# COMMON LAW, FEDERAL AND CONSTITUTIONAL ASPECTS OF CHOICE OF LAW IN TORT.

The rule in *Phillips v. Eyre*[1] has attracted a great deal of comment since it was first formulated a century ago.[2] The main objection to it as a choice of law rule[3] is obvious; the first part of the rule is essentially a forum public policy, not a choice of law, test, and to make matters worse the criterion of public policy which is thus imported is the totally discredited one that a law different in any respect from the *lex fori* must be disregarded to the extent of its inconsistency.[4] If such an approach were ever appropriate to an island-state which was the most powerful in the world and which was convinced that its own standards and institutions, where they differed from those of other nations, were not just different but positively superior, it is certainly not appropriate to a highly developed federal State a century later, particularly as regards tortious situations arising within the federation. For the rule breathes its very life from suspicion of things foreign; yet one premise of federation is, one hopes, an acceptance of the notion that things to be found in sister-States are not so foreign after all. This spirit finds expression in the constitutional injunction to give full faith and credit to the laws, public acts and records, and

1 (1869) L.R. 4 Q.B. 225; affirmed (1870) L.R. 6 Q.B. 1.

2 The literature is voluminous, and the leading works give numerous detailed references: for example, see CHESHIRE (7th ed.), Ch. 10; DICEY (7th ed.), Ch. 28.

3 Yntema, (1949) 27 CAN. BAR. REV. 116, and Spence, *ibid.*, at 661, argue that Willes J. was really formulating a jurisdiction test, that once the first two rules are satisfied there is jurisdiction to hear the case, and the choice of law should be the *lex loci*. The argument is convincingly based upon a close analysis of the language used by Willes J.; but there is certainly no hint in the legal history of the period of a general view that anything more than service within the jurisdiction was necessary to establish jurisdiction in actions in personam. Moreover, the implication of the view is that where suit on a foreign tort fails under the first rule, the matter is not res judicata and could be sued upon again in the courts of another country. This would mean that the unsuccessful plaintiff in Anderson v. Eric Anderson Radio and T.V. Pty. Ltd., (1964) 82 W.N. (Pt. 2) (N.S.W.) 121, to be discussed later in the text, could sue again in the Australian Capital Territory, but there is not a hint of this in the case or in any other case where an action has failed. This argument, therefore, though ingenious, seems out of line with history and authority.

4 The most cogent rejection of such a criterion is to be found in Loucks v. Standard Oil Co. of New York, (1918) 224 N.Y. 99, 120 N.E. 198, *per* Cardozo J.

the judicial proceedings of sister-States.[5] In the light of these factors, it would be surprising if the rule had survived completely intact in the Australian context, and a series of recent cases[6] has made relevant a discussion of its current standing. Two distinct, though related, approaches to the problem of choice of law in tort may be found: (i) interpretation and modification of the rule within its own context as a common law rule, (ii) modification and development of the rule under the compulsion of constitutional and federal considerations.

### *Phillips v. Eyre* as a common law doctrine in Australia.

The peculiar twist which was given to the second part of the rule in *Machado v. Fontes*[7] is well-known. In further reducing the role permitted to the foreign tort law, the case epitomised the affectation that forum law is better than foreign law. The first part of the rule produces anomalous results for plaintiffs who sue in a common law forum less generous in the rights it recognises than is the *lex loci delicti*; it hardly expiates this anomaly to subject the defendant to an even more onerous one, depriving him not simply of the 'procedural' defences of the *lex loci* but also of the plea that his conduct was not *civilly* actionable at all by that law. The High Court of Australia has, of course, taken this point in *Koop v. Bebb*,[8] and while formally disclaiming any "necessity to express a concluded opinion on the controversy that surrounds *Machado v. Fontes*" the majority nevertheless indicated that the act sued upon "must be such as to give rise to a civil liability by the law of the place where it was done."[9] It is extremely unlikely that any Australian court would disregard this dictum, and for present practical purposes it probably represents the law. The familiar rule that, in applying the second part of the rule, one disregards procedural defences conferred by the *lex loci delicti* remains, of course, unaffected.[10]

While recasting the rule in this way however, the High Court at the same time pointed the way to a loosening of it, in wrongful death actions at least, by its discussion of *what* civil cause of action must

5 S. 118. See also, as regards full faith and credit between Territories and States, the State and Territorial Laws and Records Recognition Act 1901-1950.

6 Plozza v. South Australian Insurance Co., [1963] S.A.S.R. 122; Parker v. The Commonwealth, (1965) 38 A.L.J.R. 444; Anderson v. Eric Anderson Radio and T.V. Pty. Ltd., (1964) 82 W.N. (Pt. 2) (N.S.W.) 121; Pederson v. Young, (1964) 110 C.L.R. 162.

7 [1897] 2 Q.B. 231.

8 (1951) 84 C.L.R. 629.

9 *Ibid.*, at 643.

