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DANCING ON THE GRAVE OF PHILLIPS v EYRE

(1) INTRODUCTION

A recent issue of the Australian Law Journal contained a brave attempt by Professor Phegan to discuss the current state of play in the law of choice of law in tort in Australia.[1] This is always a hazardous undertaking, because, once one proceeds beyond the banal, any proposition is bound to be arguable, and therefore possibly incorrect; such is the state of chaos in the area. What follows is an idiosyncratic attempt to amplify his comments, and to suggest a possibly more radical conclusion.

Professor Phegan concludes that (a) choice of law in tort in Australia is governed by the rule in *Phillips* v *Eyre*[2]; (b) that rule involves the imposition of the lex fori and that therefore the only significant question is the role of the lex loci by the interpretation of the second limb of the rule; (c) the plaintiff must lose if it cannot be shown that there is "some civil liability" in the lex loci; and (d) a more flexible approach is desirable, and that criticisms based on "uncertainty" are misconceived given the "uncertainty" inherent in the present situation.

(2) THE MEANING OF PHILLIPS v EYRE

It is certainly true that the conventional wisdom is that the rule in *Phillips* v *Eyre* represents the "rule" for choice of law in tort cases in Australia. It is equally true that, as *Anderson* v *Eric Anderson* demonstrates, once the "rule" is applied, the first limb dealing with the role of the lex fori is substantively otiose, for there is no point in demonstrating "actionability" in the lex fori if you cannot demonstrate liability in the lex fori which will be eventually applied to the merits of the claim.[3] As a procedural matter, however, application of the first limb of *Phillips* v *Eyre* may serve the purpose of preventing an action doomed to failure at the start from going to a pointless trial. The debate concerning whether or not the "rules" are rules of jurisdiction or choice of law is meaningless: there has never been any suggestion that the law to be applied to determine the merits of the claim is anything other than the lex fori or the lex loci, and the Australian consensus is that it is the former. It follows that the "rule" is best stated for present purposes as: "apply the lex fori unless the tort was 'justifiable' by the lex loci." Thus, on the traditional analysis, the only significant question was as to the meaning of the word(s) "(not) justifiable".

On the present state of play, it seems equally clear that there are only two main choices at stake: "(not) justifiable" must refer to either "(not) actionable" or "(not) liable", if the questions concerning what those words mean are reserved for the moment. The broad "(not) innocent" interpretation of *Machado* v *Fontes* must be regarded as dead and gone.[4]

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1 Phegan, "Tort Defences In Conflict Of Laws – The Second Condition Of The Rule In Phillips v Eyre In Australia" (1984) 58 ALJ 24.

2 [1870] LR 6 QB 1.

3 (1965) 114 CLR 20.

4 Cf Phegan, supra n 1 at 26f. The Canadians seem locked by the force of authority into the *Machado* v *Fontes* [1897] 2 QB 231 authority. See *McLean* v *Pettigrew* [1945]

It also seems to be clear that the choice between "actionable" and "liable" is a choice turning on the relevance of defences to the claim. "Actionable" is satisfied if the plaintiff can show that the relevant cause of action exists in the lex loci and if its elements can be made out (although even this broad proposition is open to dispute); to satisfy "liable", the plaintiff must show that, in addition, they would recover, meaning overcome any defences the lex loci would confer upon the defendant. In short, given that the lex loci is given some role in *every* choice of law question, the alternatives offer roles of differing strength. The "liable" alternative requires the plaintiff to show that they will succeed in both jurisdictions. The "actionable" alternative places heavy emphasis on the lex fori, so long as the lex loci recognises the type of recovery sought.

Professor Phegan concludes on an analysis of the Australian cases that, with reservations concerning the meaning of the word, the courts have adopted the "liable" alternative. He may well be right, though he concedes that there is contrary authority. This writer is not concerned with what Willes J really meant, because His Honour probably had no idea of the reverence with which his words would be applied in the future, and in any event, there must be some limit to the weight of the dead hand of the past resolving the complex issues of the present. The real question is what the words should mean. Equally, this writer is not overly concerned with what the weight of Australian authority at present interprets the words to mean; if anything can be learned from a survey of the case-law, it is that the courts are desperately searching for some rational analysis rather than for the state of authority. In short, the question is open.

The really striking thing about the case-law is that the authority in favour of the "liable" alternative is largely composed of multi-state defamation cases, and that the authority in favour of the "actionable" alternative is largely composed of motor accident cases.[5] It would probably be fair to say that in 1975, the weight of authority was accident cases in favour of "actionability"[6] and the reason is not hard to find. *Hartley* v *Venn*[7] provides a convenient example. In that case a judge in the ACT was faced with a case involving an accident in NSW. Whatever may have been the case when *Phillips* v *Eyre* was decided, the law of torts dealing with motor accidents serves the purposes of loss and risk distribution almost exclusively, and despite the silly legal fictions, the contest is between institutions such as insurance companies rather than individuals in all but the rarest of cases. To that end the substantive law of torts has developed in such a way, for example, that fault is almost invariably apportioned where the jurisdiction in question adopts apportionment of damages. The ACT had a law of apportionment of damages, and so Kerr J had no real choice but to find that there was some contributory negligence on the part of the plaintiff. But note that

4 *Cont.*
SCR 62, and the interesting recent example in *Guerin* v *Proulx et al* (1982) 37 OR (2d) 558.

