yard, but was never received by the sailor. The sailor sued the telegraph company in a Virginia court attempting to recover under a Virginia statute imposing a forfeiture of one hundred Dollars for failure to deliver such a message. The Virginia court allowed recovery. The U.S.A Supreme Court reversed the award.

In *Machado v. Fonte*¹²⁹, the action was brought for damages for an alleged libel of the plaintiff, contained in a pamphlet said to have been published by the defendant in Brazil. The defendant, who had delivered a defense denying the libel, and raising certain other defenses, took out a summons for leave to amend his defense by pleading that if (which was contrary to his contention) the pamphlet had been published in Brazil, by Brazilian law that publication could not be a ground of legal proceedings against the defendant in Brazil in which damages could be recovered; or (alternatively) that it could not be a

¹²⁶ Morris, J.H.C. op cit, p.45

¹²⁷ Phillips v. Eyre op cit p.49

¹²⁸ 214, U.S. 27,

¹²⁹ (1897) 2, Q.B.231

ground of legal proceedings against the defendant in Brazil in which the plaintiff could recover general damages for any injury to his credit, character, or feelings.

Kennedy, J., expressed some doubt as to the plea, but he allowed the amendment, and gave leave to appeal. The plaintiff accordingly appealed. His lordship, Rigby, L. J. observed, "*The innocency of an act in a foreign country is an answer to the action. That is what is meant when it is said that the act must be*" justifiable by the law of the place where it was done" or where it took place.

In the case of *Boys vs. Chaplin*¹³⁰ both plaintiff and defendant were normally resident in England but were at the relevant time stationed in Malta, the plaintiff with the R.A.F. and the defendant with the Royal Navy. They were involved in a collision in Malta in which plaintiff sustained severe injuries. He sued in English Court. Negligence was ultimately admitted and the only issue was as to damages. By the law of Malta damages were limited to expenses and money loss (a figure of €53). By the law of England plaintiff would also be entitled to recover damages for pain and suffering and loss of amenities of life. Both vehicles were insured with an English company. Milmo J., considering himself bound by *Machado v. Fontes* held that in an action founded on tort the plaintiff was entitled to recover from the defendant the same damages as he would have recovered if the tort had been committed in England. The defendant appealed. Lord Diplock, L. J. further commented "*it is to be noted that in this passage and throughout the judgement*

¹³⁰ (1968) 2, W.L.R. 349

‘wrong’ as a noun is used in the sense of an act giving rise to civil liability in the place where it is committed”¹³¹

In *Slater v. Mexican National Ry*, Holmes J stated that, “*The only possible law which could claim to govern liability in tort is the lex loci delicti* In this cases, the plaintiff, domiciled in F, a state of the United States, is injured in X, a foreign country, by the defendant, there treated for his injuries, and, returning to F, there brings suit against the defendant. Both F and X has rules making the defendant liable for his conduct. X’s procedure for awarding damages is, however, so unlike that followed in F, that an F court simply cannot award the same damages as an X court would. Rigid application of the place of impact rule will require the F court to dismiss the plaintiff’s action and remit him to whatever recovery he might have in X. Is there a better solution?

Thus, many writers, including the present writer, were of the view and in support of the proposition that the law of the place where events occur should be the only law which can attribute legal consequence to them. Under the common law, where a tort was found to have been committed would determine the applicable law. This principle was illustrated in the case of *Metal and Rohstuff A. G. vs. Donaldson Lubkin and Jenrette Inc.*¹³² In that case, the Court of Appeal held that, “if the tort was committed in England, then English law would apply to the dispute. The basis of this rule is that the forum should characterize rules of its domestic law in accordance with that law, and should

¹³¹ Lord Diplock, L. J. further commented

¹³² (1990) 1 Q.B. 319 (C.A.)

characterize rules of foreign law in accordance with their nearest equivalents in its own domestic law.

The main argument in favour of this rule is that if the foreign law is allowed to determine in what situations it is to be applied, the law of the forum would lose all control over the application of its own conflict rules and would no longer be master in its own home.¹³³”

Another principal argument in favour of this rule is that liability in tort is akin to liability for crimes where no one doubts that foreign law is inapplicable and, that, liability for torts is closely connected with fundamental public policy of the forum and therefore must be governed by its law. However, it was argued that the adoption of the forum rule will result to hardship and injustice, hence it was criticized. It was further argued that, if it were to be the sole general rule to be applied, the plaintiff will be free to choose the forum where the law would be more favourable to him than the place of the tort i.e. forum shopping.