10 As Pederson v. Young topically illustrates.

exist under the *lex loci deliciti.* The wrongful death statutes of all the Australian States are based on Lord Campbell's Act,[11] and like that Act they require that the deceased would, had he lived, have had an action for negligence against the defendant. If this requirement is satisfied, then certain dependants[12] shall have an action for the death itself. In applying *Phillips v. Eyre,* does one merely look to see whether the preliminary negligence satisfies the two parts of the rule or does one look at the negligence plus the derived action for the death? It may clarify the question to remind oneself of the facts and decision of *Koop v. Bebb.*[13]

A resident of Victoria was injured in a motor-car accident in New South Wales. He was taken to hospital in Victoria, where he died a few days later. The Wrongs Act 1928 (Victoria) was framed in the terms already described: "Whensoever the death of a person is caused by a wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof . . ."[14] then certain named dependants shall have an action for that person's death. The children of the deceased, who were the plaintiffs in this action, were within the class of dependants entitled to an action under the Victorian Act. But, initially, the argument was made that the Victorian Act did not, in its terms, cover these circumstances. It was said that the words 'within Victoria' must be read into the Wrongs Act either after the words 'death of a person' or after 'wrongful act, neglect or default' or after 'maintain an action.' Treating the wrong as the essence of the action for wrongful death, the trial judge implied these words into the Act after 'wrongful act, neglect or default', and accordingly, as the accident occurred in New South Wales, found for the defendant. This attempt to find some immediate link between the fact situation and Victoria's power to legislate with regard to it, and then if such a link were found only to provide a right as part of Victorian municipal law, was treated as erroneous by the majority of the High Court: "Section 15 [of The Wrongs Act] should be considered as enacting a rule of Victoria, to be applied in the Victorian courts, and to be applied as it stands, without textual emendation. Its effect in relation to a case which includes an extra-Victorian element depends upon the application of the rules of private

11 Fatal Accidents Act 1846, 9 & 10 Vict. C. 93.

12 Defined in each wrongful death statute.

13 (1951) 84 C.L.R. 629.

14 S. 15.

international law which form part of the law of Victoria."[15] This approach, in turn, was susceptible of two possible interpretations. First, "the section may be considered as simply creating an addition to the category of actionable wrongs by reference to which, in a case involving a foreign element, the rules of private international law give a right of action in Victoria in conditions which they define."[16] This approach looks to the cause of action for the death as well as the preliminary cause of action for negligence which the deceased would have been able to bring had he not died. Only if New South Wales and Victoria have wrongful death statutes covering these facts (which means also that the negligence would have been actionable in both States) will the plaintiff be successful in Victoria. On the other hand, "the section may be regarded as giving a right of action in Victoria whenever the condition is fulfilled that the deceased person (if he had survived) would have been entitled by the law of Victoria, including its rules of private international law, to recover damages for the act, neglect or default which caused his death."[17] By this formulation, it is sufficient if the negligence would have been actionable had it occurred within Victoria and also would have attracted civil liability by the law of New South Wales, where it actually occurred; thereafter whether there is an action for the death itself is for the law of Victoria to determine, and it will reach the same answer whether or not New South Wales has a wrongful death statute.

As it happened, of course, New South Wales did have such a statute, so nothing decisive turned upon which formulation of the effect of the rule in *Phillips v. Eyre* the court invoked. But the possible implications of the second approach are worth noting. If there would have been recovery in the Victorian forum, even if New South Wales had not had a wrongful death statute, a fortiori there would have been recovery if New South Wales had such a statute conferring rights of action upon a different class of dependants from the Victorian statute. And if the forum can positively decide for itself in these circumstances *whose* is the cause of action it can presumably decide too whose is the liability. Negatively to deny a cause of action to a particular plaintiff against a particular defendant where rights conferred by the *lex fori* are less generous than those conferred by the *lex loci delicti* is familiar doctrine;[18] but it would seem to be breaking new ground to refer solely to the *lex fori* where that is more

15 (1951) 84 C.L.R. 629, at 641.
16 *Ibid.*
17 *Ibid.*
18 See The Halley, (1868) L.R. 2 P.C. 193, 16 E.R. 514.

generous than the *lex loci deliciti* to ascertain who can sue and be sued. Previous authority[19] had indicated that general civil actionability by the *lex loci delicti* was not enough, but that actionability was required by this very plaintiff against this very defendant. Nevertheless, the decision of the Supreme Court of South Australia in *Plozza v. South Australian Insurance Co.*[20] would seem to suggest that this implication can be drawn from the majority judgment in *Koop v. Bebb*.

The case arose out of a collision in Victoria in which the plaintiff, a passenger in one of the cars, was injured. The crash was due to the negligence of the driver of the car in which the plaintiff had been travelling, and this driver had been killed in the same accident. The Motor Vehicles' Act 1959 (S.A.) allows an action to be brought directly against the insurer where the insured person is dead;[21] by Victorian law the insured person or his personal representative must first be sued before there can be a remedy against the insurer. The insurance policy, which was issued in Adelaide and whose proper law was South Australian, made the insurers liable to indemnify the insured "in respect of all liability for negligence which may be incurred by the insured . . . in respect of . . . the bodily injury to any person caused by or arising out of the use of such vehicle in any part of the Commonwealth of Australia." It was argued that these terms should be construed as providing indemnity against claims sustainable under the law of the place where the negligence occurred, and that such indemnity did not let in a direct claim against the insurer in a South Australian forum when such a claim would not be available in a Victorian forum.[22] Initially the judge seems to accept this view, for he quotes, apparently with approval, the argument of the defendant: "In determining what is wrongful according to the *lex loci delicti* . . . the act must be wrongful according to that law in relation to the person who is sought to be made liable in tort under the law of the State where the action is brought. The negligent use of [the insured's] car in Victoria was not wrongful in relation to the defendant to this action according to . . . the *lex loci delicti;* . . . on general principles of private international law the plaintiffs have no cause of action against the defendant. . . ."[23]

19 See The Mary Moxham, (1876) 1 P.D. 107.

20 [1963] S.A.S.R. 122.

21 S. 113.

22 Another reason why the claim could not have been brought in a Victorian forum was that the insured's personal representative had not had the letters of administration resealed in Victoria as required by Victorian law before he could be sued; but anyone wishing to sue could compel him to do so.