5 The exception appears to be *Maple* v *David Syme & Co Ltd* [1975] 1 NSWLR 97.

6 This may well explain why Professor Nygh came to the actionable conclusion, criticised by Phegan, supra n 1 at 27-29. Cf Nygh, *Conflict of Laws In Australia* (3rd edn 1976) 264-6.

7 (1967) 10 FLR 151.

that decision is made in the exclusively domestic context in an interactive system in which the apportionment rule has relevance. There was in the case no discussion of the question whether a NSW court would have reached the same conclusion. For the law of NSW was the common law that contributory negligence barred recovery. Contributory negligence was a "defence" in the lex loci, so the question was neatly presented. The defendants would not be "liable" in the lex loci, but the wrong was "actionable" in the lex loci.

Viewed sensibly, there should be no argument about the result. The whole point of the system is to distribute loss through recovery, albeit by manipulation of fictions like "fault" and "personal suit". We all know that the arguments about fault are largely cosmetic and that the arguments are made by and in the interests of insurance funds. All rational policy dictates recovery in the case; no rational policy denies it. Moreover, the NSW rule is both archaic and ludicrous. The ACT so determined by abolishing it. It would not last much longer in NSW. Why on earth should it prevent recovery in this case? The result has been the same all over the common law world, notably in the United Staes. Combine a recovery oriented (plaintiff oriented) system policy with an archaic anti-recovery defence, and sensible[8] courts will do whatever they reasonably can to give effect to the policy rather than the archaism.[9] In the United States this led to "interest analysis" and its variants. In Australia, this led to "actionability" interpretations.

Unless the courts are prepared to throw *Phillips* v *Eyre* out altogether, the rules must be fiddled. The only possible fiddle is with the role of the lex loci, for it is there that the archaisms will show up. (If the plaintiff is silly enough to pick the archaism as the forum, he or she deserves what they get. If the plaintiff cannot find another forum, then the case is effectively domestic anyway.) So reduce the power of the archaism by reducing the role of the lex loci. "Actionability". QED.

But when one considers the multi-state defamation case, different considerations of policy apply. This is far more the classical function of the law of torts. There is no general policy of loss and risk distribution, although the defendant is likely to be insured, and there is no pro-recovery bias. Serious defendant oriented policies balancing freedom of speech with responsibility in the dissemination of information are involved, and the proper balance is one over which different States may rationally differ. Failure by the plaintiff is a real option which does not impose real and terrible social costs.

Equally important is the fact that, when compared with the car accident case, the lex loci is likely to be far more flexible. A car accident is, by and large, a localised event, which takes place in one location. But defamation takes place at the point of publication, and that may well be any number of States; or all of them.[10] This is, of course, not

8 The decision in *Ryder* v *Hartford Insurance Co* [1977] VR 257 is not sensible and should be overruled.

9 The classic American example is the "guest passenger" statute, the existence of which led the New York Court of Appeals to adopt interest analysis. This caused a problem because the statute had no discernable defensible policy to further. See, generally, Ely, "Choice Of Law And The State's Interest In Protecting Its Own" (1981) 23 Wm & Mary LR 173 and Sedler, "Interest Analysis And Forum Preference In The Conflict Of Laws: A Response To The 'New Critics' " (1983) 34 Mercer LR 593.

10 See the more detailed discussion in Handford, "Defamation And The Conflict of Laws In Australia" (1983) 32 ICLQ 452.

necessarily so, but is so in the major cases. Once accepted, two things follow. First, to allow the defendant the defences of the lex loci, ie the "liability" alternative, will generally only reduce the liability of the defendant rather than prevent it entirely. Second, and more important, to deny the defendant the defences of the lex loci will lead to injustice. Since the criterion for jurisdiction in tort cases is the locus delicti, the plaintiff may sue wherever there is publication. The "actionability" interpretation reduces the role of the other leges loci to an absolute minimum. The result would be blatant forum shopping, for in multi-state cases, the plaintiff could effectively choose the law applicable by choice of forum. But if you give the defendant the defences of each lex loci in respect of the publication in each place, then much the same result will follow wherever the plaintiff sues *so long as the plaintiff has the sense to pick a forum permitting recovery by the lex fori.* Some forum shopping is inevitable in any case where the ultimate choice of law rule points to the lex fori, but the "liability" alternative keeps it to a minimum and more nearly balances the position of plaintiff and defendant. It therefore makes perfect sense to adopt the "liability" interpretation.