4.3 THE LAW OF THE PLACE WHERE THE COURT IS: *LEX FORI*

According to the proponents of this rule, however, it is necessary for the forum Courts to determine the place of tort for the purpose of granting leave to serve a writ outside jurisdiction. The rule, therefore, allows the forum Courts to exercise discretion to grant such leave where the action was founded upon a tort committed not within the jurisdiction.

¹³³ Morris, op cit, p.483

4.4 THE PROPER LAW OF TORT

This rule was formulated because the two above mentioned rules were found to be insufficient to give remedies justly or fairly. According to Morris¹³⁴, while in most situations, there would be no need to look beyond the place of wrong, there ought to have a conflict rule broad and flexible enough to take care of the exceptional situations as well as the more normal ones; otherwise the results will begin to offend the people's common sense. He maintained the view that a proper law of the tort rule, if decisively applied, would furnish a much needed flexibility and enable different issues to be served and thereby facilitate a more adequate analysis of the social factors involved¹³⁵. He further maintained that a proper law of tort rule, if intelligently applied, would facilitate more rational solution to the problems arising in one country and harms ensuing in another¹³⁶.

Under the conflict of tort rules, the issue of intention of the parties does not arise; therefore, what is given precedence is the policy consideration relative to the facts constituting the tort, which is given the controlling effect in the ascertainment of which system of the law may be applicable to a particular tort.

This rule of proper law of tort provides the foundation which the courts in U.S.A and some common wealth countries utilized to develop the most appropriate methods of ascertainment of the applicable law of tort in any given conflict of laws situation¹³⁷. The courts in the U.S.A resorted to the use of different principle apart from the proper law of

¹³⁴ Morris, op cit, p. 304

¹³⁵ ibid

¹³⁶ ibid

¹³⁷ Rufa'i, A.M. Tort Liability in the Anglo-Nigerian and American Conflict of Laws, unpublished LL.M Thesis, submitted to Faculty of Law, A.B.U. Zaria, Nigeria, 1988, p. 108

the tort rule aimed at achieving the same objectives, but still under the umbrella of the proper law of tort principle.

The American restatement law institute adopted the proper law of the tort rule as its working guide. It sets down its own principles of ascertaining the applicable law of tort in conflict of laws situation and went ahead to provide the factors to be taken into account in arriving at the applicable law of torts. Section 6 provides, “*The rights and liabilities of the parties with respect to an issue of tort are determined by the local law of the state which, as to that issue, has the most significant relationship to the occurrence and the parties*¹³⁸.”

According to Morris¹³⁹ the factors to be taken into consideration in determining the most significant relationship are; (i) the place where the injury occurred, (2) the place where the conduct or act causing the injury occurred, (3) the domicile, nationality, place of relationship, etc. The rule was supported in the case of *Babcock vs. Jackson*¹⁴⁰, where the plaintiff, a gratuitous passenger in the defendant’s car was injured in an accident that occurred in Ontario. The two had started in New York where the car was licensed, insured and garaged. By the Ontario rules, a private vehicle (driver) is absolved from liability toward gratuitous passengers. New York rules of conflict of laws have no similar provisions. The plaintiff succeeded for negligence against the defendant in New York.

This rule has, however, been criticized on many grounds. Firstly, that the analogy with contract cannot be of any benefit to tort issues because parties to a contract have the

¹³⁸ The Restatement of the Law, Second: Conflict of Laws, American Law Institute, (1971–2005)

¹³⁹ Morris, op cit, p. 304

¹⁴⁰ 12 N.V. 2d 473, 1991, N.E. 2d 279 (1963)

opportunity through various means of choosing the applicable law to govern their transaction; which is not the case with tort cases. Secondly, while the application of the proper law rule to contracts has ensured choice of law rules that are certain, predictable in the application of the rule to the tort cases¹⁴¹.

4.5 ASCERTAINMENT OF APPLICABLE TORT RULES IN THE NIGERIAN COURTS.

The field of ascertainment of the applicable law of tort in conflict of tort laws situation is one of the areas where Nigerian courts largely rely on the received English case laws and precedents. However, it is viewed that application of those received English tort case laws will work injustice in the Nigerian context, having regard to the Nigerian legal systems. Therefore, it has been expressly provided in the various reception statutes that the application of English law is subject to such modification and reception clauses as local circumstances will require¹⁴².

