The Interest Approach to Law with Special Reference to Tort Problems

BY AMOS SHAPIRA [MARTINUS NIJHOFF, LEYDEN, 1970, pp. xv, 273]

This book is based on the author's doctoral thesis submitted to the Yale University Law School in 1968. Its aim is to construct a coherent set of choice of law rules based, not on the established choice of law rules, but on a concept of analyzing the public and private interests involved in concrete conflicts cases rather than established rules.

The author attacks the traditional choice of law rules and infers that the courts, while paying lip service to the traditional choice of law rules, have resorted to a variety of ingenious techniques designed to outflank the established rules in order to avoid unfair decisions. Amongst such techniques the author suggests that the vagueness of some choice of law rules, such as the identification of the proper law of the contract, the principle of *renvoi*,[1] and the distinction between procedure and substance, has enabled judges to reach rational decisions within the framework of existing conflicts rules. The author concludes with a frontal attack on the established choice of law rules relating to torts pointing out the difficulty of determining the law *loci delicti* and the difficulties of the English rule in *Phillips* v. *Eyre*.

Having attempted to demolish the existing choice of law rules, the author sets out to attack various of the criticisms of the application of the law of the forum *qua forum*, as leading to forum shopping. The real answer to the problem of forum shopping in the author's view lies in the proper development of jurisdictional rules and the proper application of the doctrine of *forum non conveniens*. The author plainly believes that the forum should normally apply the *lex fori* unless it clearly proves that it would be more rational to apply some foreign law.

Whether it is more rational to apply the *lex fori* or some foreign law is determined, in the author's view, by trying to find the public or private interests embodied in the statutory provisions or case law of the relevant countries and then applying the law that has the greatest interest to the problem at hand. Herein lies the root of the problem, for law makers have rarely perceived the possibility of foreign elements being applicable when legal rules are made. Even where a case is recognized as having foreign elements and the competing interests of the various laws need to be tested against each other, the problems are immense. The aims and policies of the various

1 This seems to neglect the reluctance of Russell, J., in *Re Annesley*, [1926] Ch. 692 to apply the doctrine of *renvoi* at all.

laws may not be immediately apparent and there is a danger of an *ex post facto* attempt being made to impute "appropriate" or "sensible" aims as being at the root of particular laws. In other cases it is difficult, if not impossible, for the judge of the forum to determine accurately what the content of foreign law is. The present rules may often forbid a judge from making an excursion into foreign law, and the judge may be ill equipped to determine the content of foreign laws where the writings of academics are at least as important as statute or case law. Attempting such an adjudication would be a delicate task, requiring very high level of judicial resourcefulness which can only be secured by the combined stimuli of ". . . logic, and history and custom, and utility, and the accepted standards of right conduct. . .". As the author states such skills are rare and "the intellectual skill required for an interest-based choice-of-law process is in principle akin to what is needed for judicial policy analysis in general. Unfortunately, many judges, particularly on the European side of the Atlantic, still lack such a capability." The implication that American lawyers are best fitted for this task would not necessarily be seen by other lawyers as a tribute to the United States.

Moreover, the interest analysis of the foreign and domestic laws, by the author's own admission, presupposes an exhaustive, "time-consuming and expensive judicial process. It necessitates thorough research in foreign legal and related data which may often prove to be meager or inadequate. It might require the hiring of the services of foreign experts, an enterprise usually entailing substantial costs. Above all, it is apt to consume a great deal of time—a valuable asset of over-burdened courts."

In an attempt to allay the fears of those who believe his scheme to be impracticable, the author suggests that "the *lex fori* is always *prima facie*" applicable, and it is up to the interested litigant, after giving due notice to his opponent, to make out a persuasive case for the displacement of domestic law by some interest grounded foreign rule. The fact that foreign law is only to be referred to (and possibly applied) after an *ad hoc* inquiry into its relevance poses problems. The author admits that this pragmatic approach is to some extent inconsistent with having clear cut rules applicable in other cases. This must be a real problem for the practising lawyer. Once the relevance of foreign law has been raised by one of the parties the author encourages the court to make independent inquiry of the foreign law unfettered by many of the current restrictions and expense of proof of foreign law. The author wishes to dispense with the requirement of the personal attendance of foreign witnesses and the acceptance instead of "official legal documents; expert written opinions, normally in the form of affidavits; written opinions of governmental agencies, including courts and diplomatic organs; written opinions of specialized institutions, such as comparative-law institutes; and written opinions of transnational organizations for legal assistance".