In the 1960s and early 1970s, the litigation involving the interpretation of *Phillips* v *Eyre* was dominated by motor accident cases. These cases have dropped in frequency as the laws on recovery and, more recently, their statutory incidents such as the abolition of interspousal immunity, have become more uniform. The more recent cases have involved multi-state defamation.[11] It is probable that this is testament to the increasingly national nature of the dissemination of information. It is suggested that it is a mistake to regard the decisions on the interpretation of *Phillips* v *Eyre* in the context of car accident litigation as being common with the interpretation of the same rules in the context of the defamation litigation. It has been submitted above that the questions of policy involved are different, both from the domestic and from the multi-state point of view. In short, it is suggested that the rule in question should have a different interpretation depending on the specific context in which is it to operate. If we are to keep *Phillips* v *Eyre,* its rigour must be qualified by flexibility in the light of defensible domestic and multi-state concerns. This is one way of achieving that result.

(3) THE MEANING OF ACTIONABLE/LIABLE

The discussion above has been conducted on the convenient and erroneous assumption that there is an agreed meaning to the terms "actionable" and "liable". In fact, there is only an agreed difference between the two terms; that is, that "liability" includes a consideration of the defences open to the defendant and that "actionability" does not. That agreed difference was sufficient for the previous discussion, but the time has come to consider the possible variations on the meaning of the words.

So far as the difference is concerned, Professor Phegan has concluded that the appropriate meaning to be attributed to the word "justifiable" is the concept of "liability". However, he mitigates the seeming rigours of

11 The significant decisions are *Gorton* v *Australian Broadcasting Commission* (1973) 22 FLR 181 (ACT); *Renouf* v *Federal Capital Press of Australia Pty Ltd* (1977) 17 ACTR 35; *Cawley* v *Australian Consolidated Press* [1981] 1 NSWLR 225; *Carleton* v *Freedom Publishing Co Pty Ltd* (1982) 45 ACTR 1.

this conclusion by submitting that "some civil liability" only is required. By this he means that in order to recover, it is not necessary for the plaintiff to show identical liability between the lex fori and the lex loci.[12] He suggests that recovery in the lex loci for one head of damages but not another may be enough for recovery of the other head of damages in the lex fori as well; thus if the forum permits recovery for solatium and funeral expenses but the lex loci only permits recovery for the latter, then the wrong is not "justifiable" and the plaintiff recovers according to the rules of the lex fori. There are a number of legal routes to that conclusion, and it seems uncontroversial.

However, Professor Phegan does not stop there. He suggests that "liability" of the defendant to an action in contract in the lex loci may suffice to make the action in tort "not justifiable", and further that some liability of a different defendant in the lex loci may suffice to make the action "not justifiable" for the purposes of an action against another defendant.[13] The former is easily illustrated by instancing dual liability in tort and contract for industrial injury;[14] the latter by an action for damages in the lex fori supported by an action against a government body in a "no-fault" compensation scheme in the lex loci. In fact there are a number of these kinds of alternatives. They may conveniently be represented as follows:

"LIABILITY"

(a) Of the same defendant

	same tort	different tort	some other action
same P		*	
different P	+		=

(b) Of a different defendant

	same tort	different tort	some other action
same P		&	#
different P			

NB: If one is of the "actionable" school, one simple amendment is necessary.

There has been no organised or explicit judicial consideration of which of these categories will fulfil *Phillips* v *Eyre* and which will not. There have, however, been some examples in the case-law.

Example (A) *McMillan* v *Canadian Northern Railway.*[15] The plaintiff was employed by the defendant railway. He suffered injury in the course of his employment in Ontario as the result of the negligence of a fellow employee. Ontario had replaced the common law with a statutory right to compensation against an Accident Fund. The plaintiff brought action in Saskatchewan which retained a common law regime, but which had abolished the doctrine of common employment. Thus, the fictional action in the lex loci was (i) against a different defendant, (ii) for a statutory

12 Supra n 1 at 33, 37.
13 Ibid.
14 A recent example in which the point is not argued is *Coupland* v *Arabian Gulf Petroleum Co* [1983] 2 All ER 434 (QBD).
15 [1923] AC 120.

cause of action, and (iii) involved the same plaintiff. This is marked in the schema above with the symbol #.

This configuration fits any case in which one jurisdiction retains a common law system for compensation, and the other has adopted a "no-fault" variation. The result in the instant case does not assist in any general way. The Privy Council, in a very convoluted opinion, held that the second limb of *Phillips* v *Eyre* was not satisfied in this case, but the decision appears to rest on the legal ground that, at common law in Ontario, the plaintiff would have been barred by the defence of common employment, and the conferral of the statutory right to compensation did not make "not justifiable" what had been "justifiable" in the past. A very odd decision which should be laid to rest.