That notwithstanding, the Nigerian rules of conflict of laws, like the general Nigerian laws, are derived primarily from English law, Nigerian legislation, case laws and public international law. Therefore, the English general rule in conflict of tort law in *Phillips vs. Eyre*¹⁴³ is applicable in Nigeria basically as a received rule of English common law. The accepted common law rule in the ascertainment of the applicable tort law in conflict of laws situation, on the question of which law should English Courts apply to torts

¹⁴¹ Ehrenweigh, op cit

¹⁴² Agbede, op cit, p. 159

¹⁴³ (1870) L.R. 6 Q.B. 1, 28-29

committed abroad is found in the celebrated dictum of Willies, J. in *Phillips vs. Eyre* where he states;

*As a general rule in order to found a suit in England for a wrong alleged to have become 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*¹⁴⁴.

The first part of the rule was severely criticized on the ground that it closes the doors of the Court to every action in tort not recognized by English domestic law, and requires the application of that law even though the case has no connection with the England except that the defendant took refuge thereafter the tort was committed.

Following the Nigerian reception legislation, the Nigerian courts gave judicial approval to the case of *Phillips vs. Eyre* in the cases of *Benson vs. Ashiru*¹⁴⁵, and *Ubanwa vs. AFocha and University of Nigeria*¹⁴⁶. In these cases torts were committed in Nigeria but in different regions (now states). The suits were not brought in the regions where the torts occurred, but different ones. It should be noted that Nigeria operates as Federal system of government just as England, Scotland, Northern Ireland, etc. are each a separate country of U.K. The rule in *Phillips vs. Eyre*¹⁴⁷ was also given judicial approval in the case of *British Bata Shoes Co. vs. Melikana*¹⁴⁸ where the Court held that each region (now state) is like a foreign country to any other region. For example, Lagos and Kano States are different jurisdictions.

¹⁴⁴ *ibid*

¹⁴⁵ (1967) N.M.L.R. 363

¹⁴⁶ (1974) 4 E.C.S.L.R. 308

¹⁴⁷ *ibid*

¹⁴⁸ (1956) 1 F.S.C. 100

In the case of *Benson vs. Ashiru*¹⁴⁹, the Respondent/Defendant of an automobile accident victim brought an action in the Lagos High Court against the Appellant, for an accident that occurred in Western Nigeria, under the Federal Fatal Accident Act. On appeal to the Supreme Court, the Defendants/Appellants (driver and owner of the vehicle) contended that an action could not be maintained under the Lagos statute when the injury and the death occurred in Western Nigeria. The Court held that:

*As a general rule, foreign law is a question of fact and must be pleaded but section 73(1)(a) of the Evidence Act requires that High Court of Lagos to take judicial notice of all laws and enactments and any subsidiary legislation made there under having the force of law or heretofore in force or hereafter to be in force in any part in Nigeria and it is necessary to plead matters of Nigeria and Court take judicial notice. It appears from *Koop v. Bebb* that the Courts in the different states of Australia similarly were unanimous in rejecting a submission that the Plaintiffs were debarred from relying on the law of the State where the wrong took place by the fact that they had not pleaded it in their statement of claims.*¹⁵⁰

On the substantive issue as to the choice of the applicable tort law cases, the Supreme Court said:

*During the argument on this question we drew the attention of counsel to the judgement given in the High Court of Australia in *Koop* where the facts were the same as in the present case. After considering this and other authorities following points; the rule of the common law of England, on questions of private international law applies 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 character that if committed in Lagos; Secondly, it must not have been justifiable by the law*

¹⁴⁹ *Benson vs. Ashiru* (1967) N.M.L.R. 363

¹⁵⁰ *ibid*

*of the part of Nigeria where it was done. These conditions are fulfilled in the present case.*¹⁵¹

It is the view of the author of the present work that the above principle of ascertainment of the applicable tort law in Nigeria is the best option. This is because the principle adopted is in line with the current position of the Nigerian Constitution which is that, what is that before a person can be prosecuted for an offence it must be known to law and the punishment thereof defined by the statute creating that offence.

