Bernard O'Brien[1]

CHOICE OF LAW IN TORTS

Introduction

The recent decision of the High Court in *Breavington v Godleman*[1] has ushered in a new era of confusion in an area of law which has traditionally been beset with analytical difficulties. As is characteristic of so many recent High Court decisions, there are a number of analyses developed by different judges, with none of them commanding majority support. Thus creating the difficulty of extracting any authoritative rule which would be binding on lower courts. To the traveller in this area, the case provides little direction, some guidance and much confusion.

In this paper I intend to address the peculiar problem with which *Breavington* was concerned. Namely what ought to be the choice of law rule in torts cases. In order to develop a proper understanding of the problem and in order to arrive at a sensible solution to it, it is useful to look back on how this difficulty unfolded. That will involve in the first instance looking at the rule in *Phillips v Eyre*,[2] and why that rule proved to be unsatisfactory. Its subsequent modification by Lord Wilberforce in *Boys v Chaplin*[3] solved two of the three problems inherent in that rule. Lord Wilberforce's modification owed much to the then recent developments in choice of law in torts which had occurred in the U.S., in particular in the State of New York. Modern judicial thinking as to the proper approach to choice of law in torts first evolved in that jurisdiction. The problem which beset the traditional rule in the U.S. was the same as one of the defects or potential defects in the rule in *Phillips v Eyre*. It is therefore useful to look at developments in the U.S. as well.

What the U.S. experience demonstrates and what was confirmed in Breavington is that the solution to the problem of determining what ought to be the rule will not be discovered by the traditional method of case analysis. Given the large number of reported cases in recent times on choice of law in tort in Australia and, in particular in America, a statistical analysis can be employed. Although the method which I have used is both complex and sophisticated, its results can readily be translated into quite comprehensible lay terms. What this analysis reveals is that the judges intuitively have a very strong preference for the application of the common domiciliary law of the parties if there is one, and in the alternative they apply the law of the jurisdiction in which the antecedent relationship between the plaintiff and defendant was formed. Although these two propositions need some elaboration, that is what is revealed in 44 cases taken from Australia and the U.S. This paper will conclude with an analysis of those statistics. I will begin with a brief look back into the past.

The Rule in Phillips v Eyre:

In 1870 the Exchequer Chamber in *Phillips v Eyre* laid down the rule that before an action could be brought on a foreign tort it had to meet two conditions. One, it had to be actionable under the *lex fori*. That is a cause of action would lie, in accordance with the *lex fori*, on that same set of

---

1 (1988) 80 ALR 362.
2 (1870) LR 6 QB 1.
3 [1971] AC 356.

facts if the wrong had occurred in the forum. Two, it 'must not have been justifiable by the law of the place where it was done'.[4] Needless to say, in the course of time this rule raised as many questions as it answered. Was the rule a threshold requirement which had to be satisfied before an action could proceed on a foreign tort, something akin to a jurisdictional requirement, and if so what was the choice of law rule.[5] Alternatively if it was a choice of law rule then which limb of the rule constituted that choice of law rule.[6] Another possibility also existed, namely one limb was a threshold requirement and the other was a choice of law rule. If that was so then the next question was, which was which. Beyond those specific questions the more general question arose as to what practical differences if any would result given the answers to those questions. So far as I have been able to ascertain, there were none. However, as I will show at the end of this paper, there is now a real practical advantage in drawing a distinction between a threshold approach and a substantive approach.

Apart from those academic issues which have taken up a disproportionally large amount of judicial discourse, there was the much more practical and theoretical problems as to the meaning and effect of the second limb of the rule. At different times different courts have favoured one of three interpretations as to the meaning of the requirement that the foreign tort be not justifiable under the *lex loci*. The first was that if the wrong complained of was unlawful under either the civil or criminal law of the *lex loci* then it was not justifiable, and hence that limb was satisfied. This broad approach was adopted by the English Court of Appeal in *Machado v Fontes*,[7] where an action was allowed to proceed on a libel published in Brazil, under whose law only criminal liability attached to such publications. The second view was to say that so long as the wrong complained of attracted some civil liability under the *lex loci* then that was sufficient to satisfy the rule. That was the view taken by O'Bryan J. in *Breavington* at first instance.[8] The third view was that the second limb required that the damages which the plaintiff could recover under the *lex fori* were only those damages which could be recovered under the *lex loci*. This was the view of Lords Wilberforce and Donovan in *Boys v Chaplin*.

The first two approaches solved one problem by creating another, and conversely the third approach solved the problem created by the first two, however it created the problem that the first two solved. In the majority of foreign torts cases both the plaintiff and the defendant come from the forum and that jurisdiction is the natural forum for the action. It was merely fortuitous or unfortuitous that the tort occurred outside the natural forum. In which case there is little logic and considerable injustice in giving the defendant a defence which is available under the *lex loci*, but which is denied to him under the *lex fori*. Alternatively the first two approaches allow for the possibility of forum shopping which is clearly demonstrated in both *Breavington* and *Machado v Fontes*. Mindful of this conundrum Lord Wilberforce adopted a flexibility exception to what would otherwise

4 (1870) LR 6 B 1 at pp.28-29.

5 (This matter was intensely discussed in the judgments of the High Court in *Anderson v Eric Anderson* (1965) 114 CLR 20. This point was also discussed at great length in the judgment of Lord Wilberforce in *Chaplin v Boys*.

6 In Breavington there was a considerable divergence of opinion on this question, although as it was conceded by all that for Australia the position was laid down in the joint judgment of Dixon, Williams, Fullagar and Kitto JJ. in *Koop v Bebb* (1951) 84 CLR 7629.

7 [1897] 2 QB 231.

8 See [1985] VR 851.

have been an inflexible application of the *lex loci*. By adopting at the first stage a rigid application of the *lex loci*, and then relaxing its application in those torts cases in which there exists only a fortuitous connection between the *lex loci* and the tort, then both forum shopping would be discouraged and the injustice which would result from an invariable application of the *lex loci* would also be avoided.

The origins of Wilberforce's flexibility exception lay in judicial developments occurring in the U.S. and in particular in New York. In order to put those developments in their appropriate context it is useful to look at briefly the history of the U.S. approach to choice of law in torts.

The American Experience:

In the early 20th century the Americans developed a general theory concerning the Conflict of Laws. The pioneers of this theory were Holmes J. in *Slater v Mexican National Railroad Co.*[9] and Professor Beale.[10] This theory was based on the concept of legally enforceable rights and liabilities vesting in the parties at the time and place, and in accordance with the law of the place where the cause of action arose. Once vested these rights and liabilities attached themselves to the parties and they carried them with them into whatever jurisdiction they entered. Thus when the plaintiff sued the defendant in a jurisdiction other than the one in which the cause of action arose, the court would not apply the *lex loci*, but rather would enforce the only set of rights and liabilities which existed, namely those created by the *lex loci*. This theory in effect dictated that in Conflicts cases the *lex loci* exclusively prevailed.

This theory was soon subject to academic criticism. Walter Wheeler Cook[11] led the initial assault and convincingly exploded the analytical foundation of Beale's vested rights theory. He also attacked the very notion that there is or that there can be a general theory governing the Conflict of Laws. However despite his efforts and those of an ever growing number of other Conflicts scholars the vested rights theory took a stranglehold on the American judicial imagination. Thus all U.S. jurisdictions adopted the choice of law rule in tort that the *lex loci* exclusively determined liability. This development, as experience had already demonstrated, represented a triumph of grand theory over justice and common sense.

In 1892 in *Alabama Great Southern R.R. v Carroll*,[12] the plaintiff was injured whilst temporarily working in Mississippi. His normal place of employment was Alabama, he was resident in Alabama, his employer was incorporated in Alabama and the contract of employment was made in Alabama. Apart from the site of the accident every other contact was with Alabama. Nonetheless the Supreme Court of Alabama applied the law of Mississippi which provided employers the common law defence of common employment, even though this defence had been abolished by statute in Alabama. Such nonsensical and harsh outcomes were bound to recur again

9 (1904) 194 US 120.

10 See J. Beale A Treatise On The Conflict Of Laws (1935).

11 See W.W. Cook *The Logical And Legal Bases Of The Conflict Of Laws* (1942). Cavers in a Book Review (1943) 56 *Harvard Law Review* 1170, at p.1172 said of Cook: 'the author's technique has enabled him to destroy the intellectual foundations of the system to the erection of which Professor Beale devoted a lifetime.'

12 (1892) 11 So 803.

and again if the choice of law rule in torts required an inflexible application of the *lex loci.*

Unfortunately Beale had bequeathed to American Conflict of Laws two legacies. The first was the vested rights theory and the second was the notion that there is and that there should be a general theory of Conflicts. As to the latter, it is worth noting that Anglo -Australian Conflicts has managed tolerably well in over two centuries without such a theory. Nonetheless so long as the belief existed in the need for such a general theory, then justice would languish in the quagmire of the vested rights theory until a new general theory was developed. The chief proponent of the new theory was Brainerd Currie who published prolifically in the late 1950's and early 1960's. These publications have been collected in a book by Currie entitled *Selected Essays On The Conflict Of Laws*.[13]

The centrepiece of Currie's theory was the concept of governmental interests. To illustrate this theory let us take a case like *Alabama Great Southern R.R. v Carroll.* What interest did Mississippi have in having its law apply to the parties in that case? The answer is none. Whilst the adventitious fact that the accident occurred in Mississippi attracts the operation of Mississippi's laws, apart from that technical formality, Mississippi has no other interest in that case. Whereas Alabama has an overwhelming interest. It is the domicile of the parties, it is the ordinary place of employment and it is the place where the contract of employment was made. Currie described such cases as giving rise to a false conflict. In other words there was merely the legal illusion that the two legal systems were in conflict in respect to the facts of that case, in reality there was no conflict, since only one legal system had any interest in the outcome of the dispute. In the case of a false conflict such as that one, the courts of all jurisdictions, in Currie's opinion, should apply the law of the state which has the only interest in the outcome of the dispute.