23 [1963] S.A.S.R. 122, at 126.

Up to this point, this is orthodox *Mary Moxham*[24] reasoning. But it is reasoning which, in this particular case, only takes one part of the way: "I consider, however, that the indemnity so given to persons liable by Victorian law does not of itself exclude the possibility of an injured person also having the right to bring an action direct against the insurer where the policy was issued under South Australian law and the action is brought in this State."[25] So where the law of South Australia, including its conflicts' rules, does not of its own force make a particular defendant liable for a particular foreign tort, that defendant may nevertheless be made liable by a collateral approach. The collateral approach the judge purports to adopt is to argue that the right of an injured person to recover direct against an insurer in stated circumstances is not a right in tort at all but a right sui generis conferred by statute. One looks simply to the statute to define the circumstances under which this statutory cause of action is available; on looking one finds that the most essential ingredient is that an insured person in the course of using an insured vehicle has caused death or bodily injury to some person under circumstances that would have made him liable for negligence; once this fundamental requirement is satisfied, all that remains to be done is to show that the insured person is dead, that the defendant is an 'approved insurer' within the meaning of the South Australian Act, the insurance policy relates to the vehicle concerned, and notice of claim has been given in the manner required by the South Australian statute.[26] The *Phillips v. Eyre* question that has to be asked relates only to the essential ingredient of this statutory cause of action, the negligence: "The true test is not to ask whether the insurer is liable according to the *lex loci delicti* in respect of some wrongful act of the insured person; but to ask whether the insured person was guilty of an act which would have rendered him liable for the negligent use of the motor vehicle according to the law of that place if he had not died. If that condition is fulfilled, South Australian law gives a right of action under section 113 [of The Motor Vehicles' Act 1959] direct against the insurer, and it does not matter whether or not a similar cause of action exists against the insurer according to the domestic law of the State in which the negligence took place."[27] This language seems, at first sight, to be even wider than the second formulation of the majority in *Koop v. Bebb;*

24 (1876) 1 P.D. 107.

25 [1963] S.A.S.R. 122, at 126.

26 *Ibid.,* at 127. For the definition of an "approved insurer," see s. 99 (1), Motor Vehicles Act 1959 (S.A.).

27 [1963] S.A.S.R. 122, at 127.

it seems to contemplate that if the negligence were actionable by Victorian law and the particular defendant came within the ambit of the South Australian Act, then the plaintiff would succeed in South Australia, *even if* the negligence would not have been actionable by South Australian law and the particular defendant would not have been liable by Victorian law. Such a selection of the most favourable (to the plaintiff) parts of the *lex loci* and the *lex fori* would certainly be revolutionary in the Anglo-Australian approach to choice of law in tort;[28] and it is perhaps possible that the judge simply assumed that the negligence would be actionable in both Victoria and South Australia, thus satisfying *Phillips v. Eyre,* as there are no salient differences in their respective laws of negligence. If so, then the decision is exactly in accord with the second formulation in *Koop v. Bebb.* Whichever interpretation of his language is correct, its spirit and effect is far different from his earlier acceptance of the traditional effect of choice of law rules in tort.[29]

Can this approach be applied to the problem of who can sue as well as who can be sued? If it is correct, there seems no reason why not. For example, both New South Wales and Western Australia have wrongful death statutes in the usual terms.[30] But, in contrast to Western Australia, New South Wales does not include within its list of dependants illegitimate children or their parents.[31] If, therefore, an accident occurred in New South Wales in which an illegitimate son who is supporting his mother is killed, the mother would be well-advised to bring her action in Western Australia. If it followed *Koop v. Bebb,* the court would simply ask whether "the condition is fulfilled that the deceased person (if he had survived) would have been entitled by the law of Western Australia, including its rules of private international law, to recover damages for the act, neglect or default which caused his death";[32] if it followed the *Plozza* case, the court would say that "the true test is . . . to ask whether the insured person was guilty of an act which would have rendered him liable for the

28 In the United States, some recent cases have openly done this: See *e.g.,* Kilberg v. Northeast Airlines Inc., (1961) 9 N.Y. 2d 34, 172 N.E. 2d 526; Pearson v. Northeast Airlines Inc., (1962) 307 F. 2d 131; and compare Davenport v. Webb, (1962) 11 N.Y. 2d 392, 183 N.E. 2d 902. Public policy is used in these cases as a positive choice of law criterion, rather than a negative one for cutting down a choice already indicated.

29 See [1963] S.A.S.R. 122, at 126, quoted above at p. 200.

30 Fatal Accidents Act 1959 (W.A.), S. 4. Compensation to Relatives Act 1897-1953 (N.S.W.), S. 3 (1).

31 Compare S. 3 (1), W.A. Act, and S. 4, N.S.W. Act.

32 (1951) 84 C.L.R. 629, at 641.

negligent use of the motor vehicle according to the law of the place . . ."[33] On either of these formulations, the illegitimate mother would succeed in the Western Australian forum. Yet the extent of Western Australia's interest in applying its own notions of 'dependants' to these facts is nil.