Example (B) *Plozza* v *South Australian Insurance Company Ltd.*[16] The plaintiffs were passengers in a car that was involved in an accident in Victoria. The drivers of both vehicles were killed. The plaintiffs wished to recover damages against the company which had insured the driver of their car. In a South Australian forum they relied upon s113 of the SA Motor Vehicles Act, which permitted a plaintiff "direct recourse" to the insurance company if, inter alia, the insured was dead. The Victorian lex loci had no such provision.

There are a number of very interesting aspects to this decision. In the present context, it is noteworthy that counsel for the insurance company argued that, in considering what is wrongful in the lex loci, the act must be wrongful in relation to the person who is sought to be made liable in the forum. In short, the argument was that the second schema above contained examples which were all "justifiable". The argument was rejected, but again the case is not of much general help, for it was rejected on the ground that s113 should be classified as sui generis rather than a matter of "tort".

Example (C) *Corcoran* v *Corcoran.*[17] A Victorian husband and wife had a car accident in NSW in their Victorian registered and insured car. The wife brought action in Victoria against the husband for damages for physical injury. Both Victoria and NSW had abolished the common law doctrine of interspousal immunity, but the provision in NSW was limited, for some reason, to vehicles registered in NSW and hence did not cover this case. The defendant therefore argued that the common law in NSW made the wrong "justifiable" in the lex loci.

It should surprise no-one that such an unmeritorious defence did not succeed. For present purposes, however, the interesting point is that the plaintiff argued that she would have in NSW (a) an action against the husband's employer on the basis of vicarious liability or (b) an action against the husband for damage to her personal property, and further (c) that had the wrong injured another passenger or some other person, that other would have a right of action. Action (a) is (i) different defendant, (ii) same plaintiff, and (iii) different tort (?), marked on the schema above as &. Action (b) is (i) same defendant, (ii) same plaintiff, and (iii) different tort, shown in the schema as *. Action (c) is (i) same defendant, (ii) different plaintiff, and (iii) same tort, shown on the schema as +.

16 [1963] SASR 122.
17 [1974] VR 164.

Adam J held that the wife should recover, and did so principally by invoking the so-called "flexibility exception" formulated by Lord Wilberforce in *Chaplin* v *Boys*[18]. Once that is done, the case is an easy one. The policy of Victoria and NSW is identical. The wife should not be barred from recovery from her husband for damages for personal injury arising from a motor accident by the archaic common law rule of interspousal immunity. Judgment for the plaintiff. His Honour's attitude to the variations on liability described above is not precisely clear, but it is a fair inference that he adopted a very strict test of "liability" which would exclude those variations.

Example (D) *Borg Warner (Australia) Ltd* v *Zupan.*[19] An employee of the plaintiff company was injured in Victoria while driving to his place of employment in NSW by the negligence of the defendant, a Victorian. The employer was obliged to pay workers' compensation to its employee under the NSW legislation. The employer then sought indemnification from the defendant by suit in Victoria, relying upon the right to indemnification contained in the NSW legislation. There was no such right of action under Victorian law.

The Full Court of the Supreme Court of Victoria held that the action was justiciable in Victoria. That result was achieved by consideration of a number of different devices designed to avoid the strict consequences of *Phillips* v *Eyre*, such as characterization (or classification) and the "flexibility exception". Of course, this is not strictly a conflicts case of the normal kind, for the accident took place in foro. To make matters easier, assume that the forum is in NSW. In that case, the question is whether the wrong is "justifiable" in Victoria. The answer may be that the wrong is such as to give an action to the employee against the defendant for damages for negligence. That action involves (i) the same defendant, (ii) a different plaintiff, and (iii) a different cause of action. This example is marked = in the schema above.

Again, particularly since this is a hypothetical instance, there is no precise discussion of the point by the court. Nevertheless, it may well be that Marks J had this kind of problem in mind when His Honour stated after a lengthy discussion:

> "As between the Australian States in the context of the accident and compensation schemes here under discussion the conditions of the rule [in *Phillips* v *Eyre*] are capable of being fulfilled notwithstanding that the double actionability may not be between the actual parties but between privies succeeding to their rights as a result of statute or other rule of law." [20]

But again, this was not central to the decision.

It is tempting to conclude at this point that analysis of the concepts of "liable" and "actionable" at this level of sophistication is simply not necessary because there will always be an easier way out for a court determined to get its own way and thus nothing important turns on this kind of logic-splitting. The easier way out may be one of a number of what the Americans used to call "escape devices": classification, the "flexibility exception", or plain "robust common-sense".[21] It may be that

18 [1971] AC 356.
19 [1982] VR 437.
20 Ibid 454.
21 This phrase is applied to the decision of Lucas J in *Edmonds* v *James (No 2)* [1968]

whether the word "justifiable" means "actionable" or "liable" will matter to a court which is unwilling to engage in blatant manipulation, but even so, it has been submitted above that that choice is really governed by an analysis of underlying domestic and multi-state policies.