In *Ubanwa v. Afocha & University of Nigeria*,¹⁵² the Plaintiffs were dependents of the deceased who was killed in a motor accident in Zaria. The plaintiffs brought an action under the Fatal Accident Law of Northern Nigeria at Enugu High Court. In a preliminary objection, counsel for the defendants argued that the Enugu High Court had no jurisdiction to try an action based on accident that occurred in Northern Nigeria and the Fatal Accident Law of Northern Nigeria on which the action was brought had no extraterritorial application and so could not apply in Eastern Nigeria. It was held that:

under the common law regarding conflict of laws, the High Court of Enugu state had 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 if it had been committed within Enugu state and was not justifiable under the law of that part of Nigeria where it was committed. However, on the question of choice of the applicable law, the learned judge concluded that the applicable law was that of the place where the accident occurred.

¹⁵¹ Per Brett, J. in *Ashiru v. Benson*, *ibid*

¹⁵² *Ubanwa vs. Afocha and University of Nigeria* (1974) 4 E.C.S.L.R. 308

From the foregoing, we come to the conclusion that the above rules of tort laws that is, the law of the place where the tort occurred and the proper law of tort are intertwined and concurrently applied in the Nigerian context because those rules for determining the applicable law to tort are derivable from legislation. However, it is clearly understood that when determining which tort law shall be applicable in conflict of tort laws situation in Nigeria, after revolving round the issue of jurisdiction, the Nigerian courts mostly applies the law of the place where the tortious liability occurred.

It has been observed that, the above rules of ascertaining the applicable tort law in conflict of laws situation had been changed and reformed in both America and England from where the Nigerian rules are imported. But it seems, Nigeria did not change from those rules to the newly formulated rules. The current position, both in England and the United States of America, regarding the conflict of tort rules, have been placed on statutory footing, which is more acceptable, in line with the present situation of the complex world, though the Nigerian legislature and judiciary have tried to deviate from the obsolete rules. We are of the view that Nigeria, as a state, should provide for uniform rules that will govern the choice of applicable tort law issues in any conflict of tort laws situation.

CHAPTER FIVE SUMMARY AND CONCLUSION

5.1 SUMMARY

This thesis dealt with the issues relating to the ascertainment of the applicable law of torts in conflict of laws situations. It was examined in the like manner and was aimed at making an analysis on the basis, nature and scope of the conflict of laws, particularly with respect to torts situations.

The research work dealt with the history of the old theories when ascertaining the applicable law of torts in conflict of laws situation, as well as, the modern approach of the law. It was aimed at showing the advantages, disadvantages and to some extent, the defects of the olden rules and theories of the applicable law of torts, or for the purpose of shaping the effective structure of the law, which is the primary objective of every research work, particularly in line with the Nigerian context.

Therefore, chapter one of this thesis has given the general overview of the work by supplying the aim and objectives of the research as well as the scope and limits of the work. Some of the resounding literatures that were used are also reviewed therein for their profound importance and contribution to the research work.

Chapter two tackled the Nature and sources of conflict of laws in Nigeria. It dealt with the general concept of conflict of laws in the Nigerian situation as well as reception and application of English laws and world or rather international treaties in the Nigerian courts. It also dealt with the status of foreign cases in the Nigerian Courts vis-à-vis the

Nigerian legislation and case laws in respect to conflict of tort laws in Nigeria, its applicability and sources.

Chapter three focused on the theories of the ascertainment of applicable law of tort in conflict of laws situations. Under that chapter, the olden theories on the choice of applicable tort laws and their practical application were examined. In that course, cases, both foreign and domestic were considered. Criticisms, advantages as well as disadvantages of these theories were brought to light in the chapter. Later in that chapter, modern approach to the ascertainment of applicable law of tort in conflict of laws situations and the connecting factors are all considered.

Chapter four of the thesis was a sort of an appendage to chapter three. It dealt with the issue of the ascertainment of the applicable law of torts in conflict of laws situations, but this time dealing with three basic rules, that is the forum rule, the law of the place where the tort occurred and the proper law of tort that has nearest connection. This aimed at bringing out the reforms that were attempted to cure the defects caused by the olden principles of ascertaining the applicable laws. Under the chapter the basis and applicability of those rules in the Nigerian context has been discussed.

Finally, chapter five is a general conclusion under which major aspects of the study were re-appraised. Findings and recommendations for reforming, enhancing and developing, as well as shaping the image of the laws were made.