However, what of the case where there was a true conflict, in that not only did the law of two or more states apply to the facts of the case, but also two or more of those states had a legitimate interest in the outcome of that dispute? Currie was, subject to some qualifications, of the view that each state should apply its own law if it had a genuine interest in the outcome. A modification of this second aspect of Currie's theory was put forward William F. Baxter[14] in 1963. The proper way in which to resolve a true conflict is to apply the law of the state which has the greater or greatest interest in the outcome. This modification to the Currie theory was much more satisfactory in theory at least because it promoted uniformity as between different jurisdictions as to the result of each case, assuming of course that all jurisdictions would agree on which state had the greater interest. A large assumption indeed. With this theoretical development in place, the stage was now set for the overthrow of the vested rights theory and the birth of a revolution in Conflicts in the U.S.[15]

---

13 (1963) Duke University Press.

14 W.F. Baxter 'Choice of Law and the Federal System' (1963) 16 Stanford Law Review 1.

15 It should be noted that Currie's theory was one of a number of theories which had been formulated as a substitute for the discredited vested rights approach. In the Restatement Second, for instance, the most significant relationship test had been advocated. J.H.C. Morris had advocated that a proper law of the tort test be adopted. See J.H.C. Morris 'The Proper Law of the Tort' (1951) 64 *Harvard Law Review* 881. Another alternative was the 'grouping of contacts' or 'centre of gravity' approach.

That revolution began with the case of *Babcock v Jackson*.[16] In that case two New Yorkers took a trip by car which began and was to end in New York. Whilst travelling through Ontario an accident occurred due to the negligence of the driver. Under the then law of Ontario there was what is known as a guest statute which precluded a guest in a motor vehicle accident from suing his host driver for personal injuries, except in cases of either a wilful or reckless indifference to safety. No such defence was available under New York law. The New York Court of Appeals abandoned the vested rights theory and rejected an inflexible application of the *lex loci*. The language of the majority opinion is consistent with not only the theory advocated by Currie, as modified by Baxter, but also it is consistent with the other theories which were then being advocated[17]. Indeed there is a considerable degree of conceptual overlap as between those theories. Insofar as the facts of *Babcock v Jackson* reveal a false conflict in the most classic form, it was an authority which at the very least illustrated an application of the law of the state which had the only interest in the outcome, namely the law of New York.

Once the wall had been breached in *Babcock v Jackson* the New York Court of Appeals soon discovered that their new approach to choice of law in tort created its own set of difficulties. Two years after the decision in *Babcock v Jackson* the Court of Appeals was faced with its first true conflict case in *Dym v Gordon*.[18] In that case both the plaintiff and defendant were domiciliaries of and ordinarily resident in New York. They were students who were temporarily resident in Colorado for the purpose of taking a summer course. They meet in Colorado and had no prior arrangement formed in New York to meet whilst in Colorado. The plaintiff was a passenger and the defendant was the driver. The plaintiff was injured as a result of a two car collision involving negligence on the part of the defendant. In Colorado there was a guest statute. By a majority of four to three the Court applied the Colorado guest statute, and in the process somewhat unwittingly revealed most of the defects in the Currie approach as modified by Baxter.

The ratio which the majority derived from *Babcock* was stated as follows in the majority opinion of Judge Burke:

> Following our approach in Babcock, it is necessary first to isolate the issue, next to identify the policies embraced in the laws in conflict, and finally to examine the contacts of the respective jurisdictions to ascertain which has a superior connection with the occurrence and thus would have a superior interest in having its policy or law applied.[19]

In the abstract that would appear to be a sufficiently rigorous method of analysis to ensure a reasonably reliable means of predicting the outcome. However in the same paragraph they then went onto identify what subsequently can be seen as the intrinsic difficulty of that approach. They described the policies behind Colorado's guest statute as:

---

16 (1963) 12 NY 2d 473.

17 See supra note 15.

18 (1965) 16 NY 2d 120.

19 Ibid at p.124. Although the decision in*Dym v Gordon* has been effectively overturned by latter New York cases, in particular in *Tooker v Lopez* (1969) 24 NY 2d 575. This statement of principle has been repeatedly affirmed. See, for instance, Tooker at p.574.

> Contrary to the narrow view advanced by the plaintiff, the policy underlying Colorado's law is threefold: the protection of Colorado drivers and their insurance carriers against fraudulent claims, the preventing of suits by 'ungrateful guests', and the priority of injured parties in other cars in the assets of the negligent defendant.[20]

It later transpired after this case was decided that that description of the policy objectives behind the guest statute was largely wishful thinking. The policy behind guest statutes is no more sophisticated than to provide protection for host drivers from 'ungrateful guests'.[21] If that is the case then what interest does Colorado have in applying its policy of protecting host drivers from ungrateful passengers when both passenger and driver are from New York? Presumably it has no interest, in which case New York law should apply.

If the policy behind the statute was to protect insurers, then the critical question would be is the insurer in New York or in Colorado? Presumably, the insurer was in New York. Alternatively, if the policy is to give third party plaintiffs priority over guest passenger plaintiffs, then where did the third party plaintiff come from. In *Dym v Gordon*, he came from Kansas. In which case what interest does Colorado have in giving priority to Kansas plaintiffs? Once again presumably there is no interest.

As can be seen from these questions and answers, as the policy supposedly behind the *lex loci* changes so do the critical issues, and the determination of whether a state has or has not an interest in the outcome. If the determination of what is the policy behind a particular rule can only be, as it is in fact in many cases a matter of speculation, then the outcome will turn on what a majority of the court regard, as a matter of speculation, that policy to be. Such an approach is destined to be one fraught with uncertainty and unpredictability.

This problem is further compounded when the rule providing a partial or total defence is old and its original raison d'etre has long since evaporated, however it's continued existence is perpetuated by the fact that vested interests have prospered under its regime and they are sufficiently powerful enough to resist any political pressure to abolish the rule.[22] In which case it is somewhat artificial to search for and apply the policy behind that rule, or to say that policy is why the state in question has an interest in the outcome.

At the time *Dym v Gordon* was decided, these difficulties could have been dismissed as merely teething problems which are always inherent in the formulation of an entirely new and different rule. However as time unfolded experience revealed that they were not just teething problems, but rather they were a largely inevitable by -product of the new rule.[23] Before concluding this aspect of the discussion, it is worth noting that Currie's

---

20 Ibid.

21 See *Tooker v Lopez* (1969) 24 NY 2d 569.

22 One might reasonably suspect that the continuation of the monetary limit for wrongful death actions in Massachusetts, which was at the heart of the dispute in *Rosenthal v Warren* (1973) 475 F.2d 438 is a case in point.

23 In *Tooker v Lopez* (1969) 24 NY 2d 569 Chief Judge Fuld went to some considerable lengths in his judgment to spell out, in the form of laying down a code, when New York law would apply and when it wouldn't in personal injuries cases arising out of motor vehicle accidents.

analysis resolved these difficulties in the case of a true conflict by applying the lex fori, where there are two competing interests.

At this stage it is useful to assess the influence of these developments in the U.S. on the formulation of Lord Wilberforce's approach in *Boys v Chaplin*.

The Flexibility Exception:

In *Boys v Chaplin* both the plaintiff and the defendant were ordinarily resident in England, that was their domicile and they were temporarily stationed as members of the British armed forces in Malta, where the tort occurred. Under Maltese law the plaintiff could not recover damages for pain and suffering. Whereas, under English law the plaintiff could obviously do so. Lord Wilberforce accepted that the rule in *Phillips v Eyre* should continue to apply, and he also was of the view, as noted earlier, that the requirement of the second limb of the rule should be read strictly so that the plaintiff can only recover under *lex fori* those heads of damage which he can recover under the *lex loci*. Lord Wilberforce appreciated that such a rule, whilst it would be effective in stopping forum shopping would work palpable injustice in some cases. As a consequence he proposed an exception to the rule in *Phillips v Eyre*. He formulated his exception as follows:

> 'Given the general rule, as stated above, as one which will normally apply to foreign torts, I think that the necessary flexibility can be obtained from that principle which represents at least the common denominator of the United States decisions, namely, through segregation of the relevant issue and consideration whether, in relation to that issue, the relevant foreign rule ought, as a matter of policy or as Westlake said of science, to be applied. For this purpose it is necessary to identify the policy of the rule, to inquire to what situations, with what contacts, it was intended to apply; whether not to apply it, in the circumstances of the instant case, would serve any interest which the rule was devised to meet.[24]

At the kernel of Lord Wilberforce's exception is Brainerd Currie's interest analysis as it has been developed by such cases as *Babcock v Jackson* and *Dym v Gordon*. Both cases were in fact referred to by Wilberforce in that judgment.[25]

In *Boys v Chaplin* the House of Lords failed to develop a majority view such as to give the case a ratio. However the view which subsequent authorities have favoured is that of Lord Wilberforce. This is certainly true in Australia.

The Australian Position Prior to Breavington:

In the period subsequent to *Boys v Chaplin* and prior to *Breavington*, there were three Australian cases which adopted and applied Wilberforce's flexibility exception to the rule in *Phillips v Eyre*. They were *Kemp v Piper*,[26]

---

24 [1971] AC 356 at p.391.
25 Ibid at pp.389-391.
26 [1971] SASR 25.

Warren v Warren[27] and *Corcoran v Corcoran.*[28] In *Kolsky v Mayne Nickless Ltd,*[29] On the other hand, the NSW Court of Appeals refused to adopt Wilberforce's flexibility exception. More recently, in *Breavington*, the Full Court of the Victorian Supreme Court did adopt in principle the Wilberforce flexibility exception, although on the facts of that case it clearly was inapplicable.[30]

In those three cases which both adopted and applied the flexibility exception each case involved a false conflict. In all three cases both plaintiff and defendant were domiciled in the forum, the tort action arose out of a motor car accident in relation to a journey which began and was to end in the forum, the plaintiff was a passenger and the defendant was the driver, and finally apart from the place where the accident occurred, there was no other contact with the *lex loci*, and the *lex loci* had no interest in applying its rule to those parties. The flexibility exception, like Currie's interest analysis from which it was derived, is ideally suited to a case involving a false conflict. The problems of uncertainty and unpredictability which emerge from an application of an interest analysis in the case of a true conflict do not arise in the case of a false conflict. Furthermore a false conflict provides the clearest case for departing from an inflexible application of the *lex loci.* Consequently the Australian experience up to *Breavington* has demonstrated the virtues and has not revealed the vices of the flexibility exception.