This, perhaps, indicates the difference between this hypothetical problem and the actual situations of the cases: in both the forum State had a genuine interest in applying its own statute, once it had been ascertained that the *lex loci delicti* looked for and found the same primary cause of action, negligence, as the *lex fori.* Admittedly, in *Koop v. Bebb* this genuine interest was a slight one, being only a general concern with filling a lacuna in the law of wrongs (namely that wrongful death was not actionable at common law) where one element of that wrongful situation, the death itself, occurred within Victoria. It can be argued, of course, that the essence of a wrongful death action is the wrong rather than the death;[34] nevertheless, Victoria's interest in the death would seem reasonably sufficient to justify an application of its own statute once it has been ascertained that the law of the place of the wrong has not legislated to cover the exact situation.[35]

In the *Plozza* case, the interest was much stronger; the proper law of the insurance policy from which sprung the defendant's involvement in the situation at all was South Australian. Indeed, the court treated this as an alternative basis of decision, saying that an 'approved insurer' who issued an insurance policy whose proper law was South Australian was bound by any statutory extensions to his liability.[36] Though, obviously, subsequent statutes of the State whose law is the proper law can affect the measure of the obligation between the parties,[37] it is difficult to see, in the present state of authority,[38] how this can be relevant to the rights of a stranger to the conract *under*

33 [1963] S.A.S.R. 122, at 127.

34 This is the view of P.R.H. Webb, *The Conflict of Laws and English Fatal Accidents Acts,* (1961) 24 MOD. L. REV. 467, at 469.

35 If the New South Wales Statute specifically purported to control cases where the accident occurred in New South Wales and the death outside that State, there would be nice full faith and credit problems Undoubtedly, if the wrong is the essence of the action, the New South Wales Statute would be making a reasonable claim; but if Victoria treated the death in Victoria as justifying the application of Victorian law, this would not necessarily seem to be so hostile to New South Wales law as to amount to a denial of full faith and credit.

36 [1963] S.A.S.R. 122, at 128.

37 *E.g.,* Kahler v. Midland Bank [1950] A.C. 24.

38 See, particularly, Scruttons v. Midland Silicones Ltd., [1962] A.C. 446.

the contract.[39] Perhaps this part of the judgment is better regarded as indicating an awareness that it is desirable for the forum to have some genuine interest in the resolution of the case if it is to be permitted to look to the *lex loci delicti* only for the limited purpose of assaying its law of negligence, thereafter applying its own law. But it is not put in these terms. The nearest the judge come to doing so is when he puts the converse example: "Where the law of the State in which the policy was issued" (which he seems to equate on this occasion with the State whose law is the proper law of the contract) "gives no remedy direct against the insurer, South Australian law will give no remedy direct against him."[40] South Australia, it seems, has no interest in imposing its own notions of liability where the contract linking the 'approved insurer' with the situation is not governed by South Australian law. But if this statement is read quite literally, it would deny a South Australian remedy where there was a genuine South Australian interest, *e.g.* accident within South Australia, but the contract was not governed by South Australian law. This would certainly be contrary both to the theory being suggested and to the judge's "true test" of liability. Perhaps the key to the example is that it is extremely unlikely that a contract whose proper law is not that of South Australia will have been made by an 'approved insurer'; so where, conversely, it will probably have been made by an insurer who is not an 'approved insurer', and accordingly the statutory prerequisites of a South Australian action cannot be fully complied with.[41]

Presumably, however, the South Australian statutory scheme could be regarded as "simply creating an addition to the category of actionable wrongs by reference to which, in a case involving a foreign element, the rules of private international law give a right of action. . . ."[42] In that case if the *lex loci delicti* has a substantially similar scheme permitting direct actions against its 'approved insurers' and an action is brought against such an insurer in South Australia, the action would succeed even though that insurer is not an 'approved insurer' under the scheme in force in the forum.[43] The judge goes

39 *Cf.* Hogarth J., [1963] S.A.S.R. 122, at 128: ". . . The proper law of the contract of insurance is the law by which the liability of the insurer is to be guaged, not only in relation to a claim by an insured person for indemnity under the policy, but also in relation to claims by persons injured in the negligent use of an insured vehicle."

40 [1963] S.A.S.R. 122, at 128.

41 See above.

42 Koop v. Bebb, (1951) 84 C.L.R. 629, at 641.

43 We seem to have come a long way since Potter v. Broken Hill Pty. Ltd., [1905] V.L.R. 612: see in particular the judgment of Hood J. at 625-631.

even further than this, implying that if the State whose law was the proper law of the contract had such a scheme covering the defendant in the South Australian action, the defendant would be liable because of the constitutional obligation of South Australia to give full faith and credit to the laws of sister-States. Such a basis transcends, of course, *Phillips v. Eyre* notions of equivalence; South Australia would have to permit an action against the foreign 'approved insurer' whether or not it had an equivalent scheme satisfying the first part of the rule. Of course, if the State whose law governed the contract of insurance had such a scheme, the State where the accident occurred did not, and the action was brought in a third State, the problem would arise as to *whose* law should be given full faith and credit; this brings us back to the problem raised earlier of whether, vis-à-vis the plaintiff, the liability of the insurer is tortious or contractual.

The arguments in the case and their implications cover broad sweeps of doctrine in a somewhat confusing way, throwing them all together to make one pot-pourri rather than keeping the various ingredients separate. Certainly the result supports the view, amongst others, that where the *lex loci delicti* and the *lex fori* coincide in recognizing a primary liability for negligence, the *lex fori* may decide the exact nature of the secondary liability where it has a genuine interest in the situation. One such interest is that the defendant is only involved in the situation at all because of a contract whose proper law is that of the forum.