Professor Phegan comments that:

> "there is no Australian case in which the final result has applied a foreign law at the expense of the lex fori, once the conditions in *Phillips* v *Eyre* have been met . . . there is no precedent for, and therefore no real prospect of, a degree of flexibility which would allow displacement of the lex fori even in the most extreme case."[22]

That conclusion can be accepted if two caveats are entered. First, the defamation cases demonstrate a displacement of the lex fori in the sense that the defendant is entitled to the defences of the lex loci. Second, in at least three cases in which the lex fori and the lex loci were the same, that is, in *Phillips* v *Eyre* terms the case was a domestic one, the courts have applied the provisions of a foreign law. Those cases are *Edmonds* v *James (No 2),*[23] *Hodge* v *Club Motor Insurance*[24] (particularly the opinion of Zelling J), and the *Borg Warner* case discussed above.[25]

The caveats lead one to formulate the governing rule for choice of law in tort in Australia as follows: the court will apply the lex fori unless considerations of policy dictate the application of the lex loci. That statement may then be modified by two further considerations. First, reference to the application of the lex fori is fundamentally a statement of plaintiff preference, simply because the plaintiff may, within the limits of jurisdictional rules, choose the forum in which they will issue process. The jurisdictional limits within Australia are not particularly harsh. Second, the reference to the lex loci cannot be seen as exclusive. For example, the classification fiddles of the lex domicilii (in the case of interspousal immunity) and "the proper law of the quasi-contract" (in direct recourse cases), may conceivably point to a law other than that of the forum or the place where the wrong happened. So considered, the rule closely resembles a variation on the much despised American systems of interest analysis, developed here within the nominal constraints of the Dicean rule-based system and its escape devices. This goes further than the supposedly "interest analysis" based "flexibility exception": in Australia, the sub-text to the impact of statutory intervention in compensation has been the development of an interest analysis approach to the solution of conflict of laws problems.

(4) FIDDLING WHILE PHILLIPS v EYRE BURNS

Conflicts theory in the latter half of the nineteenth century was dominated by the so-called "obligatio" principle, which emphasised the controlling influence of the lex loci delicti. In the United States this led to the adoption of the simple choice of law rule in tort cases: apply the

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21 *Cont.*
QWN 46, paraphrased by Zelling J in *Hodge* v *Club Motor Insurance Agency Pty Ltd* (1974) 7 SASR 86 as "the policy of what were in effect interlocking insurance laws of the two states should not be defeated by technicalities".

22 Supra n 1 at 24, 25.

23 Supra n 21.

24 Ibid.

25 Supra n 19.

lex loci.[26] Such a rule may have been adequate at some point, though that is hard to imagine, but the development of tort law as a system of compensation backed by insurance to ensure loss and risk distribution rendered its simplicity simply unjust.[27] The American courts could not face the consequences of the dysfunction between developing domestic compensation policy and stagnant and inflexible choice of law policy, and coped by the creation of an impressive range of "escape devices" designed to allow the result intended by new compensatory systems.[28] It quickly became apparent that the exceptions had swallowed the rule, and once the New York Court of Appeals began throwing out the old rules in favour of flexible forum oriented policy analysis, the landslide began.[29]

Phillips v *Eyre* had its roots in "obligatio" theory, and it is quite likely that Willes J meant to require civil liability in the lex loci. However, because Willes J balanced "obligatio" with a major role for the lex fori, the choice of law rule represented a balance between forum and lex loci interests, and hence contained an inherent flexibility which, as it happened, permitted adjustment to some extent to the new compensatory domestic policies. Nevertheless, that flexibility was insufficient to cope with the pace of change, and Anglo-Australian courts have also developed a range of escape devices, based on the idea that antiquated choice of law theory should not stand in the way of domestic (particularly forum) compensatory policy.

Some of these escape devices are avowedly based on an analysis of competing policy considerations. If one ignores the very poor wording,[30] the *Chaplin* v *Boys*[31] flexibility exception really says: apply *Phillips* v *Eyre* unless interest analysis produces the more defensible result. Some escape devices look unrelated to a policy analysis, but are not. For example, classification of an interspousal immunity issue as one governed by the lex domicilii represents a judgment that (a) that issue is separate from the issue of negligence based recovery, and (b) the interest in regulating the marital relationship lies with the legal system of its permanent home. Equally, classification of direct recourse provisions as "quasi-contractual" involves a judgment that the choice of law system cannot ignore the reality that the supposedly tortious action is based on a contract of insurance and should be governed by the law regulating the insurance contract.