Having ascertained all the interests, whether arising from foreign or domestic provisions, applicable to the particular case the author

sets out to see whether the difference between the various provisions are not more apparent than real in that the provisions are either identical, similar or lead to the same conclusion, albeit by a slightly different route. It is regrettable that courts have rarely recognized the "false conflict" situation and Australian readers need look no further than the first instance judgment in *Koop* v. *Bebb* (1951), 84 C.L.R. 629 for an example of judicial short-sightedness.

The analysis of cases in terms of interest does seem to avoid many of the difficulties of deciding whether a matter is substantive (and possibly governed by a foreign law) or procedural and thus governed by the law of the forum. If the matter is one relating to fair trial, convenient procedure or sensible methods of ascertaining facts, the forum has a clear interest in upholding its rules without the need to define whether such rules are procedural or substantive.

Where the varying interests of domestic law and foreign law clash some means of resolution of the conflict is necessary. The author rejects Currie's views that the forum should always invoke its own domestic law since no conceivable choice of law system for the handling of real conflicts can be devised as a matter of judicial science.

At the same time he also rejects Caver's preference for rules imposing liability as against rules insulating a defendant from liability. This rule is no doubt based on the premise that the defendant is either adequately insured or is a corporation better able to accept the loss than the plaintiff who is likely to be a little man of restricted financial resources. Whilst this rule is no doubt true more often than not, it is not impossible for the position to be reversed and for considerable hardship to arise. The author instead opts for a measurement of the respective strengths and merits of the opposing public and private interest implicated in a given situation. Thus where a plaintiff resident in Country A sues a defendant company based in Country A in respect of domages occurring in Country B, the author would not allow heads of damage or quantification of damages to be governed by the law of Country B because its interest in the case is purely fortuitous and inferior to the interest of Country A.[2] Where the interests of the forum and the foreign law are equal, or where the foreign law infringes some strong public policy of the forum, the author suggests that the forum should invoke its own law as a last resort.

The author defends his thesis as providing an *ad hoc* process of flexible decision making focusing on concrete issues and particular cases, albeit in the light of general considerations.

The book concludes by setting out in an appendix the author's own interest analysis of a dozen English tort cases having foreign elements.

The Australian lawyer will find much in this book that is stimulating

2 The result and the reasoning of some, if not all, of their Lordships in *Chaplin v. Boys* supports this view. See, for example, the judgments of Lords Wilberforce and Hodson.

but at the same time will regret the paucity of British Commonwealth references. The book, as might be expected of a thesis submitted to an American University is preoccupied with American decisions and references to American authors. Sometimes the criticisms of English and Australian law seem strange; thus the chief criticism of *Phillips* v. *Eyre* that the author cites is that it places undue influence on the *lex fori* and too little on the *lex loci delicti* with the possibility of a remedy being granted in England where none is obtainable in the place of wrongs. This seems to ignore the fact that the real criticism of the rule as applied in cases like *M'Elroy* v. *M'Allister*, [1949] S.C. 110 and *MacKinnon* v. *Iberia Steamship Co.*, [1955] S.C. 20 is that the rule apparently allows the defendant the benefit of all the defences allowed under both the *lex loci delicti* and the *lex fori*.

At the same time there seems to be an inconsistency in suggesting that the existing rules relating to the proper law of a contract (where the competing factors are weighed against each other) are vague, and that the same approach when applied to weighing interests against each other provides a new and rational choice of law.

The author's analysis of at least one of the cases in the appendix seems to have overlooked certain vital points. The real reason for reliance on Spanish law in the *M. Moxham* seems to have been a private agreement to this effect by the parties [see for instance the analysis of this case by Lord Pearson in *Chaplin* v. *Boys*, [1969] 2 All E.R. 1110, letter A.] The other cases, however, are interestingly analyzed and most English and Australian lawyers would find the discussion rewarding, particularly in relation to the Canadian Railroad cases.[3] The defence of the decision in *The Halley* may be more open to question, however, particularly in a book purporting to issue a new and progressive approach to the choice of law rules.

In short, this is a stimulating book which could be read with benefit by all those interested in the conflict of laws though, whether the author's thesis would bring greater certainty in this area of law and provide greater practicability is still, in the reviewer's opinion, a matter for conjecture.

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3 *Canadian Pacific Railway Co. v. Parent*, [1917] A.C. 195 (P.C.); *Walpole v. Canadian Northern Railway Co.*, [1923] A.C. 113; *Macmillan v. Canadian Northern Railway Co.*, [1923] A.C. 120.

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