The next case, *Parker v. The Commonwealth,*[44] also seems to lend some support to the second formulation of *Koop v. Bebb.* Like that case it concerns a wrongful death action. The deceased was a civilian electrician working on the destroyer H.M.A.S. Voyager, and he was killed as a result of the collision, on the high seas, between Voyager and H.M.A.S. Melbourne. The collision was due to the negligence of the officers of one or both of the vessels, Parker's death was causatively related to the collision, and the Commonwealth was vicariously liable for the negligence of its military personnel towards civilians. Despite all this, by what law did Parker's widow have a cause of action? The common law was not adequate to assist her on its own, for death is not, of course, a cause of action at common law; moreover, common employment is a defence. Nor did any Commonwealth statute deal with the matter.[45] But Windeyer J., exercising the original

44 (1965) 38 A.L.J.R. 444.

45 S. 56 of the Judiciary Act simply makes it clear that the Commonwealth *can,* in principle, be liable in contract or tort, without defining the substantive law of contract or tort under which it would be liable.

jurisdiction of the High Court pursuant to a writ issued out of its Melbourne Registry,[46] found the answer in Victorian law. He did so for two alternative reasons, only the first of which need concern us at this juncture: "One takes as its starting point that, the action being heard in Victoria, the Commonwealth is subjected to the law of Victoria, including the rules of private international law applicable there: *Musgrave v. The Commonwealth.*[47] Then, having regard to the decision in *Davidson v. Hill,*[48] it is said that the conditions existed necessary to give the plaintiff a right of action according to the doctrine of *Phillips v. Eyre,* the law of Victoria being by adoption the *lex fori.* See *Koop v. Bebb.*"[49] Obviously, the municipal law of Victoria does by itself not cover the situation, for the Wrongs' Act does not purport to extend to deaths caused by accidents on the high seas; but if the *lex loci* provides an action then Victorian conflicts' rules will provide one. This raises two problems—what law is the *lex loci,* and what action must the *lex loci* provide?

The case of *Davidsson v. Hill,* which the judge cites, deals with both of these questions. That case concerned a collision on the high seas between a British vessel and a Norwegian vessel due to the negligence of the master of the British vessel. The widow of a sailmaker who had been killed on the Norwegian vessel as a result of the collision sued in England. What was the *lex loci*? According to Phillimore J. it was either Norwegian or English[50] or the general law maritime. And whichever it was, the plaintiff would succeed. If the reference were to Norwegian law, the second part of the rule in *Phillips v. Eyre* was satisfied because Norway had a wrongful death statute;[51] if English law were the *lex loci* there was no choice of law problem

46 The action was actually commenced in the Admiralty jurisdiction of the High Court; but because original jurisdiction of the High Court in Admiralty matters has been derived, since 1939, not from s. 76 (iii) of the Constitution but from the Colonial Courts of Admiralty Act 1890 it was possible that the High Court's jurisdiction was narrower than its jurisdiction under s. 75 (iii). Accordingly, Windeyer J. treated the case as an ordinary action at law: see 444-445. The other jurisdictional problem was that, though evidence and argument were heard at Melbourne, judgment was given, for reasons of convenience and speed, at Sydney. By consent this was treated as jurisdiction exercised in Victoria: see 448.

47 (1937) 57 C.L.R. 514.

48 [1901] 2 K.B. 606.

49 (1965) 38 A.L.J.R. 444, at 448.

50 This depends on the rather dubious "floating island" theory. *Cf:* CHESHIRE, PRIVATE INTERNATIONAL LAW (7th ed.), 258.

51 This is blandly assumed, because "till it is otherwise pleaded and proved, I take the law of Norway to be the same as our own": *per* Phillimore J., [1901] 2 K.B. 606, at 617.

anyhow;[52] and if general maritime law were the *lex loci,* this at least would have provided an action in negligence for the benefit of the injured man had he not died. That being so, the forum's statute could be looked at to ascertain what further liability flowed from the situation, for the prerequisite cause of action for negligence had come into being.

Applying this reasoning to the *Parker* case, the only laws competing for the position of being the *lex loci* are general maritime law and "Australian" law, *i.e.* Commonwealth law. As we have seen, there is no such law, so we are left with the general law maritime. Accordingly, in relying upon *Davidsson v. Hill,* Windeyer J. must be taken as giving some support to the second approach of the majority in *Koop v. Bebb,* in not requiring the *lex loci* to supply a cause of action for wrongful death but only for the primary negligence. The only reservation that need be made is that it was argued in *Davidsson v. Hill* that general maritime law in fact supplies an action for wrongful death.[53] If this is so, then the case shows a more traditional application of *Phillips v. Eyre* than has been suggested here. But the case did not depend for its result upon such a finding, and in adopting it Windeyer J. would seem to have adopted the implications which have been described.

It follows that, in such circumstances, there seems no reason why any potential plaintiff should be confined to Victoria, rather than any other forum. So if one Australian State has a wider definition of 'dependants' or if another is known, as a practical matter, to be more generous in its awards of damages in wrongful death cases, there is no legal reason why either of these forums should not be selected, even though they have no conceivable interest in or link with the situation. In such unusual circumstances as those which were before the Court in the *Parker* case, in the absence of Commonwealth law, this is, perhaps, inevitable. In relation to such an ubiquitous and impersonal defendant as the Commonwealth, few may feel much concern at the possible variation of rights by the volition of individual defendants. But the same opportunity for forum-shopping could arise with regard to a State shipping line or a private shipping company or the owner of a single cray-boat; and in such circumstances we should have to ask ourselves whether indiscriminate bestowal of rights upon plaintiffs

52 Though there is a problem of statutory interpretation as to whether a foreign non-resident can properly be said to be within the purview of the English Act: see Adam v. British and Foreign Steamship Co., [1898] 2 Q.B. 430.