The reality of "back-door" or "sub rosa" interest analysis is also clear in the way in which the choice of law process has coped — or failed to cope — with the expression of new compensatory policy in legislation. It is not terribly surprising that multi-state defamation actions seem to be governed by a "pure" application of an "obligatio" oriented version of

26 The classic statement is in *Slater* v *Mexican National Railway Co* 194 US 120 (1904).
27 The textbook example is *Alabama Great Southern RR Co* v *Carroll* 97 Ala 126 (1892); 11 So 803.
28 A convenient summary is that contained in Reese and Rosenberg, *Conflict of Laws: Cases and Materials,* (7th edn 1978) 440-457.
29 Notably in *Babcock* v *Jackson* 191 NE2d 279 (1963).
30 The language is that of the Second Restatement. Without entering into detail, it is submitted that we should not be compelled to repeat all of the mistakes made in the development of a respectable choice of law theory, and translate that language into some acceptable form of interest analysis. What is acceptable and what is not is beyond the scope of this discussion.
31 [1971] AC 356.

Phillips v *Eyre,* for it is hard to think of an area in which the basic principles of nineteenth century tort law remain so unchanged. It is equally unsurprising that the escape devices and the really silly decisions occur in the area of accident compensation, for it is in these areas that the common law has been fundamentally altered by legislation designed to spread the risk and loss of accidents in the hazardous twentieth century environment. The development of pro-recovery policies backed by compulsory insurance has so overlaid the basic tort principle of recovery only on the basis of fault, that the latter only emerged through cracks in the patchwork legislative system. The problem of choice of law is one of those cracks.

With the occasional lapse, what happened was that the courts analysed the domestic, forum, legislative, pro-recovery policy and applied it to the cases in which the courts thought it ought to apply. Professor Kelly has documented the process and it is not intended to repeat his valuable discussion here.[32] The point for present purposes is that the result closely resembles American interest analysis in all but name, with *Phillips* v *Eyre* being avoided by some means wherever possible.

The really interesting case is the one in which the analysis leads to the application of non-forum law. The latest example is the *Borg Warner* case, the facts of which have been noted above.[33] It will be recalled that a NSW employer was asking a Victorian court to apply a NSW indemnification provision against a Victorian resident with respect to an accident which occurred in Victoria. It is truly remarkable that the Victorian Full Court held that, all else being equal, it saw no reason why that should not be done.

The first obvious sign of the moribund condition of *Phillips* v *Eyre* is that, in terms of that choice of law rule, this is a domestic case. Indeed, Marks J held that that fact alone rendered the rule in *Phillips* v *Eyre* irrelevant to the case,[34] but it must be doubted whether, had the action concerned an accident in NSW, the result would or should have been any different. On the contrary, one can be forgiven for thinking that a further contact with NSW would render its statute even more relevant. Indeed, the case arose in Albury-Wodonga. The employee lived in Victoria but commuted to work in NSW. Thus, this is one of those cases in which the place of the accident could in fact just as easily have occurred in NSW, and in which the border has no actual functional significance.[35]

The court held that the NSW provision was not so limited as to exclude from its ambit an action against a Victorian defendant in a Victorian court.[36] Murphy J, with whom Starke J agreed, further held that the indemnification action should not be classified as "tortious" so as to attract *Phillips* v *Eyre* arguments. His Honour held that the action was neither "tortious" nor "contractual" in nature.[37] Marks J agreed, but went considerably further, in language reminiscent of the abandonment

32 Kelly, *Localising Rules In The Conflict of Laws* (1974); Kelly, "Theory And Practice In The Conflict Of Laws" (1972) 46 ALJ 52.
33 Supra n 19.
34 Ibid 454-455.
35 See, for eg, Sedler, "The Territorial Imperative: Automobile Accidents And The Significance Of A State Line" (1971) 9 Duquesne LR 394.
36 Supra n 19 at 439, 448.
37 Ibid 442.

of choice of law rules in favour of a variety of "interest analysis" theories by American courts:

> "In my view, the principles by which Victorian courts will apply the laws of others are not per media legal fictions in deference to the esoteric rules of private international law as developed for the purposes of European communities. Strained characterizations of statutory rights as 'quasi-contractual' or in 'tort' can only lead to a capricious operation of the law. The concept of 'quasi-contract' attaching to a statutory right is certainly difficult to follow. In *Bagot's Case* there was no contractual relationship at all between the plaintiff and the deceased owner or the executor of the estate. It was because of the absence of contract that the suit was instituted. I think it unnecessary and undesirable to invoke intricate legal concepts, difficult in application, to meet the problem." [38]

This represents an obvious challenge, not only to *Phillips* v *Eyre* and the escape devices, but to the rule-based classification system of choice of law, at least so far as it applies to the statutory compensation overlay to accident tort law.