Before moving on it is worth noting that whatever may be the shortcomings of an interest analysis, insofar as it provides an admirable solution to the problem of a false conflict case it has much to recommend it, since cases involving false conflicts are the most common. In the 44 cases surveyed from England, Australia and the U.S., in 18 of those cases the domicile of both parties and the origin of their relationship prior to the tort were all connected with the forum, and in 6 of those cases none of those contacts were connected with the forum. Thus in 24 cases out of 44 those three contacts related to only one jurisdiction. If we add to those three contacts two more contacts, namely the place of residence of both parties immediately prior to the tort, then in 19 of those 44 cases all the contacts related to only one jurisdiction. Therefore, depending on how you determine what is a false conflict, then at a minimum 43% of those cases involved a false conflict, and it would be more reasonable to treat the 24 cases, being 54.5%, as involving a false conflict. It is also interesting to note that in all of the reported cases in Australia, decided since *Boys v Chaplin*, none have involved a true conflict.

It is against this background of learning and experience that the High Court embarked upon an analysis of this whole question in *Breavington.*

The Analysis in Breavington:

The facts of *Breavington* are quite straight forward. The plaintiff was injured in a motor car accident in the Northern Territory. Under Northern Territory legislation a no fault scheme operated which precluded the right to sue for some but not all the heads of damage recoverable at common

27 [1972] Qd R 386.
28 [1974] VR 164.
29 (1970) 72 SR (NSW) 437.
30 [1987] VR 645 per *Young C.J.* at pp.650-651, and Beach J., with whom King J. agreed, at p.659.

law. In particular the plaintiff could claim for pain and suffering and loss of amenities of life, but could not recover for loss of earnings or earning capacity. At the time of the accident the plaintiff and the first -named defendant were resident and presumably domiciled in the Northern Territory. There was nothing in the facts of that case to suggest that that case had any contact with any other jurisdiction. However, for reasons which are immaterial, the plaintiff was able to sue the defendants in the Supreme Court of Victoria.

In interlocutory proceedings the question arose as to whether a claim for loss of earnings was barred not only in the Northern Territory, but also in Victoria. Before O'Bryan J., at first instance, the plaintiff was allowed to proceed with respect to his claim for all heads of damage. On appeal to the Full Court the decision of O'Bryan J. was overturned and the plaintiff was limited to a claim for pain and suffering and loss of amenities of life. That decision was affirmed by all the seven judges sitting in the High Court. Upon that point alone all the judges agreed.

Brennan and Dawson JJ. adopted the traditional rule in *Phillips v Eyre* without its operation being qualified by any flexible exception.[31] Both judges were of the view that the second limb required civil actionability under the lex loci to the same extent as the plaintiff claims under the *lex fori*,[32] and both were of the view that the choice of law rule was the application of the *lex fori*.[33] Toohey J. agreed with two of those three propositions, namely, that the second limb required civil liability under the *lex loci* to the same extent as under the *lex fori*,[34] and the choice of law rule was the application of the *lex fori*.[35] His Honour, however disagreed with the proposition that there should be no exception to such a rigid rule. His Honour adopted a flexibility exception in much the same terms as had been formulated by Lord Wilberforce.[36]

The Chief Justice, having identified the traditional rule in Australia as to the choice of law in torts was to apply the *lex fori*,[37] moved away from that approach because in his view it encouraged forum shopping.[38] Whilst an application of the *lex loci* clearly discouraged forum shopping, it nevertheless would lead to serious injustice, if it was allowed to operate exclusively.[39] Consequently he proposed that the law to be applied ordinarily ought to be the *lex loci*, unless there was another system of law 'with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection'.[40] His Honour went on to point out that this approach rendered the rule in *Phillips v Eyre* redundant, and so he proposed abandoning the rule.[41]

---

31 See (1988) 80 ALR 362 at p.398 per Brennan J., and at p.423 per Dawson J.
32 Ibid at p.396 per Brennan J., and at p.422 per Dawson J.
33 Ibid at pp.396-397 per Brennan J., and at pp.422-423 per Dawson J.
34 Ibid at p.433.
35 Ibid.
36 Ibid at p.424.
37 This was clearly stated in *Koop v Bebb* (1951) 84 CLR 629 at p.644 per Dixon, Williams, Fullagar and Kitto J.J. This was followed by the High Court in *Anderson v Eric Anderson* (1965) 114 CLR 20.
38 Ibid at p.369.
39 Ibid at p.371.
40 Ibid.
41 Ibid.

This approach in theoretical terms is closely associated with the American approaches which go under the labels 'centre of gravity', or 'grouping of contacts', or, as it was described in the Restatement Second the most significant relationship test. Translated into Anglo -Australian Conflicts terminology, this is a proper law of the tort approach. This approach in theoretical terms is distinct from an interest analysis. The latter looks to the policies underlying the conflicting rules and asks which one has the only or superior interest in applying its rule and policy to the outcome. A proper law of the tort approach, on the other hand, is not concerned with the subjective content of the competing legal systems, but rather with the objective facts which link the tort and the parties with one legal system rather than with another. In practical terms all these approaches produce no significant differences.

The remaining three judges, namely Wilson, Gaudron and Deane JJ., based their decision on the full faith and credit doctrine which is elliptically laid down in s.118 of the Constitution, it states:

> 'Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.

This requirement is further extended in certain respects to the territories by s.18 of the State and Territorial Law and Records Recognition Act 1901 (C'TH). This provision states:

> All public Acts, records and judicial proceedings of any State or Territory, if proved or authenticated as required by this Act, shall have such faith and credit given to them in every Court and public office as they have by law or usage in the Courts and public office of the State or Territory from whence they are taken.

Wilson and Gaudron JJ. delivered a joint judgment and Deane J. delivered a separate judgment in which they formulated the theory underlying the full faith and credit doctrine.

Wilson and Gaudron JJ. approached the problem presented in *Breavington* from two initial assumptions. Firstly, the choice of law rules in tort should not provide a source of comfort or encouragement to forum shoppers. A choice of law rule which adopted the *lex fori* did just that.[42] However, they readily conceded that if this alone was the only adverse consequence flowing from an adoption of the *lex fori* the problem might be alleviated by employing a *forum non conveniens* doctrine.[43] Secondly, however, to use their words that if the lex fori is adopted as the choice of law rule:

> It is not only undesirable, but manifestly absurd that the one set of facts occurring in the one country may give rise to different legal consequences depending upon the location or venue of the court in which action is brought.[44]

The possibility must always exist that two or more legal consequences will flow from the one set of facts if the choice of law rule favours the *lex fori* and a court can entertain and will exercise jurisdiction over a foreign tort.

---

42 Ibid at p.379.
43 Ibid at p.382.
44 Ibid at p.379.

Similarly that same possibility will also exist if courts can entertain jurisdiction over a foreign tort and two or more jurisdictions have the freedom to adopt different choice of law rules. In their Honours opinion the possibility that two or more legal outcomes may emerge from the one set of facts was one of the things to which s.118 was addressed.[45] Section 118 prevented that possibility from arising by requiring all courts within the Australian Federation to determine tortious liability 'by the substantive law that would be applied if the matter were adjudicated in a court exercising the judicial power of the State in which the events occurred'.[46] Thus the legal outcome as it would be determined by the local court is, by virtue of s.118, to prevail in all other Australian jurisdictions.

Their Honours carefully avoided using the expression the *lex loci*, or any other similar expression. This use of a somewhat novel terminology raises the inference that s.118 was not simply a choice of law rule which directed the application of the *lex loci*. The analysis which may have been contemplated by their Honours, but not articulated, was that in applying the substantive law of the local court choice of law rules would be incorporated in that substantive law which would pick up and apply the law of other jurisdictions as well. This possibility is strongly suggested in the following passage:

> Nor is it necessary in the present case to identify by implication from other constitutional provisions . . . the criteria by which the laws of one State rather than another will be selected as supplying the law by which the legal consequences of a set of facts occurring in a State is to be adjudicated. It is sufficient in the present case to note that effect is given to the requirement flowing from s.118 that there should be only one body of State law determining the legal consequences attaching to a set of facts occurring in a State only by the adoption of an inflexible rule that questions of liability in tort be determined by the substantive law that would be applied if the matter were adjudicated in a court exercising the judicial power of the State in which the events occurred.[47]

This ambiguous passage suggests that there are two steps in complying with this constitutional requirement. The first is that the law to be applied is that law which is applied by the local court. The second is that the local court in determining the substantive law must select either its own domestic law, if that is the appropriate course, or otherwise that of the more appropriate sister State. If there is only one stage, namely the application of the domestic rules of the local court, then the choice of law rule being proposed by their Honours is simply a variant of the vested rights theory. In short it is the vested rights theory constitutionally entrenched which is a strange result, given that their Honours presumably were aware of the criticisms which have been made in respect thereof, and they without saying so found those criticisms so insubstantial that they could embrace that theory without even referring to its much publicised critics.

Alternatively, if their Honours are proposing a two step process in which the law of the local court is first adopted, and then it is further determined

45 Ibid at p.386.
46 Ibid at p.387.
47 Ibid at pp.386-387.

whether, on the facts of the particular case, the local law incorporates, by the use of choice of law rules, the law of another State, then what are those choice of law rules? Upon this question the judgment is silent save for the cryptic comment:

> Nor is it necessary in the present case to identify by implication from other constitutional provisions, notably ss.106, 107 and 108, the criteria by which the laws of one State rather than another will be selected as supplying the law by which the legal consequences of a set of facts occurring in a State is to be adjudicated.[48]

All this tells us is that they are choice of law rules which are to be derived by implication from the Constitution, and are therefore not necessarily the traditional choice of law rules. If this is what their Honours are saying, then their judgment is open to a basic criticism, namely that it raises many more questions than it answers, that it is substantially incomplete in its formulation, and hence it provides no useful guidance.

To avoid those criticisms the judgment must be read, as I noted above, as constitutionally entrenching the vested rights theory under another name without addressing any of the real difficulties which that theory creates. The important point to emerge is that the judgment is so ambiguous that you cannot discern an answer to one of the critical questions, namely whether their Honours contemplate anything analogous to a flexibility exception to the operation of the *lex loci*.