53 See *per* Phillimore J., [1901] 2 K.B. 606, at 618.

would be an adequate policy in the development of conflicts' rules. If, once a general liability has been established by reference to the *lex loci delicti,* the *lex fori* is to be permitted a dominant role in determining such matters as the conditions under which a wrongful death action can be brought or who can sue and be sued in negligence, it seems desirable that some concept of forum-interest should control the application of forum law. As it happened, the courts in *Koop v. Bebb* and *Plozza v. South Australian Insurance Co.* had such an interest sufficient to justify the application of their own law, and in *Parker v. The Commonwealth* there was no persuasive counter-interest. But the decisions were not articulately based upon such an approach. Accordingly, as they stand the cases could seem to permit a more unrestricted scope to the *lex fori,* within the context of the rule in *Phillips v. Eyre* than is proper in the Australian context.

## Constitutional and federal considerations in choice of law.

In three recent cases[54] the effect of sections 79 and 80 of the Judiciary Act upon the problem of appropriate choice of law in tort has been considered. An ingenious attempt was made by Jacobs J., dissenting in *Anderson v. Eric Anderson Pty. Ltd..,*[55] to take choice of law in tort cases subject to federal jurisdiction out of the realm of *Phillips v. Eyre* altogether and exclusively into the realm of the Judiciary Act. It may be instructive to examine this case.

The defendant's employee, driving a truck negligently in the Australian Capital Territory, caused a collision with a car driven by the plaintiff, injuring him. The plaintiff was 10% contributorily negligent.[56] He brought an action in New South Wales, by whose law any amount of contributory negligence defeated the entire claim; the law of the Australian Capital Territory, on the other hand, ordered a proportionate reduction in the measure of damages.[57] On these facts, the majority had no difficulty, by a conventional application of *Phillips v. Eyre,* in finding for the defendant. For the rule applied to State/Territory as well as State/State situations; if all the circumstances had arisen within New South Wales they would not have been actionable;

54 Anderson v. Eric Anderson Radio and T.V. Pty. Ltd., (1964) 82 W.N. (Pt. 2) (N.S.W.) 121; Parker v. The Commonwealth, (1965) 38 A.L.J.R. 444; Pedersen v. Young (1964) 110 C.L.R. 162.

55 (1964) 82 W.N. (Pt. 2) (N.S.W.) 121, at 129-132.

56 This finding was made by the New South Wales trial jury.

57 Law Reform (Miscellaneous Provisions) Ordinance 1955, Part 5.

accordingly, the first part of the rule was not satisfied.[58] The majority was anything but complacent about having to reach this conclusion: "The rights of the plaintiff as recognised and enforced by the courts of New South Wales are thus vastly different from those that would have been established had the action been brought and determined in the courts of the Australian Capital Territory. This is anomalous and arbitrary in the extreme. However it would seem to be inevitable in the light of the rigid and obsolete rule of private international law as to torts, which, in the absence of any appropriate legislation on the subject,[59] provides the test to apply in order to determine which is the appropriate law in a case in which a tort is committed in the Australian Capital Territory and the action to recover damages for the injury resulting therefrom is brought in this State."[60] Jacobs J. did not accept so readily that this "rigid and obsolete rule" told the whole story about choice of law in this situation.

He argues, firstly, that where an action for negligence that has occurred in the Australian Capital Territory raises a problem of contributory negligence, original jurisdiction in that cause could have been conferred upon the High Court, because it is a matter "arising under . . . laws made by Parliament."[61] The laws in question were The Seat of Government (Acceptance) Act 1909-1938 and The Seat of Government (Administration) Act 1910-1947, which adopted the law of tort from New South Wales, and The Law Reform (Miscellaneous Provisions) Ordinance 1955, which effected the modification of the common law defence of contributory negligence. It seems undeniable that laws and Ordinances made for the government of the Australian Capital Territory are, indeed, "laws made by Parliament" within the meaning of the Constitution,[62] for they certainly are not made by anyone else. What is much more dubious is whether this matter *arises under* such laws. Brereton J., presumably bearing in mind the language of Latham C.J. in *R. v. The Commonwealth Court of*

58 The characterisation of the Australian Capital Territory Ordinance as substantive makes no difference, of course, to the effect of the first part of the rule: see *per* Hardie J., at 125.

59 This could not be federal legislation, for to legislate generally with regard to the law of tort is not a power within s. 51, except where s. 51 (xxxvii) is operative. Otherwise, uniform legislation by all the States, backed up by Ordinances in similar terms for the Territories, is the only way, short of Constitutional amendment, that a uniform law of tort could be established.

60 *Per* Hardie J., (1964) 82 W.N. (Pt. 2) (N.S.W.) 121, at 129.

61 Section 76 (ii) of the Constitution.

62 They are laid before Parliament and can be disallowed; see s. 12 Seat of Government (Administration) Act 1910-1947.

*Conciliation and Arbitration, ex parte Barrett,*[63] made this point: "I should have distinct reservations about holding that an action for negligence in the Australian Capital Territory, under the common law inherited from New South Wales as modified by Ordinance, was a matter arising under the Seat of Government (Administration) Act any more than a similar action in New South Wales could be said to arise under 9 Geo. 4, c.83."[64] Though these are "laws made by Parliament", the right or duty in question did not owe its existence to laws made by Parliament but to the common law. The Commonwealth Acts referred to were simply declaratory in adopting the common law of tort for the Australian Capital Territory upon its cession to the Commonwealth. This is a persuasive argument, but it does not have the same force in relation to the Ordinance modifying the effect of contributory negligence in an accident which occurred in the Australian Capital Territory. The Ordinance is the only law authorising proportionate reduction of damages in such cases, and it is "a law made by Parliament."