But having disposed of the classification arguments, and having disposed of *Phillips* v *Eyre,* how did their Honours rationalise their application of NSW law? Murphy J adopted the more conservative approach of the two. He held, first, that there was no principle of the conflict of laws which prevented that result,[39] second, that a judgment of Cardozo J in *Loucks* v *Standard Oil Co of New York*[40] stated principles applicable in Victoria whether or not those principles were applicable in English courts,[41] and third, that public policy demanded the application of the NSW provision.[42] The first of these holdings is understandable as far as it goes, but a little misleading. The truth of the case was that, according to any of the traditional connecting factors that could be accepted, this was a domestic case. It is therefore not surprising that no rule could be found pointing anywhere. Equally, however, a domestic case prima facie demands the application of domestic law.

The third of these holdings is difficult to analyse. Murphy J notes that the reach of workers' compensation statutes has been legislatively defined so as to provide for cover irrespective of State boundaries[43] as a result of the decision in *Mynott* v *Barnard*,[44] that the provisions in Victoria and NSW are "not dissimilar" with respect to indemnification, and that the provisions "are in this sense complementary, and public policy demands that regard be had in Victoria to the statutory provisions of the State of New South Wales on this subject".[45] His Honour's decision is however characterised by repetition of the idea that there is no rule of the conflict of laws to prevent the application of NSW law.[46]

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38 Ibid 459.
39 Ibid 443, 444, 445.
40 224 NY 99 (1918).
41 Supra n 19 at 444.
42 Ibid.
43 Ibid.
44 (1939) 62 CLR 68.
45 Supra n 19 at 444.
46 Supra n 39.

The second of the three holdings is quite remarkable. One of the escape devices employed by the American courts to avoid the consequences of inflexible obligatio theory and hence the strict application of the lex loci was the "unruly horse" of public policy. Crudely put, the court applied the rule, looked to the rule in the lex loci, shuddered in horror, and held that the rule of the lex loci was contrary to the public policy of the forum and hence unenforceable in the forum.[47] This sort of device is all very well in the right hands, but is so unruly that it will, and did, lead to some very odd decisions.[48] The remarks of Cardozo J in *Loucks* were a criticism and a limitation of that practice. Here, of course, there was no suggestion that the law of NSW on indemnification was contrary to the public policy of Victoria, and so the passage quoted has analogical significance at best. Equally, however, its use demonstrates both the lengths to which courts may go to the avoidance of artificial restrictions on basic policy implementation in the area, it being ironic but significant that the passage does concern an escape device, and the fact that bald policy implementation rather than rule application is in fact the issue.

The judgment of Marks J is the more revolutionary. His Honour embraces the flexibility exception and decries the classification escape device. His judgment is worth extensive quotation, for it gathers together many of the themes explored in the discussion above:

> "Cushioning losses from harm in the Australian context involves fundamentally the two parallel systems of fault and no fault compensation . . . All these things and others are taken care of by the various legislative schemes not by reference to insurance or other funds but by reference to persons whose liability is to be adjudged, usually, in accordance with tort law . . . But there is no fundamental difference [between the various State schemes]. The differences are in the methods by which the insurance or other funds or sources of recovery are identified. The fact that the legislative schemes refer to persons and not funds is necessary because the fault system exists and interlocks with the no fault system. The fault system, of course, is necessarily structured on the law of tort, but operates now as part of a sophisticated welfare programme. Both systems are engaged in cushioning and shifting losses. Having regard to the present-day mobility of people and traffic in and out of the Australian States and Territories individual schemes must be seen as operating together to form something in the nature of a single interlocking structure for the nation. The application of private international law rules as though each scheme was that of a sovereign state at arm's length tends to frustrate their planned operation and increases the likelihood of unintended windfalls and losses. It is the task of the law to ensure that the rules of private international law conform

47 A classic example is *Kilberg* v *Northeast Airlines Inc* 9 NY2d 34 (1961); 172 NE2d 526.

48 A recent oddity is *Pancotto* v *Sociedade de Safaris de Mocambique, SARL* 422 F Supp 405 (1976) in which the Federal District Court of the District of Illinois solemnly held that a personal injury suffered by an American resident on holiday in Mozambique was to be governed by the law of Mozambique as to liability and as to damages, yet held that "our educated prediction is that the Illinois courts would refuse to enforce the Portugese limitation [as to recoverable damages] as unreasonable and contrary to Illinois public policy".

> with public interest consonant with the comity of nations. The courts in recent times have recognised the problems but different views have emerged as to the proper legal basis for applying the law of another State." [49]

This is all good sense. More, the dialectic is that of the precursor to interest analysis. Part of the problem is that the underlying and interlocking common policy of compensation can be frustrated by the conflict of laws dimension. The sillinesses of domestic policy in trying to fit the realities of twentieth century compensation policy into the straitjacket of nineteenth century deterrence oriented tort law surface in the complexities of *Phillips* v *Eyre*. If domestic policy is based on the fictions demanded by the refusal to acknowledge the role of fund liability in the fault based systems, then, first, the weaknesses of an antiquated choice of law rule cannot be ignored, and second, the fact that that choice of law rule is being applied in a homogeneous federation with artificial boundaries cannot be ignored.