The judgment of Deane J., like that of Wilson and Gaudron JJ., adopts an analysis based on full faith and credit. The judgment of Deane J. proposes a complete revolution in thought based not just on s.118, but also on other provisions of the Constitution. His Honour, like all the other judges in *Breavington*, and in particular Wilson and Gaudron JJ., was troubled by the prospect of the choice of law rules producing within Australia two or more inconsistent legal outcomes from the same set of facts.[49] To avoid such an eventuality his Honour erected an elaborate system of jurisprudence. His starting point was the proposition that the Constitution created one national and unitary system of law which consisted of the Constitution and Commonwealth legislation, the constitutions of the States and legislation enacted thereunder and the common law.[50] Within this unitary system there was no place for the rules of private international law.[51] Indeed there was no need for them since, save for one small exception, there could be no conflicts between laws emanating from different sources within this unitary system. Legislation prevails over the common law. Commonwealth laws prevail over inconsistent State laws under s.109 of the Constitution, and State legislation is, under s.118, limited in its territorial reach to affect only those things and events which occur within its boundaries or with which that State has a sufficient territorial nexus.[52]

Furthermore, under s.118, the courts of sister States must recognise and enforce the laws of every State insofar as those laws prescribe the legal consequences which are to flow from events which occur within its

48 Ibid at p.386.
49 Ibid at p.404.
50 Ibid at p.414.
51 Ibid.
52 Ibid.

borders.[53] In relation to events which are subject to valid and conflicting State laws in a case when both States can each claim a sufficient territorial nexus, then the rules of private international law by analogy will be used to determine which State has 'the predominant territorial nexus'.[54]

Thus in the case of a false conflict where the locus of the tort is purely fortuitous the territorial interest or nexus of the *lex loci* would be at best only slight, whereas in the case of parties with a common domicile, the *lex domicilii* would have an overriding interest in the outcome. Presumably in such a case the *lex domicilii* would have the 'predominant territorial nexus'. In the case of a true conflict a similar analysis would apply. There would be a need to weigh the competing interests of two or more States to determine which had the 'the predominant territorial nexus'. In the area of torts, Deane J.'s approach produces by way of a quite different theoretical route and by the use of different but equivalent terminology an interest analysis. The only fundamental difference is that under this approach interest analysis is constitutionally entrenched.

Apart from the formal or verbal distinctions and a different theoretical derivation, this approach in practical terms, in the arena of tort, does not differ from that adopted by Mason C.J. Under the Chief Justice's approach so long as the choice of law rule in tort is governed by the common law and is not affected by State statutes then only one legal consequence can flow from any given set of facts, irrespective of the number of State courts which could exercise jurisdiction with respect to that set of facts. This of course assumes that, for the sake argument, the Chief Justice's view prevails in the High Court. Therefore the only practical difference between the Chief Justice's approach and that of Deane J. is that in the case of the former the State Parliaments still retain the power to make laws altering the choice of law rules insofar as they operate within Australia, whereas under Deane J's approach the State Parliaments lose that power. If it is conceded that the State Parliament ought to retain that power then it is open to them to prescribe choice of law rules different from those at common law and therefore different States could have different rules and thereby different legal consequences could flow from the same set of facts. This is not the place to discuss this issue,[55] I merely make the point that in practical terms that is the only meaningful difference between the approach of Mason C.J. and Deane J. in the area of tort.

In other areas the position would appear to be very different. Take an area like contract. Under the Chief Justice's approach the existing rules on choice of law remain unaffected, whereas under Deane J.'s approach they will be altered in a profound way, and in a way which cannot be readily predicted. For instance, in what circumstances can the parties to a contract stipulate what the proper law of that contract shall be, or is it the case, under Deane J.'s approach, that the parties to a contract have lost the freedom to stipulate the proper law of the contract? Whether or not a particular State has or has not 'the predominant territorial nexus' cannot be affected by a choice made by the parties, one would assume. The substance, operation and all the surrounding circumstances of the contract will determine which State has 'the predominant territorial nexus'. The claim of one State over every other State to have 'the predominant

53 Ibid at p.415.
54 Ibid.
55 I have dealt with this question at length in *Law Review* 169 at pp.177-191.

territorial nexus' cannot be either enhanced or diminished by an express choice made by the parties.

Apart from all these problems which are very difficult, if not impossible, to foresee, there are other difficulties posed by Deane J.'s judgment that go beyond mere conflicts questions. Despite the fact that in s.2(1) of the Australia Acts the States are given full extra -territorial legislative power, according to Deane J., that power is now denied them if they wish to exercise it within Australia.[56] If in practical terms the problem presented by Breavington is that of forum shopping and the possibility of two or more legal consequences flowing from the one set of facts, then surely there are less drastic ways of solving those problems than to invoke such a grand theory with such vast and unforceable ramifications.

As the Chief Justice noted with respect to the authorities in America, the Supreme Court has avoided giving to full faith and credit such an operation which would prevent the further development of judge -made choice of law rules. He then asked: 'Why then should we give the facsimile an interpretation denied to the original?'[57] Deane J.'s approach would seem to attract this criticism in particular.

Apart from Toohey J., who refrained from expressing an opinion on the nature and effect of s.118, the other three judges, namely Mason C.J., Brennan and Dawson JJ., all favoured confining the operation of s.118 so that it would not intrude on the development of choice of law rules, or fundamentally affect the common law principles of private international laws.

In the joint judgment of Wilson and Gaudron JJ., and in the judgment of Deane J., by applying full faith and credit to determining the applicable law in the case of an Australian tort, it must follow that the choice of law rules will differ, depending upon whether the tort is an Australian tort or a foreign tort. Brennan J., on the other hand, was of the view that the same rule should apply to both foreign torts and extraterritorial Australian torts.[58] The Chief Justice, Dawson and Toohey JJ. adopted what appears to be a somewhat ambivalent position on the question of whether the choice of law rules should distinguish between Australian and foreign torts.[59]

The Ratio in Breavington:

Determining the ratio in *Breavington* is not at all easy. As is ordinarily the case one just has to simply determine what the majority was for each proposition. I shall consider the following propositions:

1. The rule in *Phillips v Eyre* in relation to Australian torts.
2. A choice of law rule favouring the *lex loci.*
3. A flexibility exception either to the rule in *Phillips v Eyre* or a rule which prima facie adopts the *lex loci.*
4. The role of s.118 of the Constitution.

I will deal with the last first. Three judges favoured a broad role for s.118, namely Wilson, Gaudron and Deane JJ., three favoured a narrower approach to varying degrees, namely Mason C.J., Brennan and Dawson JJ., and Toohey J. expressed no view either way. Thus the Court was evenly divided on that question.

---

56 Ibid at p.418.
57 Ibid at p.375.
58 Ibid at pp.393 and 397.
59 Ibid at p.372 per Mason C.J., at p.423 per Dawson J. and at p.437 per Toohey J.

In relation to the first proposition, three judges favoured the continued operation of the rule in *Phillips v Eyre*, namely Brennan, Dawson and Toohey JJ., and four rejected its continued operation in respect of Australian torts. They were Mason C.J., Wilson, Gaudron and Deane JJ. Therefore in respect of Australian torts, the rule in *Phillips v Eyre* has been overturned.

With respect to the second proposition four judges favoured the *lex loci* as the prima facie choice of law rule, namely Mason C.J., Wilson, Gaudron and Deane JJ., and three rejected it. They were Brennan, Dawson and Toohey JJ. Thus the *lex loci*, at least as the initial choice, is now the new choice of law rule for torts.

Finally there is the question of a flexibility exception to the *lex loci*. Mason C.J. clearly supported such an exception. For the reasons which I have already given so does Deane J., however he would formulate it differently as the law of the State with 'the predominant territorial nexus'. Toohey J. also favoured a flexibility exception, however it was an exception to the rule in *Phillips v Eyre*. Nonetheless there is nothing in his judgment to suggest that he would be opposed to the application of such an exception to the *lex loci*, consequently he can be notionally, at the very least, treated as supporting such an exception to the lex loci. Brennan and Deane JJ., although they expressed their opposition to a flexibility exception to the rule in *Phillips v Eyre*, they for the same reasons can be treated as notionally opposed to such an exception. That leaves Wilson and Gaudron JJ. holding the balance of power. As I explained above their judgment is so ambiguous and obscure on this question, that it is not possible to discern their position one way or the other. They must therefore be treated as remaining silent on that issue. That results in a majority of three to two with two abstentions on the question of a flexibility exception.

The ratio of *Breavington* is therefore set out in the judgment of the Chief Justice. This may seem a curious result since no other judge appears to be in agreement with the Chief Justice. Nonetheless that is how the numbers pan out. That of course is not to say that the Chief Justice's formulation of the flexibility exception was approved by the Court. Assuming that it is accepted that there is a flexibility exception to the application of the *lex loci*, an authoritative determination of the exact nature of that exception still remains to be developed.

Developments Since Breavington:

Since *Breavington* two important cases have been decided by the NSW Court of Appeals. The first is *Voth v Manildra Flour Mills Pty Ltd.*[60] The second is *Byrnes v Groote Eyelandt Mining Co Pty Ltd.*[61] *Voth* involves a complicated set of facts. In this case there are two plaintiffs, both related companies, being members of a family owned group of companies. The second plaintiff, being the holding company, had a wholly owned subsidiary called Manildra Milling Corporation (MMC), which was incorporated in the State of Kansas, and it did business in the State of Missouri. MMC became indebted to the first plaintiff and paid to that plaintiff interest on the loan. Those interest payments were subject to U.S. withholding tax. The defendant Voth was an accountant who practised in Kansas City Missouri, and provided accountancy services to MMC. Voth

60 (1989) 15 NSWLR 513.
61 (1990) 19 NSWLR 13.

neglected, so it was alleged, to advise MMC of its liability to pay U.S. withholding tax. It was further alleged that had the defendant provided that advice not only would the tax have been paid and the subsequent penalty arising from the failure to do so would have been avoided, but the first plaintiff could have treated those interest payments as exempt income for Australian tax purposes under s.23q of the *Income Tax Assessment Act 1936 (Cth).*

It was alleged that the defendant owed a duty of care not only to MMC, but also to the first and second plaintiffs. Since the second plaintiff was a shareholder, indeed the only shareholder of MMC, the legal basis of such a duty of care is easy to establish. However, in the case of the first plaintiff, the basis of a duty of care is much more tenuous, since it was merely a creditor of MMC and a related company. The damages claimed by the first plaintiff was overpayment of taxes which were irrecoverable, and the deprivation of an opportunity to carry forward tax losses into future years. If the taxable income of the first plaintiff was reduced by the amount of the interest payments which it had received, assuming of course that they could have treated those payments as exempt income on the basis that U.S. withholding tax had been paid on them, it would have made in some years a tax loss which could have been carried forward into future years, thus reducing its taxable income in those years, and hence its tax liability.