5.2 OBSERVATIONS

It is the basis of conflict of laws that whenever a technical legal argument becomes intellectually and academically attractive, a strong presumption arise that something, somewhere, along the line, is wrong with the law or its application or with the procedure adopted. The laws as perceived in intellectual academic parlance, rarely reflects the practical working of the Courts in almost all countries of the world. With this perception in mind, the following findings/observations were made;

- i. It has been observed that in conflict of laws or private international law proper, one of the problems which dominate every case with foreign element is *jurisdiction*. This is because in a case where there is a foreign element, it means there is more than one territorial areas involved by the facts of the case. That is to say, the facts of the case took place in two or more places. For example, in the hypothetical case of accident involving passengers in a station wagon, traveling from Zaria to Lagos which tumbled at Jebba where some passengers died on the spot at Jebba and some died few days later; there are two or more territorial or geographical areas involved in the facts of the case. Firstly, there is Zaria where the contract to carry the passengers to Lagos was entered into. Secondly, there is Jebba where the car was involved in an accident as a result of which three passengers died. Thirdly, Lagos, where more passengers eventually died again. If we take it that the accident took place in Nigeria, but because of the federal system of government where the country is divided into states, each of the states where the accident or the facts of the cases occurred is an independent and separate state.

Therefore, the jurisdictional problem comes into play. In this case, which court is competent to hear and determine cases involving claims for damages/compensation? Is it the court situated at Zaria or Jebba or Lagos? Each of these courts would claim that one fact or another took place in its jurisdiction. This may pose a problem for a court.

- ii. Another problem, it has been found, is the one which is commonly available or often faced in cases with foreign elements is the *Choice of applicable law*. In other words, where there is more than one applicable law, which law will the court choose? In our hypothetical case above, if the applicable law in Zaria, Jebba and Lagos are different, which law would be chosen for application in order to enable the court award or disallow the payment of compensation? Is it the law of Kaduna State, Lagos State or Kwara State?

In the case of *Phillips vs. Eyre*¹⁵³, an action was brought in England against the governor of Jamaica for false imprisonment committed against the plaintiff in that Island. The defence was that a subsequent act of the local legislature had indemnified the defendant. Most of the argument was concerned with the competence of the Jamaican legislature to pass a retrospective legislation. The court of first instance held that the local legislature was competent and gave judgment for the defendant. This decision was affirmed on appeal to the Exchequer Chamber, Judge Willes, stated as follows:

¹⁵³ [1890] L.R. 6 Q. B1

As a general rule in order to found a suit in England for a wrong alleged to have become 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.

These two statements above are very confusing. This is because, in the first statement, the judge was making reference to jurisdictional issues. However, in the second statement, the judge was talking of the choice of law. To further adumbrate these two problems, is to say that, if an action is actionable in the place where it was committed and also actionable in the place where the court was asked to try and determine it, the problem is that of a double character. One character refers to jurisdiction and another refers to choice of law. However, the pendulum, in our view, is tilted very much in favour of jurisdiction. That is to say that, though the case is that of jurisdiction, it can equally be considered to be a problem of choice of law. However, the second statement is more pointed toward the problem of choice of law. This is because of the existence of the word justifiable. This means that if the law of the place where the action took place has justified it, and the law of the place where the court that is trying the case does not justify it, but criminalized it or it is a base for awarding liability, then the court asked to award the liability may have to consider the problem of applying its law which exonerates liability and the law of the place where the action took place, which exonerates the dependent from liability. This is a proper case of choice of law. It therefore poses a problem i.e. is it a choice of law or a case of jurisdiction? Only a

very critical mind, with immense knowledge of law and advocacy, would be capable enough to unknot this strong knot. In our mind, this is a serious concern, in matters of conflict of laws involving torts in this country. For example, what will be the caliber of judges and counsel involved in order to separate the chaffs from the husk very accurately? Secondly, what would be the time and energy that would be dissipated in these type of cases, in order to seeing that justice is done to the case and indeed, to the litigants involved in such a case(s)? All these are findings of this research.