Full faith and credit is the shadow behind the substance of policy-based decision making in this case. In *Hodge,*[50] Zelling J was prepared to give effect to the claim to application in South Australia of the Queensland statute per medium of the full faith and credit provision, and in *Plozza,*[51] Hogarth J indicated that he too would be prepared to look to the application of the full faith and credit provision to a statute which was intended to apply to an event occurring in another state. However, the High Court has not considered the question of full faith and credit for some time, and the High Court jurisprudence on the matter is miniscule, consisting entirely of statements that the provision does not do various things.[52] One could be forgiven for thinking that, on the record, the High Court is of the opinion that the clause means nothing significant at all.

In *Borg Warner,* Murphy J was of the opinion that "there is every reason why full faith and credit should be given to the workers' compensation statute law of a sister State", but felt compelled by the force of authority to add that, of course, full faith and credit was no sufficient reason for decision.[53] Marks J was less reticent. His Honour at once gave lipservice to the state of authority while ignoring it:

> "These provisions [of full faith and credit] either singly or cumulatively cannot in my view be construed as a constitutional or legal mandate to the States to apply each others' laws. Indeed, rather the contrary was indicated in *Anderson* v *Eric Anderson & T.V. Pty. Ltd.* (1965), 114 C.L.R. 20. However the mandate enshrines linchpin policy of Federation, that the States and Territories of Australia, whilst sovereign, are fused in one nation, with transcending identity and mutuality of interests. The mandate incorporates the negative direction of non-obstruction . . . In my view, it is public policy interpreted in the light of the constitutional mandate that dictates a conflict of law rule for

49 Supra n 19 at 460-461.
50 Supra n 21 at 102.
51 Supra n 16 at 128.
52 See, generally, Sykes and Pryles, *Australian Private International Law* (1979) 172ff. Much has been written on the subject of full faith and credit, but its desired meaning is beyond the scope of these comments. The last High Court utterance was in *Anderson* v *Eric Anderson* supra n 3, and it was suitably delphic.
53 Supra n 19 at 440.

> Victoria that in the appropriate case in the interests of justice it should apply the law of another State or Territory." [54]

The seeds of a revolution are here. The High Court has not addressed the problem of *Phillips* v *Eyre* and the role of the full faith and credit clause for twenty years. That is far too long. If we are to have conflict of laws chaos, let it be loosed. That at least might provoke some resolution of the present state of uncertainty. If we are to have sense and sensibility, let it be authoritative. The American courts found the combination of lipservice to the antiquated doctrines of the conflict of laws, and the expedient use and abuse of fundamentally silly escape devices intolerable; and so should we. It is unlikely in the extreme that the legislature will move on the problem. It is far too esoteric and difficult. Those who lose are a small minority and it is difficult to whip up scandal over such issues. It is incontestable that judges make law; this is an area in which they can and should do so. The only question is whether or not anyone is prepared to take the risk that the High Court will simply create a bigger mess. So far the verdict appears to be unanimous. The present state of the law continues to be dominated by the hardly disguised policy decisions of State Supreme Courts.

(5) CONCLUSIONS

(A) Australian choice of law in tort is always dominated by the reflex deference to *Phillips* v *Eyre*, probably because the courts are more afraid of the devil they know than the Faust they do not. That deference really means very little except in the hands of judges who take their formal function far too seriously, and who, therefore, are prepared to wring their hands over the silliness that will result. The defamation cases are an aberration based, at least in retrospect, upon a defensible domestic and federalist policy analysis, and the fact that, despite the best efforts of the Australian Law Reform Commission, the law of defamation remains in the nineteenth century to which the rule is *Phillips* v *Eyre* truly belongs. Excepting such cases, the exact interpretation of *Phillips* v *Eyre* really does not matter, unless the use of escape devices is to remain epidemic.

(B) The rule in *Phillips* v *Eyre,* insofar as it remains a rule, is best expressed as: apply the lex fori unless considerations of policy dictate the application of some other law (usually the lex loci) but if that does not produce a defensible result, don't worry; there is a wide range of escape devices.

(C) There is at present no way of telling what the court will do unless you have some information as to the predilections of the judge(s) in question as to (a) the role of the courts in making law, and (b) the appropriately analysed policy issues at stake in the case at hand.

(D) Sooner or later, some litigant will be persuaded to go to the High Court on the issue of full faith and credit, and perhaps *Phillips* v *Eyre* as well. What will happen is in the lap of the . . . (perhaps not).

(E) *Phillips* v *Eyre* is dead but will not lie down. Long live what? The task of academic writers is now to recognise the fact and get to the serious task of articulating the alternatives. We cannot ignore the American experience. Nor can we ignore the fact that while we are reaching expedient solutions, some of which make sense, the courts will not and cannot reasonably be expected to revolutionize the field unless they have some real alternatives. That is the task ahead.

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54 Ibid 461f.