The damages of the second plaintiff were more obscure. It claimed that as it was the holding company within the group that the losses which were initially felt by the first plaintiff were ultimately passed on to it, since the group's tax liability was unnecessarily increased by the defendant's negligence. In short, since it received dividends from the first plaintiff, had the correct tax procedure been followed its after tax profits would have been higher. In addition it suffered further loss by being kept out of the use of that extra profit in the form of interest payments on loans which if it had have derived that extra profit it could have partially or totally retired. Consequently it suffered economic loss in the form of an opportunity cost which is recoverable in Australia, by virtue of the High Court decision in *Hungerfords v Walker.*[62] At this point it is worth noting that under the law of Missouri such a head of damage is either not recoverable or it is not recoverable to the same extent as here.[63]

The arguments in that case before the NSW Court of Appeal were concerned with jurisdictional questions, the principal one being *forum non conveniens.* Questions of choice of law in tort did not arise. However, it is noted in Kirby P's judgment in the latter of those two cases, namely in *Byrnes,* that since the Court of Appeal decision in *Voth* special leave to appeal to the High Court has been granted in respect of the issues relating to its previous decisions in *Oceanic Sun Line Special Shipping Co Inc v Fay,*[64] and *Breavington.* So although the Court of Appeal did not look at the choice of law issues, evidently the High Court will. What are those choice of law issues? One can only speculate, however I would suggest that since the only difference between Australian tort law and that of Missouri, which has so far emerged in *Voth,* is that Australian courts have a more generous view as to recovering economic loss in the form of a lost

62 (1989) 63 ALJR 210.
63 See (1989) 15 NSWLR 513 at p.525 per Gleeson C.J.M.
64 (1988) 62 ALJR 389.

opportunity than in Missouri, the choice of law question will therefore I presume revolve around that issue.

In this case there are very real difficulties in determining the situs of the tort. However, that may prove to be irrelevant in respect of the choice of law question. Irrespective of whether NSW or Missouri is the place where the alleged tort occurred, the principal issue may well prove to be whether or not the flexibility exception is invoked, and if so to which law does one look? I will return to this case latter in the discussion.

Finally there is the very recent decision of the NSW Court of Appeal in *Byrnes*. This case clearly exposes another weakness in the approach taken by all the judges in *Breavington* in respect of providing an effective bar to forum shoppers. The traditional rule is that questions of procedural or adjectival law are governed by the *lex fori*. Furthermore statutes of limitation are treated traditionally as being procedural and not substantive in character. Thus where the substantive law of two jurisdictions are the same, but the plaintiff is statute barred in the *lex loci*, but not so in the other jurisdiction, then there is a clear incentive for him or her to sue in that other jurisdiction in order to avoid the limitation period under the *lex loci*. That is what happened in *Byrnes*. That was a worker's compensation case which was statute barred, *inter alia*, in the place of the accident, namely the Northern Territory. So the plaintiff sued in NSW where the action was not statute barred. All three judges in the Court of Appeal interpreted that particular limitation period as being substantive and not procedural.[65] His Honour Mahoney JA had some real misgivings about construing the relevant provision as being substantive in nature, however he was prepared to acquiesce, given that the other two judges were firmly of that view and thereby they were able to prevent what would have been otherwise a blatant exercise in forum shopping.

Obviously such an ad hoc or piecemeal approach will not provide a definitive solution to the problem of treating substantive and procedural laws differently. This is yet another illustration of the intellectual complexities that beset this whole area of law. Much of the confusion which currently surrounds this whole question is the product of the cases themselves, and in particular *Breavington*. Finding a solution to this problem by only using traditional case law analysis has to date singularly failed, not only in this country but also in the U.S. I have attempted to remedy this deficiency by resorting to a statistical analysis as well. This statistical analysis has been employed in order to discover judges' intuitive responses to torts cases in conflicts, rather than merely rely on their intellectual and articulated responses as they appear in the reported judgments.

The Statistics:

Forty-four cases were taken from England, Australia and the U.S. All the variables which could be discovered and which I thought could be relevant were included in the data base. Those variables were then compared with the outcome in each case. The objective was to find which variable or variables or combination of variables could provide the best explanation of the outcome in all of those 44 cases. The statistical analyses which I used were multiple regression analysis (MRA), discriminant analysis and to a

65 They were Kirby P, Mahoney JA and Hope AJA.

lesser extent logistic regression. The results can be analyzed in simple terms by the use of contingency tables.

MRA, discriminant analysis and logistic regression are all closely related statistical methods. The object in using these methods can be simply stated. The outcome in each case is the dependent variable, otherwise known as the response variable. It is the variable which one wants to predict or explain by the use of the other variables, which are known as the independent or predictor variables. In short what I wanted to do was to determine which of the independent variables or set of variables had the strongest relationship with the dependent variable, i.e. the outcome. Regression analysis measures the strength of a relationship between two or more sets of numbers or variables by asking how much of the variation in one set of numbers or variables can be explained by the variation in one or more of the other set of numbers or variables. In regression analysis the parameter used to measure the strength of a relationship between two or more variables is known as R squared. So what I did was by a process of trial and error attempted to discover that set and combination of variables which maximised R squared.

The set of variables so ascertained is therefore those factors which have the greatest influence in determining the outcome in those 44 cases. Those variables turned out to be just two. The first was the jurisdiction in which the antecedent relationship between the parties was based, and the second was the common domicile or alternatively the common domiciliary law of the parties if there was one. At a later point I will examine why those two variables assume such importance. First, however I should explain in more detail how the data was entered into the data base.

Both the dependent variable and the independent variables were what is known as qualitative or categorical variables. In other words they are not susceptible to metric measurements by using such numbers as 1, 2, 3, and so on. They assume a binary form, that is they are either one thing or another. To put it another way, they are variables which can only fall into one of two mutually exclusive categories. For instance, in relation to the outcome of a case I asked the question whether or not the court applied the *lex fori*. That question is susceptible of only one of two mutually exclusive answers, save for two exceptions which I will discuss later. If the answer was yes and the court did apply the *lex fori* then the outcome was recorded as 1, and entered as such into the data base. If the answer was no, then the outcome was recorded as 0. The use of 0 and 1 as the measure of categorical variables are also known as dummy variables.

Likewise all the independent variables were dummy variables. They were: Was the plaintiff at the time of the tort domiciled in the forum? If yes then 1 was entered, if no then 0 was entered. Was the defendant at the time of the tort domiciled in the forum? If yes then 1 was entered, if no then 0 was entered. Was the antecedent relationship between the parties based in the forum? If yes then 1 was entered, if no then 0 was entered. Was the plaintiff resident in the forum immediately prior to the tort? Again the answer was recorded as either 0 or 1. Finally, was the defendant resident in the forum immediately prior to the tort. Once again 0 or 1 was entered depending on the answer. They were the only variables to be initially entered into the data base.

Other variables were used by combining two or more of those initial independent variables. The process by which they were combined was to simply multiply them together. Thus by multiplying the variables which

looked at the domicile of each party a new variable was created, namely did the parties have a common domicile in the forum. If yes then the variable acquired the value of 1, if no then it was assigned the value of 0.

In relation to the variable concerning the antecedent relationship between the parties some difficulties naturally arose. In the case where there was an actual relationship prior to the tort, then there was no difficulty in establishing where it was based, subject to one qualification. In the case of *Miller v Miller*,[66] a wrongful death action was brought in New York in respect of a death arising out of a motor car accident in Maine. In the State of Maine there was a monetary limit of $20,000 on the amount of damages which could be recovered in a wrongful death action. No such limit operated under New York law. The decedent was a passenger in a car driven by his brother. The brother who was the defendant was domiciled and resident in New York. The decedent, although originally domiciled in New York was, at the time of his death, domiciled in Maine. Both brothers operated a family business which originated in New York, but which had been expanded to Maine. Hence the presence of the decedent in Maine. In that case there was clearly an antecedent relationship which originated in New York. However, where was it based at the time of the accident, New York or Maine? As it had originated in New York, and given that one of the two brothers continued to live in New York, and it was a relationship partly based on a business whose headquarters were in New York, I regarded that relationship as being based in New York.

Apart from that case, none of the others raised such difficulties. However, what about those cases in which there was no actual antecedent relationship between the parties. In all cases I assumed that there had to be an antecedent relationship, since without there being any form of antecedent relationship between the parties, how could a tort have arisen between them. The typical case where no actual antecedent relationship existed is the case of a two car collision on a road or highway. In such a case I assumed the antecedent relationship came into existence immediately prior to the accident occurring when there was a relationship of proximity between them on the road or highway, as the case may be. That antecedent relationship was therefore based in the jurisdiction where the accident occurred.

This approach of attributing an antecedent relationship to the parties, based on the situs of the tort, would seem a simple and reasonable expedient. However, there is one case which makes that approach look quite dubious insofar as it is applied to the facts of that case. The case is *Bernhard v Harrah Club*,[67] in that case the plaintiff was injured in a head-on collision on a highway in California. The other vehicle was driven by a man who was heavily intoxicated. The drunk driver had on that same night been drinking at the defendant's premises, which was described, somewhat quaintly, as a tavern. The tavern was located in the neighbouring State of Nevada.

Under Californian law a cause of action existed against a tavern keeper by persons who were injured by a drunk driver, when the drunk driver was sold liquor by the tavern keeper and it was obvious to the tavern keeper

66 (1968) 22 NY 2d 14.
67 (1976) 546 P 2d 719.

at that time that the customer was too intoxicated to drive safely. In Nevada no such cause of action existed. At no time prior to the tort did the plaintiff and defendant even develop a physically proximate relationship. However insofar as the defendant owed a duty of care to the plaintiff, a relationship existed based on proximity. Be that as it may, where was this antecedent relationship based. In California where the plaintiff resided and was injured? Or Nevada where the initial harm of applying alcohol to a man already intoxicated was done? To base the relationship simply on where the accident occurred would be too simplistic.