- iii. It has further been found that courts may encounter difficulties in the *enforcement of foreign judgments*. Sometime, this may pose a serious difficulty. Furthermore, in the past, the basis for one court to enforce a judgment of another country or jurisdiction, so to say, was mainly cooperation between countries or nations. That is, the courts of one country may enforce judgments of another country on the basis that its own decision may one day be taken to that mother country for enforcement. Thus, this principle is like a proverb or maxim which says “scratch my back and I scratch your back”. This has been a very old principle of conflict of laws.
- iv. It has also been found that there was a confusion that had set in by the decision of the English court in the case of *Schibsby and Another vs. Westernholz and Another*¹⁵⁴. In the English conflict of laws, the doctrine of comity was abrogated

¹⁵⁴ Schibsby and Another vs. Westernholz and Another

and replaced with the *doctrine of obligation/duty*, but notwithstanding that change, the statutory provision which empowers Nigerian court to recognize and enforce foreign judgment is still worded with the ideology and philosophy of the original doctrine of comity i.e “help me I help you”. In other words, the statutory provision which provided the jurisdiction for the enforcement of foreign judgment does not have slightest semblance with the doctrine of obligation and duty. This total absence of the ideology and philosophy of the doctrine of obligation or duty on the part of the defendant in the statute has created confusion between the case law principle of doctrine of comity and the statutory provision of the doctrine of duty and obligation. As it is now, do we say we have two different laws on the enforcement of foreign judgment or we have one single law? If we have two laws i.e. case law and statute, which one would the court apply or use as a basis for enforcement of foreign judgment, the statute or the case law doctrine? While in the case of *Schibsby vs. Western Holz*¹⁵⁵ the basis for enforcement of foreign judgment is obligation and duty.

In the Foreign Judgments (Reciprocal Enforcement) Act¹⁵⁶ the basis for assuming jurisdiction for enforcement of foreign judgment is the doctrine of comity. For clarity the Act provides:

The minister of justice if he is satisfied that, in the event of the benefits conferred by this part of the Act, being extended to judgments given in the superior courts of any foreign country, substantial treatment will be assured as respects the enforcement

¹⁵⁵ *ibid*

¹⁵⁶ Cap. L35, L.F.N., 2004

in that foreign country of judgment given in the superior courts in Nigeria may by order direct, that this part of the act shall extend to that foreign country.

This means that if another country will be disposed to apply our own judgments, then Nigerian superior courts can equally enforce their judgments. This provision reinstates the ideology and philosophy of the doctrine of comity and not ideology and philosophy of the doctrine of obligation/ duty. This is a problem in the ascertainment of applicable laws of tort in conflict of laws situation in this country, Nigeria. These are the major findings identified in the course of this research work, which are so serious if looked into, in the light of the fact that precedence is supposed to influence future decisions. However, suggestions and recommendations were made under with the aim that if adopted, it will provide a guide that will cure the defects and develop this area of the law which is the end result of any research.

5.3 RECOMMENDATIONS

Based on the findings made above, the following recommendations were made;

- i.** It is recommended that jurisdiction should not be a problem now in the Nigerian context. This is because the *1999 Nigerian Constitution*, as amended, has clearly stated and delineated the extent of the jurisdiction of each state of the federation as well as each court to a particular issue. Furthermore, the rules of courts and states laws have also clearly stated and delineated the extent of the jurisdiction of

each state of the federation as well as each court to a particular issue. For example, Orders 1 & 2 of the Kaduna State (Civil Procedure) Rules, 2007 has provided and interpreted mode and extent of instituting an action, as far as Kaduna state is concern. We recommend that all other states of the federation, including Federal Capital Territory, Abuja should have similar laws.

- ii. It is recommended that despite the fact that the Nigerian legislatures, both the National Assembly and States Assemblies, have tried in their own ways to find a solution to the problems of jurisdiction of each court in respect of jurisdiction and choosing a particular law to govern a particular case or matter, they should do more to clearly enact a law to take care of jurisdiction and ascertainment of applicable law when the cause or matter has a foreign element. This will develop our legal systems and judicial system. Our courts should not make blind adherence to the rules in *Phillips v. Ayre*. This is because, it is noted that the rules in *Phillips V. Eyre* and *Boys V. Chaplin* were designed or rather adopted when human interactions, production, means of communication and science and technology were not advanced as today. It was meant to serve such a society which was provincial and parochial. While it is a trite law that a rule of law may be modified to meet the demand of a normal situation, such modification can hardly be attempted where the nature of the defect is such that can never be cured. Any attempt to modify it, will only add salt into the injury. Even the inventors of that rule have now changed with the chance of circumstance. Legislation is needed to solve this confronting and complex situation of conflict of laws.