If Jacobs J. is right so far, then by section 39(2) of the Judiciary Act the jurisdiction which the New South Wales State court is exercising is federal jurisdiction. Accordingly, sections 79 and 80 of the Act are applicable. Section 80 is the one he is concerned with, and it reads as follows: "So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law of England as modified by the Constitution and by the statute law in force in the State in which the court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all courts exercising federal jurisdiction in the exercise of their jurisdiction

63 (1945) 70 C.L.R. 141, at 154. ". . . The relevant inquiry is whether the matter arises under the law. Thus one is compelled to the conclusion that a matter may properly be said to arise under a Federal law if the right or duty in question in the matter owes its existence to Federal law or depends on Federal law for its enforcement, whether or not the determination of the controversy involves the interpretation (or validity) of the law. In either of these cases, the matter arises under the Federal law. If a right claimed is conferred by or under a Federal statute, the claim arises under the statute. . . . The construction of a Federal law, and perhaps a question of the validity of such a law, may be involved in such a matter. But it is not necessary that this should be the case in order that the matter may arise under the law."

64 *Per* Brereton J., 82 W.N. (Pt. 2) (N.S.W.) 121, at 123. The act he refers to is an "Act to provide for the administration of justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof, and for other purposes relating thereto."

in civil and criminal matters." This section raises many difficulties that will be looked at, more generally, later; but the particular relevance it has here concerns whether there is an inconsistent law of the Commonwealth. If so, the instruction to apply "the common law of England as modified by the statute law in force in" the forum State will be overridden; so is the Law Reform (Miscellaneous Provisions) Ordinance 1955 (A.C.T.) an inconsistent law? Jacobs J. has no doubt at all that it is; accordingly there is no rooom for the application of New South Wales statute law, if it were relevant, or the common law of England, including the rule in *Phillips v. Eyre*.[65]

A weakness of his opinion is that it seems to equate "a law made by Parliament" with "a law of the Commonwealth." That this equation is not necessarily correct was shown by the case of *R. v. Bernasconi*.[66] There the accused was charged under the Criminal Code of New Guinea with assault causing bodily harm. An Ordinance made by the Commonwealth Parliament provided that in certain cases, of which this was one, trial on indictment could be without a jury. It was objected that this contravened the Constitutional guarantee that "the trial on indictment of any offence against any law of the Commonwealth shall be by jury";[67] this involved the further argument that, in exercising its powers under section 122 of the Constitution, Parliament was making "laws of the Commonwealth." Griffiths C.J. rejected this proposition, saying: "Chapter 3 [of the Constitution] is limited in its application to the exercise of the judicial power of the Commonwealth in respect of those functions of government as to which it stands in the place of the States, and has no application to Territories. Section 80, therefore, relates only to offences created by the Parliament by statutes passed in the execution of those functions, which are aptly described as 'laws of the Commonwealth'."[68] Parliament could create criminal offences in regard to, say, lighthouses, and if it did so they would be aptly described as 'laws of the Commonwealth' because this is a function as to which it stands in place of the States;[69] but it does not stand in the place of the States with regard to criminal law generally, so that the occasions when it is able to exercise such a legislative function are not occasions when it is making "laws of the Commonwealth." By analogy one could say that, in exercising its power to pass laws regarding the law of tort in the Australian

65 (1964) 82 W.N. (Pt. 2) (N.S.W.) 121, at 131.
66 (1915) 19 C.L.R. 629.
67 S. 80.
68 (1915) 19 C.L.R. 629, at 635.
69 S. 51 (vii) of the Constitution.

Capital Territory, Parliament is not exercising a general law-making power conceded by the States upon federation but merely a special power conferred by section 52(i) of the Constitution.[70] The Commonwealth Parliament happens to be the body entrusted with making, directly or indirectly, laws for the Territories; in doing so it is not making "laws of the Commonwealth."

This view has by no means gone unchallenged. In the same case, in fact, Isaacs J., though reaching the same conclusion that no constitutional provision had been infringed, did so because he thought that there was no overlap between sections 80 and 122 and not because he agreed that laws governing Territories were not "laws of the Commonwealth." If a law is made by the Commonwealth Parliament, it is a law of the Commonwealth, and that is all there is to be said: "The law alleged to have been contravened is a law of the Commonwealth, because its present force subsists by virtue of the declared will of the Commonwealth Parliament. . . ."[71]

Dixon C.J. took a similar view in *Lamshed v. Lake*.[72] In that case a carrier travelling between Adelaide and Alice Springs in a vehicle registered in the Northern Territory was charged with using certain controlled routes in South Australia without having a license as required by the Road and Railway Transport Act 1930-1939 (S.A.). He pleaded that he was protected by section 10 of the Northern Territory (Administration) Act 1910-1919, which provided that trade, commerce and intercourse between the Territory and the States, whether by means of internal carriage or ocean navigation, should be absolutely free. Was a law for the government of the Northern Territory a 'law of the Commonwealth'? If it were, there was an inconsistency between this law and the South Australian law which must be resolved under section 109 of the Constitution by cutting down the South Australian law to the extent of the inconsistency. It was argued

70 The terms of s. 122 of the Constitution apply equally to the Australian Capital Territory, but the powers conferred under this section seem no wider than those conferred under s. 52(i), unless the argument is correct that s. 52(i) authorises law-making with regard to the Seat of Government itself whereas s. 122 authorises law-making with regard to the whole of the Capital Territory within which the Seat of Government is situated. But in this particular context the point is the same whether law-making power is derived from either or both sections.