The Californian Supreme Court in determining that California had the superior interest relied heavily on the fact that the defendant had advertised extensively in California for customers, and that the drunk driver in that case had gone to the defendants tavern in response to one of those advertisements. In giving the majority opinion Sullivan J. said this:

> 'Defendant by the course of its chosen commercial practice has put itself at the heart of California' regulatory interest, namely to prevent tavern keepers from selling alcoholic beverages to obviously intoxicated persons who are likely to act in California in the intoxicated state'.[68]

Equally it might be said that the defendant has by his course of commercial conduct created a relationship with the residents of California. I therefore treated that case as one in which the antecedent relationship was based in California. I will return to this case later in the context of the discussion in respect of *Voth*, in which the two cases share some degree of similarity. It is sufficient at this stage to note that my decision to base the antecedent relationship in California would not go without objection.

Apart from *Bernhard* and *Miller*, the other 42 cases were quite straight forward in terms of ascertaining where the antecedent relationship was based.

In relation to ascertaining the domicile of the parties, that also created some difficulties. Take the case of *Sabell v Pacific Intermountain Express Co*,[69] in that case the plaintiff was domiciled in Colorado, but the report does not say where the two defendants were domiciled. Both defendants were corporations which are described in the case as being 'resident and authorized to do business in Colorado'.[70] They were obviously permanent residents of Colorado, however it is doubtful whether they were incorporated in Colorado, and so strictly speaking they were not domiciled there. However, for the purposes of this statistical analysis, in the case of companies which are permanently resident within a jurisdiction and are doing business in that jurisdiction they have been treated as if they were domiciled in that jurisdiction.

In relation to common domicile, a distinction needs to be drawn between common domicile and common domiciliary law. This point is illustrated by the case of *Pfau v Trent Aluminum Company*,[71] in that case the plaintiff was domiciled in Connecticut, the defendant was domiciled in New Jersey and both attended College in Iowa. The plaintiff was injured in an accident in Iowa whilst a guest passenger in a vehicle driven by the defendant. Iowa

68 Ibid at p.725.
69 (1975) 536 P 2d 1160.
70 Ibid at p.1162.
71 (1970) 263 A 2d 129.

had a guest statute, however neither Connecticut nor New Jersey did. Thus while the parties did not have a common domicile, they did have a common domiciliary law. In *Pfau* it was not clear whether the New Jersey Supreme Court applied New Jersey law or Connecticut law, since on the point in issue they were identical. I have taken the view in this case that the Court did not apply the *lex fori* as such, but rather it applied it, if it did at all, because it was the same as Connecticut law. It can be fairly said that in that case the court simultaneously applied both the *lex fori* and another system of law as well. To put it another way, it did not apply the *lex fori*, rather it applied the common domiciliary law. Consequently, in answer to the question of whether the Court applied the *lex fori*, I gave the answer no.

In *Appendix A* in Table 1 thereof, the relevant data is set out with an abbreviation of the name of each case. In *Appendix B* the full name of each case along with its citation is set out. The cases in Table 1 begin with *Boys v Chaplin* and are initially followed by all the reported cases in Australia on choice of law in torts which were decided after *Boys v Chaplin*. To this proposition there is one qualification. The case of *Kolsky v Mayne Nickless Ltd*[72] has been omitted, the reason being is that in the report there is such an insufficiency of certain factual material that data on the all the variables which I have used in this statistical analysis is not available.

With the exception of *Breavington*, which appears at the bottom of the table, all the other cases in this table are from the U.S. They begin with the decision in *Babcock v Jackson* and include nearly all the cases decided after *Babcock v Jackson*, either in New York or in other U.S. jurisdictions in which the traditional rule of applying the *lex loci* has been abandoned. While this sample is not entirely complete, it is reasonably comprehensive and the cases which have been included have been selected at random. The selection is random in that every reported case on this topic which satisfied the relevant criteria had an equal chance of getting into the data base.

As I have already indicated that amongst the set of independent variables which I looked at the only two variables which were of significance and which accounted for 71% of the variation in the outcome of those cases were the jurisdiction in which the antecedent relationship between the parties was based, and the common domicile or to put it another way the common domiciliary law of the parties, if commonality of domicile or domiciliary law existed.

The coefficient of multiple determination, designated as R squared, was 0.7311, and Adjusted R squared was 0.7109. The regression coefficients were:

Intercept:	0.133333	Probability of arising by chance: 0.0481
Beta 6:	0.866666	Probability of arising by chance: 0.0000
Beta 7:	0.7	Probability of arising by chance: 0.0000
Beta 8:	0.7	Probability of arising by chance: 0.0003

Beta 6, 7 and 8 refer to the slope coefficients of the variables in Table 1 in the columns designated as X6, X7 and X8.

Unless one is reasonably well versed in statistics this information would be totally meaningless. This information can, however, be imparted in a

72 (1970) 72 SR (NSW) 437.

much more comprehensible way in the form of contingency tables,[73] which are set out in Tables 2, 3 and 4.

In Table 2 it can be seen that in 23 of those 44 cases the antecedent relationship was based in the forum, and in every case the *lex fori* was applied. From Table 3 it can be seen that in 24 of those 44 cases the common domicile of the parties was the forum, and in 23 of those cases the *lex fori* was applied. Obviously there is considerable overlap between cases in which the antecedent relationship is based in the forum and where the common domicile is in the forum.

This can be ascertained from Table 4, where it can be seen that in 18 of those 44 cases both the common domicile of the parties and the antecedent relationship between the parties was based in the forum. Thus of the 24 cases in which the common domicile of the parties was in the forum in 18 of those cases the antecedent relationship was also based in the forum. There were therefore 6 cases in which the common domicile of the parties was in the forum, but the antecedent relationship was not based in the forum. Also it can be shown that in Tables 3 and 4 there were 23 cases in which the common domicile of the parties was in the forum and the *lex fori* was applied of which 18 also involved cases in which the antecedent relationship was based in the forum. Thus in 5 of those 23 cases in which the common domicile was in the forum, but the antecedent relationship was not based in the forum, the *lex fori* was applied. That is in 5 cases out of 6. There was therefore 1 case in which the antecedent relationship was not based in the forum, however the common domicile of the parties was in the forum and the *lex fori* was not applied. Put simply this case was out of step with the others.

From Table 2 it can be seen that in 7 cases the *lex fori* was applied and the antecedent relationship was not based in the forum. Of those 7 cases, for the reasons set out above, 5 were cases in which the common domicile was in the forum. There were therefore two cases in which the *lex fori* was applied and in which neither the antecedent relationship nor the common domicile of the parties was in the forum. From Table 4 it can be seen that there were 15 cases in which neither the antecedent relationship nor the common domicile were in the forum. Thus in 13 of those 15 cases the *lex fori* was not applied, and in 2 of those 15 cases the *lex fori* was applied. Those 2 cases were also out of step. There were therefore a total of three cases which were out of step. To put it another way the outcome in those 3 cases is not consistent with the outcome in the other 41 cases.

In summary, therefore, in 23 cases out of 23 the antecedent relationship was based in the forum and the *lex fori* was applied. In 5 cases out of 6 the antecedent relationship was not based in the forum, but the common domicile was and the *lex fori* was applied. In 13 cases out of 15, neither the antecedent relationship nor the common domicile of the parties was in the forum and the *lex fori* was not applied. This leaves a total of 3 cases out of 44 which cannot be explained by these two variables. Discriminant analysis can readily identify these 3 cases. They are *Dym v Gordon*,[74] *Rosenthal v Warren*[75] and *Peters v Peters*.[76]

---

73 I would like to acknowledge my indebtedness to Dr Jarrett of the University of Melbourne Statistical Consultancy Centre in drawing my attention to this method of analysis.

74 (1965) 16 NY 2d 120.

75 (1973) 475 F 2d 438.

76 (1981) 634 P 2d 586.

Dym v Gordon, it will be recalled, involved an action brought by an injured passenger against a host driver. The accident occurred in Colorado where there existed a guest statute. Although the antecedent relationship was formed in Colorado both parties were domiciled in New York where the action was brought. This was the first case decided by the New York Court of Appeals after *Babcock v Jackson*. In the majority opinion Judge Burke said this:

> 'However appealing it might seem to give effect to our own public policy on this issue, merely because the negligent driver of the car in the collision, and his guest, are domiciled here, to do so would be to totally neglect the interests of the jurisdiction where the accident occurred, where the relationship arose and where the parties were dwelling, and to give overriding significance to a single factor reminiscent of the days when British citizens travelled to the four corners of the world secure in the belief that their conduct would be governed solely by the law of England.'[77]

Further on in that opinion, his Honour said:

> 'Neither is it my intention to suggest that in all cases the rule depends on the existence of some relationship for its vitality, nor do I wish to imply that in all relationship cases the seat of the relationship should be paramount.'[78]

Nonetheless by comparison with other cases his Honour attributed to the seat of the relationship an importance which no other court was prepared to accord it. *Dym v Gordon* was effectively overruled by the New York Court of Appeals in *Tooker v Lopez*.[79] The two cases are virtually indistinguishable, and in particular they both constitute cases where the antecedent relationship was not based in the forum, but the common domicile of the parties was in the forum. In the latter case the Court of Appeals applied the *lex fori*.

Before dealing with the case of *Rosenthal v Warren*, I will briefly deal with the third case *Peters v Peters*. That case involved two New York domiciliaries, husband and wife, who whilst visiting in Hawaii were involved in a motor car accident. The car had been hired by the couple and it was driven by the husband. The wife sued her husband for negligence in Hawaii. Under the law of Hawaii the common law defence of interspousal immunity was still in force. However, under New York law it had been abolished by statute. The accident occurred in 1975, long after the New York Court of Appeal had overturned the dominance of the lex loci and, in particular, allowed its domiciliaries to sue each other for torts actionable under New York law, although they are not actionable under the lex loci. It is therefore somewhat curious that the wife should proceed against her husband in Hawaii, rather than in New York.