iii. We quite believe that the significance of the historical influence of English law in the development of the Nigerian rules of the ascertainment of the applicable law of torts in conflict of laws is not in doubt. But it is recommended that it would only be as a guide. It should not have absolute application in every case. To some extent, it may only refer to influence Nigerian solutions to fundamental problems of judicial nature. The world today has become a global village and it should be viewed as a free legal market, where old ideas may outgrow their functional advantages and are discarded whenever they become obsolete or inadequate in solving present problems. As such, Nigerian courts should accept the fact that blind adherence to a principle without any attempt at analyzing it, will only lead to the development of a barren legal system. Therefore, they should adopt a rule of ascertainment of law that draws its effectiveness from the ability to analyze, assess and evaluate relevant legal rules according to their relative closeness to any tort issue. The present Nigerian choice of law rule is obsolete. It does not require a partial reformation, but a complete change in substance and in applicability. Therefore, it is recommended that the most appropriate alternative is the American approach to the ascertainment of the applicable law of torts which is based on the proper law of the tort and the Second Restatement. This is because, while it is true that the application of these 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 the decisions, this problem will not arise in Nigeria because Nigeria has a semi-unified judicial system with one Supreme

Court and a Court of Appeal. The experience of the American courts with voluminous decisions to that effect would be an eye opener to the practical working of these principles. The provisions of the Restatement Second (particularly 5.6) on torts will guide the Nigerian courts in determining the issue of ascertaining the applicable law, as they can easily be adapted to the solution of conflict problems in both interstate and international conflicts. However, these rules should only be retained where they proved adequate, workable and justifiable for just determination of the issues at hand, having full regard to our local enactments.

- iv. Furthermore, it is suggested that uniform protection of parties' expectation is well desired in Nigeria not only as a matter of justice, but also as a necessary corollary to the constitutional obligation on the part of the several states not to discriminate against the citizens of other states. It would be an intolerable idea for the court of one state to pretend that the mere enforcement or recognition of the laws of another will be repugnant to good morals or will violate its public policy. Even though this view is to be treated with courtesy and cautiousness, It may, therefore, be suggested that, the mere repugnance of foreign rule, whose recognition or enforcement will not in any way affect the interest of the forum state should not call for the non application of the foreign law. This is because of the fact that no state possesses a monopoly of justice. It should as well be understood that the Courts are not called upon to sanction the operation within the forum of foreign

objectionable rules but to recognize their operation in the state or country where they are in force and where they are lawful.

Based on the discussions made in the proceeding chapters, we were able to come to the conclusion that the ascertainment of the applicable law which is to govern tort liability in the conflict of laws situations has proved conceptually one of the most difficult and problematic area of the law. We also have realized that much of the modern academic discussions and most of the case laws from different countries do not hold the same view. In this regard, lawyers and judges were to some extent always confused whenever it comes to the issue of ascertainment of the applicable law of torts in conflict of laws situations. It is disappointing that there is so little English case law on the topic. Though most of the case laws, in this regard, emanated from the United States of America, but this may suggest either that there is little litigation about torts committed abroad or that litigants do not trouble themselves to prove any relevant rules of foreign law. Nigeria, whose rules of ascertaining the applicable law of torts in conflict of laws were the same with that of England, share the same defects as that of the English rules because of the fact that the bulk of the Nigerian decisions on the tort issues are based on English rules of choice of tort laws, for example *Benson v. Ashiru*, etc.

We were also able to discern that several different choices of law rules have been proposed or propounded from time to time as being the most appropriate, but later we came to realize that they are defective, confusing and unjustifiable. As such, considerable criticisms have been directed against such choice of law rules governing tort liability. It was thought to be obsolete and unsatisfactory and uncertain.

However, an attempt has been made to reform and or improve the means of choice of the applicable law of torts so as to meet the demand of present world. Hence, the need for a new basis of some new principle more fitted to contemporary needs. Lord Denning M.R States, “that the problem of choice of law in tort constitutes one of the most vexed questions in the conflict of laws”.

Morris has argued with conviction and imagination for the development of a proper law of tort in which the place of commission no longer remains a discussion factor of liability. A further instance of modern thinking on the problem of applicable law was observed by Justice Traynor where he states, “that in a complex situation involving multi-state contacts....no single state law can be deemed to create exclusively governing rights. The forum must search to find the proper law to apply based on interests of the litigants and the states involved”. This means that each state should remain free, within its constitutional limits to determine issues with foreign elements in the way its views of justice and fairness and its system of law prescribed.

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