Indeed Nakamura J, who delivered the opinion of the Supreme Court of Hawaii alluded to this anomaly more than once. Needless to say the plaintiff wanted the Court to apply New York law, and the insurer behind

---

77 Ibid at p.127.

78 Ibid at p.128.

79 (1969) 24 NY 2d 569. The US Court of Appeals for the Second Circuit regarded *Tooker v Lopez* as in substance overruling *Dym v Gordon*. See *Rosenthal v Warren* (1973) 475 F 2d 438.

the defendant wanted the Court to apply Hawaiian law. In the opinion his Honour states:

> 'Mrs Peters could have addressed her plea for damages to the courts of her domicile, and it is likely they would have honored an attempt to prove her husband's fault and the resultant injury. She nonetheless chose to assert her claim in Hawaii, presumably with knowledge that the courts were subject to restraint where interspousal actions are concerned. But 'the forum, qua forum, has an interest in preserving the integrity and economy of its judicial process' R. Weintraub *supra*. And neither Hawaii's interest in discouraging possibly collusive actions nor the State's reluctance to have its tribunals entertain claims its residents are precluded from filing can be discounted in this instance.'[80]

Further on in the opinion his Honour pointed to other interests which Hawaii had. One, to apply New York law in a case such as this would lead to uncertainty and unpredictability, particularly for insurers. Two, to allow an action such as this to proceed would have the indirect effect of pushing up premiums on the insurance of hire cars. This increased premium would not only be paid by tourists and other visitors to Hawaii, who would benefit from allowing the action to proceed, but also residents who hire cars in Hawaii and who would not benefit from allowing the action to proceed.

As I will demonstrate later, the reason why *Peters v Peters* is inconsistent with the other cases is because it was the only case out those 44 in which the plaintiff sought to have a different law apply to that of the *lex fori*. Now I will turn to the case of *Rosenthal v Warren*.

That case involved a wrongful death action brought by the widow of a New York resident and domiciliary. He was a patient who went to Boston Massachusetts 'where he was examined and diagnosed by Dr Warren . . . eight days after an operation performed by Dr Warren at the New England Baptist Hospital, decedent died in the hospital while under the care of the defendant Warren.'[81] Quite clearly on that set of facts the antecedent relationship was based in Massachusetts. The defendant doctor and the Hospital were both domiciled in Massachusetts.

The widow as executrix of the estate brought the action in the diversity jurisdiction of the Federal Court sitting in New York, which was obliged to apply New York law including its choice of law rules when sitting in that State.[82] Under Massachusetts law there existed a monetary limit of $50,000 on the amount that could be recovered in a wrongful death action. In New York no such limit existed. The question faced by the U.S. Court of Appeals for the Second Circuit was whether a New York court would apply the law of Massachusetts or the law of New York.

In the sample of 44 cases which I have been considering, apart from *Rosenthal v Warren*, there were only 4 other cases in which the plaintiff was domiciled in the forum whilst the defendant was not, and the antecedent

---

80 (1981) 634 P 2d 586 at pp.593-594.
81 (1973) 475 F 2d 438 at pp.439-440.
82 See *Klaxon v Stentor* (1941) 313 US 487.

relationship was not based in the forum.[83] In each one of those 4 cases the Court declined to apply the lex fori. In *Rosenthal v Warren*, on the other hand, the Court applied the *lex fori*. The Court of Appeals in balancing the competing interests of New York and Massachusetts took the view that:

> 'In any event, it is our considered view that the New York Court of Appeals would view the Massachusetts limitation . . . as so 'absurd and unjust' that the New York policy of fully compensating the harm from wrongful death would outweigh any interest Massachusetts has in keeping down in this limited type of situation the size of verdicts (and in some cases insurance premiums)'.[84]

It would appear that the Court of Appeal was not prepared to impose on a domiciliary plaintiff an 'absurd and unjust' law emanating from the *lex loci*, and thereby denying that plaintiff rights which she would otherwise enjoy under the *lex fori*. Be that as it may, the decision is unsatisfactory in that it discriminates against foreign defendants in favour of local plaintiffs.

Now that I have looked in detail at these 3 cases which are inconsistent with the other 41 cases, it is important to ask why the two factors of where the antecedent relationship is based and what is the common domicile of the parties, if there is one, are so critical in determining the outcome of choice of law cases in torts.

The Role of the Lex Fori:

The statistics in these 44 cases reveal the circumstances when a court will allow a plaintiff to rely on the benefits of the *lex fori* over some other competing system of law, usually though not invariably the *lex loci*. In other words those cases reveal when a plaintiff can be said to have a legitimate expectation that in his or her case the *lex fori* will apply. In only one of those 44 cases, namely *Peters v Peters*, did the plaintiff wish to rely on a system of law other than the *lex fori*. Obviously when the plaintiff chooses a forum he or she does so on the basis that its law is more favourable to his or her case, than some other alternative forum. A case such as *Peters v Peters* is therefore highly anomalous.

In choice of law cases in torts what the court has to decide is whether the plaintiff has, vis a vis the defendant, a right to the benefit of the *lex fori*. According to 41 of those 44 cases, that right to the benefit of the *lex fori* will only arise if either the antecedent relationship is based in the forum or the common domicile of the parties is in the forum. Otherwise courts will not choose to apply the *lex fori*. This approach can be viewed as somewhat analogous to a *forum non conveniens* approach. If one were to apply the test as formulated by Lord Goff in *Spiliada*,[85] the principle question in that context is to determine whether the forum is the natural forum.[86] Subject to certain exceptions, if it is not the natural forum the action will not be allowed to proceed.

---

83 Those cases were *Offshore Rental Co. v Continental Oil Co.* (1978) 583 P 2d 721, *Fisher v Huck* (1981) 62 P 2d 177, *Casey v Manson Construction And Engineering Co.* (1967) 428 P 2d 898, and *Cipolla v Shaposka* (1970) 267 A 2d 854.

84 (1973) 475 F 2d 438 at p.445.

85 See *Spiliada Maritime Corp v Cansulex Ltd* [1986] 3 WLR 972.

86 Ibid at p.987.

Where the antecedent relationship is based in the forum, or the common domicile of the parties is in the forum, then that forum is the natural forum. In which case the plaintiff has a right not only to invoke the jurisdiction of the forum, but also to rely on an application of the lex fori. This consideration raises the issue of whether the proper approach should be jurisdictional, rather than substantive. As I noted at the beginning of this paper, in the context of the rule in *Phillips v Eyre*, there was much judicial discussion as to whether that rule was a threshold or jurisdictional rule, or whether it was a substantive rule, or in the alternative, whether it was both a threshold and substantive rule. That discussion, at the time, seemed to be entirely academic. However the very recent decision of the NSW Court of Appeal in *Byrnes v Groote Eyelandt* demonstrates the practical importance of this distinction.

A Threshold Approach Versus A Substantive Approach:

In *Byrnes*, it will be recalled, the plaintiff, an accident victim in the workplace in the Northern Territory with all the contacts being in the Northern Territory, brought an action in NSW, *inter alia*, to avoid a limitation period applicable in the Northern Territory, but not applicable in NSW. The Court construed the relevant limitation provision as being substantive rather than as procedural. Thus it barred the action in NSW as well. This case highlights the difficulty in developing substantive choice of law rules designed to prevent forum shopping, while the distinction between substantive and procedural rules continues to be maintained. Under that distinction, it will be recalled, a choice of law rule will only pick up and apply the substantive content of a foreign legal system, and not the procedural rules of that system. In the case of procedure that will always be governed by the *lex fori.*

A threshold approach to the prevention of forum shopping does not face such difficulties. Under the doctrine of *forum non conveniens*, as formulated in *Spiliada*, the court does not draw a distinction between procedural and substantive rules in determining whether an action should be stayed.[87] A stay, for instance, can be granted, even though the action is statute barred in the natural forum.[88] Thus a limitation provision of the *lex loci* need not be construed as substantive rather than procedural in order to prevent a forum shopping exercise designed to avoid that limitation period when a *forum non conveniens* doctrine is used to prevent forum shopping.

Although a threshold approach has the advantage of avoiding the need to draw a distinction between substantive and procedural rules, it also may have certain disadvantages. In a case where the *lex fori* allows for the recovery of a head of damage which is not available under the *lex loci*, a stay of proceedings may impose considerable inconvenience and expense to both parties if the action is to be relitigated in the courts of the *lex loci.* In the interests of an expeditious trial of the action, it may be more appropriate to allow the action to proceed in the forum, and to simply apply the *lex loci.*

Depending upon the circumstances of each case there are both advantages and disadvantages in a threshold approach and a substantive

87 See [1986] 3 WLR 972 at pp.991-993.
88 Ibid at pp.992-993.

approach. Since neither of these two approaches are mutually exclusive I would suggest that both approaches be adopted in a case of forum shopping. Obviously both approaches cannot be applied simultaneously in any one case, consequently, in each case, the court must choose as to which, given the facts and circumstances of the case, is the more appropriate. In a case where the plaintiff is seeking a procedural advantage available to him or her under the *lex fori*, but which is denied under the *lex loci*, a stay of the proceedings in the forum would be more appropriate, as it would in some cases involving a substantive difference between the *lex fori* and the *lex loci*. In other cases, for the reasons which I have already referred to, it would be more appropriate to allow the action to proceed in the forum and to apply the *lex loci*.

Under either approach the ultimate question will be the same, namely should the plaintiff have the benefit of an application of the *lex fori*, irrespective of whether that benefit takes a procedural or substantive form? The answer to that question will depend on whether the forum is the natural forum in the sense that that is where the antecedent relationship between the parties was based, or it is the common domicile of the parties. If it is the natural forum then the action should be allowed to proceed and the *lex fori* should be applied. If it is not the natural forum then either the action should be stayed or dismissed, or the *lex loci* should be applied, depending on which is the more appropriate course of action.

Determining Where The Antecedent Relationship Is Based:

In the ordinary case determining where the antecedent is based will pose few if any difficulties. However in a case like that of *Bernhard v Harrah Club*, very real difficulties will arise. Similarly, in a case like *Voth* it will be very questionable as to which jurisdiction that relationship belonged. In that case it will be recalled, there was no actual relationship between the plaintiff companies and the defendant. In which case one would logically locate the relationship in the jurisdiction in which the alleged tort occurred. However in *Voth* which is the jurisdiction in which the tort occurred is a matter of some controversy. In the NSW Court of Appeal Gleeson C.J., with whom McHugh JA agreed, thought it was 'strongly arguable that the causes of action arose in New South Wales . . . '.[89] Kirby P, on the other hand, took the view that for the purposes of private international law the torts occurred in Missouri.[90]

In a case like *Voth* where there is real uncertainty as to where the tort occurred, then it makes little sense to use the situs of the tort as the determinant of where the relationship is based. In the very rare cases like *Voth* determining where the antecedent relationship is based must involve a detailed analysis of the facts of the particular case, which it will be recalled was the situation in the case of *Bernhard v Harrah Club*. In *Voth* the plaintiff companies alleged that in failing to draw to the attention of a wholly owned American subsidiary the requirement under U.S. law to pay withholding tax, the Australian parent company and another in the same corporate group suffered economic loss in Australia. The defendant had an actual relationship with the wholly owned subsidiary, and through it, it had a relationship with the corporate group. Given that that relationship involved providing accountancy services to the subsidiary in Missouri, it is

89 See (1989) 15 NSWLR 513 at p.529. McHugh JA expressed the same view at p.540.
90 Ibid at p.539.

difficult to escape the conclusion that the relationship between the subsidiary and the defendant was based in Missouri. Likewise the relationship between the defendant and the corporate group was also based in Missouri. In which case it is very difficult to see how it could be argued that nonetheless the relationship between the defendant and the plaintiff companies were based in NSW.

Once the antecedent relationship between the parties is located in Missouri the facts of *Voth* can readily be likened to the facts of *Rosenthal v Warren*. In both cases the plaintiff was resident and domiciled in the forum and the defendant was not. In both cases the antecedent relationship was located outside the forum. Arguably there is a stronger connection between the dispute in *Voth* and the forum than there was in *Rosenthal v Warren*. To that difference there is another which would tilt the scale in favour of applying Missouri law, and that is that Missouri law, unlike the Massachusetts law, cannot be described as 'absurd and unjust'. However in each case the bottomline is, where there is no antecedent relationship in the forum and the parties do not share either a common domicile in the forum or a common domiciliary law, should a plaintiff who is resident and domiciled in the forum be able to recover under the *lex fori*? Resident plaintiffs, with the exception of *Rosenthal v Warren*, have not been given special treatment over other plaintiffs, and it is difficult to justify why they should.[91]

Conclusion:

In 1827 Judge Porter in the Louisiana Supreme Court in the case of *Saul v His creditors* spoke of the subject of Conflict of laws as follows:

> 'the vast mass of learning which the research of counsel has furnished left the subject as much enveloped in obscurity and doubt, as it would have appeared to our understanding . . . '.[92]

In the intervening 163 years little has changed, other than that the material has become so much more vast, and the obscurity and doubt has been transformed into palpable confusion. This is indeed a trend that runs through the 800 year history of the subject.[93] The history of the subject tends to demonstrate that theory rather than clarifying the subject only adds further confusion. The subject is best governed by the instincts of intuition and pragmatism when developed through experience.

---

91 See Kirby P's discussion on this point in Voth (1989) 15 NSWLR 513 at p.537.
92 (1827) 5 Mart. (N.S.) 569.
93 See Friedrich K. Juenger 'A Page of History (1984) 35 *Mercer Law Review* 419.

Appendix A

Table 1

		X1	X2	X3	X4	X5	X6	X7	X8
1	Boys/Chapl	1	1	1	0	0	0	1	0
2	Kemp/Piper	1	1	1	1	1	1	1	1
3	Kerr/Palfr	1	1	1	1	1	1	1	1
4	Warren	1	1	1	1	1	1	1	1
5	Schmidt	1	1	1	1	1	1	1	1
6	Corcoran	1	1	1	1	1	1	1	1
7	Babcock	1	1	1	1	1	1	1	1
8	Dym/Gordon	0	1	1	0	0	0	1	0
9	Macey/Roz	1	1	1	0	0	1	1	1
10	Miller	1	1	0	1	0	1	0	0
11	Tooker	1	1	1	0	0	0	1	0
12	Neumeier	0	0	1	0	1	0	0	0
13	Towley/K	0	0	1	0	1	0	0	0
14	Rosenthal	1	1	0	1	0	0	0	0
15	Schultz	0	0	0	0	0	0	0	0
16	Hurtado	1	0	1	1	1	1	0	0
17	Harrah	1	1	0	1	0	1	0	0
18	Offshore	0	1	0	1	0	0	0	0
19	Paulo	0	0	0	0	0	0	0	0
20	Erwin	1	0	1	0	1	1	0	0
21	Tower/Schw	1	1	1	1	1	1	1	1
22	Fisher/Huc	0	1	0	1	1	0	0	0
23	Reich/Purc	0	0	1	0	1	0	0	0
24	Casey/Mans	0	1	0	1	0	0	0	0
25	Brickner	1	1	1	1	1	1	1	1
26	Fabricius	1	1	1	1	1	0	1	0
27	Ingersoll/	1	1	1	1	1	1	1	1
28	Bishop/Flo	1	1	1	1	1	1	1	1
29	Rostek	1	1	1	1	1	1	1	1
30	Schwartz	0	0	0	1	1	0	0	0
31	Kennedy/Di	1	1	1	0	0	1	1	1
32	Mitchell	1	1	1	0	1	0	1	0
33	Adams/Buff	1	1	0	1	0	1	0	0
34	Sabell	1	1	1	1	1	0	1	0
35	Mellk	1	1	1	1	1	1	1	1
36	Pfau	0	0	1	0	0	0	0	0
37	Cipolla	0	1	0	1	0	0	0	0
38	Pevoski	1	1	1	1	1	1	1	1
39	Jagers	1	1	1	0	0	1	1	1
40	Trahan	1	1	1	1	1	1	1	1
41	Peters	1	0	0	1	1	0	0	0
42	Fells/Bowm	1	1	1	1	1	1	1	1
43	Vick/Cochr	0	0	0	0	0	0	0	0
44	Breavingto	0	0	0	0	0	0	0	0

X1: Outcome 1=Lex fori 0=Not lex fori
X2: Plaintiff's domicile 1=Forum 0=Not forum
X3: Defendant's domicile 1=Forum 0=Not forum
X4: Plaintiff's residence immediately prior to the tort. 1=Residence in the forum. 0=Residence not in the forum.
X5: Defendant's residence immediately prior to the tort. 1=Residence in the forum. 0=residence not in the forum.
X6: Prior relationship between plaintiff and defendant. 1=Prior relationship based in the forum. 0=Prior relationship not based in the forum.
X7: X2*X3
X8: X2*X3*X7

CONTINGENCY TABLES

Table 2:
Antecedent Relationship

		0	1	Total
Outcome	0	14	0	14
	1	7	23	30
	Total	21	23	44

Chi — Square: 10.9317
Probability: 0.0000

**Table 3:
Common Domiciliary Law

		0	1	Total
Outcome	0	13	1	14
	1	7	23	30
	Total	20	24	44

Chi — Square: 18.6092
Probability: 0.0000

Table 4:
Common Domiciliary Law

		0	1	Total
Antecedent Relationship	0	15	6	21
	1	5	18	23
	Total	20	24	44

Chi — Square: 10.9317
Probability: 0.009

Appendix B:

1 *Boys v Chaplin* [1971] AC 356
2 *Kemp v Piper* [1971] SASR 25
3 *Kerr v Palfrey* [1970] VR 825
4 *Warren v Warren* [1972] Qd R 386
5 *Schmidt v Government Insurance Office of NSW* [1973] 1 NSWLR 59
6 *Corcoran v Corcoran* [1974] VR 164
7 *Babcock v Jackson* (1963) 12 NY 2d 473
8 *Dym v Gordon* (1965) 16 NY 2d 120
9 *Macey v Rozbicki* (1966) 18 NY 2d 290
10 *Miller v Miller* (1968) 22 NY 2d 12
11 *Tooker v Lopez* (1969) 24 NY 2d 569
12 *Neumeier v Kuehner* (1972) 31 NY 2d. 121
13 *Towley v King Arthur Rings Inc.* (1976) 40 NY 2d 129
14 *Rosenthal v Warren* (1973) 475 F 2d 438
15 *Schultz v Boys Scouts of America Inc.* (1985) 65 NY 2d 189
16 *Hurtado v Superior Court of Sacremento County* (1974) 522 P 2d 666
17 *Bernhard v Harrah's Club* (1976) 546 P 2d 719
18 *Offshore Rental Co. v Continental Oil Co.* (1978) 583 P 2d 721
19 *Paulo v Bepex Corp.* (1986) 792 F 2d 894
20 *Erwin v Thomas* (1973) 506 P 2d 494
21 *Tower v Schwabe* (1978) 585 P 2d 662
22 *Fisher v Huck* (1981) 624 P 2d 177
23 *Reich v Purcell* (1967) 432 P 2d 727
24 *Casey v Manson Construction and Engineering Co. (1967)* 428 P 2d 898
25 *Brickner v Gooden* (1974) 525 P 2d 632
26 *Fabricius v Horgen* (1965) 132 NW 2d 410
27 *Ingersoll v Klein* (1970) 262 NE 2d 593
28 *Bishop v Florida Specialty Paint Co.* (1980) 389 So 2d 999
29 *First National Bank in Fort Collins v Rostek* (1973) 514 P 2d 314
30 *Schwartz v Schwartz* (1968) 447 P 2d 254
31 *Kennedy v Dixon* (1969) 439 SW 2d 173
32 *Mitchell v Craft* (1968) 211 So 2d 509
33 *Adams v Buffalo Forge Co.* (1982) 443 A 2d 932
34 *Sabell v Pacific Intermoutain Express Co.* (1975) 536 P 2d 1160
35 *Mellk v Sarahson* (1967) 229 A 2d 625
36 *Pfau v Trent Aluminium Company* (1970) 263 A 2d 129
37 *Cipolla v Shaposka* (1970) 267 A 2d 854
38 *Pevoski v Pevoski* (1976) 358 NE 2d 416
39 *Jagers v Royal Indemnity Company* (1973) 276 So 2d 309
40 *Trahan v Girard Plumbing & Sprinkler Co.* (1974) 299 So 2d 835
41 *Peters v Peters* (1981) 634 P 2d 586
42 *Fells v Bowman* (1973) 274 So 2d 109
43 *Vick v Cochran* (1975) 316 So 2d 242
44 *Breavington v Godleman* (1988) 80 ALR 362.