71 (1915) 19 C.L.R. 629, at 636-637. Fullagar J. in Waters v. The Commonwealth, (1951) 82 C.L.R. 188, at 191, somewhat surprisingly could find no conflict of view between Griffiths C.J. and Isaacs J. He then goes on to give apparent support to the approach of Griffiths C.J.: *ibid*, at 192.

72 [1958] A.L.R. 388.

that laws made under the authority of section 122 are laws made for the particular Territory and no more, and that "it is just as if the Commonwealth were appointed a local legislature in and for the Territory with a power territorially restricted to the Territory."[73] Emphatically, Dixon C.J. rejects this argument: ". . . Section 122 is a power given to the national Parliament of Australia as such to make laws 'for', that is to say 'with respect to', the government of the Territory. The words 'the government of any territory' of course describe the subject matter of the power. But once the law is shown to be relevant to that subject matter it operates as a binding law of the Commonwealth wherever territorially the authority of the Commonwealth runs . . . when section 122 gives a legislative power to the Parliament for the government of a Territory the Parliament takes the power in its character as the legislature of the Commonwealth."[74] These remarks would, presumably, be equally applicable to power exercised by the Commonwealth Parliament under section 52.

Despite this cogent argument the view of Griffiths C.J. seems more persuasive. An example may show why. Before the Commonwealth exercises a power conferred upon it by section 51, each State may individually do so. For example, before 1959 there was a considerable variety of Matrimonial Causes Laws in operation throughout the States, and each particular set of laws derived its force from State constitutional authority. Until the Commonwealth Parliament chose to exercise its power under this, or any other, *placitum,* the Territories, like the States, needed laws relating to matrimonial causes for internal purposes. So, in passing Matrimonial Causes' Ordinances in 1932, 1933, 1934 and 1938, was not Parliament doing for the Australian Capital Territory the same thing as the Victorian legislature, for example, was doing for Victoria in passing the Marriage Act of 1928? And if in a suit in Victoria after 1945 the court had applied the law of the Australian Capital Territory it would have done so not because that law was a law of the Commonwealth but because section 6 of the Matrimonial Causes' Act (Commonwealth) compelled it to do so when the matrimonial domicile was in the Australian Capital Territory, just as it would have applied the law of Western Australia if that had been the matrimonial domicile. The laws passed for the good government of the Territories can sensibly be regarded as having the same effect *qua* the Territories as State laws *qua* the States. Surely it is more appropriate to assess their scope where there is any

73 *Ibid.,* at 390-1.
74 *Ibid.,* at 391.

overlap with State law as a problem of full faith and credit[75] than as a problem arising under section 109 of the Constitution?[76] If this argument is correct in relation to powers conferred upon the Commonwealth by section 51, a fortiori would it seem to be true in relation to activities that it was never contemplated should be within Commonwealth legislative power, such as the law of negligence. It does not seem to be stretching language and sense, particularly in relation to mainland Territories, to use the phrase 'law of the Commonwealth' to describe laws made by the Commonwealth Parliament for a Commonwealth purpose, by which is meant for a purpose connected with one of the *placita* of section 51. The purpose of an Australian Capital Territory Ordinance is an Australian Capital Territory purpose, not a Commonwealth one. Indeed, if it were otherwise, if in making a law for, say, the Northern Territory with regard to negligence Parliament were in fact making a 'law of the Commonwealth', the nonsensical result would follow that, if the Northern Territory were eventually to be granted the status of a State within the Commonwealth,[77] it could never modify the law of negligence bequeathed to it at the moment of independence. For any law it made would be a State law; in so far as it were inconsistent with the pre-existing 'law of the Commonwealth' it would be invalid under section 109 of the Constitution. Only by surrendering the power back to the Commonwealth Parliament under section 51 could statutory change henceforth be wrought in this branch of the law.

The validity of this criticism of the judgment of Jacobs J. is not, however, decisively valid in the present state of authority. Even if he is correct, this only leads us on to another doubtful proposition, that the Australian Capital Territory Ordinance *is,* in fact, by its terms inconsistent with "the common law of England as modified by . . . the statute law in force in . . ." the forum.[78] This is a dubious interpretation of section 15(1) of the Ordinance, which requires that where there is contributory negligence the "court" shall reduce the damages recoverable proportionately. There is nothing in any other part of the Ordinance, particularly in section 14(1) where "court" is defined,[79]

75 S. 118 of the Constitution, and the State and Territorial Laws and Records Recognition Act, 1901-1950.

76 "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

77 See s. 121 of the Constitution.

78 S. 80, Judiciary Act.

79 "In this Part—
'court' means, in relation to a claim, the court or arbitrator by or before whom the claim falls to be determined."

to suggest that courts other than those of the Australian Capital Territory are intended to be within the scope of this Ordinance or 'law of the Commonwealth', whichever one chooses to call it. But Jacobs J. held that it must be interpreted to cover any court exercising federal jurisdiction, *i.e.* any court where this law made by Parliament is in any way at issue or could be at issue. He does so not so much because of the precise language of the statute but because of the difficulty of a contrary view. For, he argues, if this jurisdiction had, in fact, been conferred upon the High Court in its original jurisdiction, as it could have been,[80] then unless the word "court" means any court exercising federal jurisdiction, wherever it is sitting, the High Court would, as a result of sections 79 and 80 of the Judiciary Act, change the basis of its decision by changing its place of sitting. His judgment does not attempt to deal with the precise and proper scope of these sections, but if he is right his policy that this should be avoided seems attractive. But if the effect of such a policy is that it gives quite a disproportionate weight in choice of law problems to the local law of a very small area of the Australian continent, a weight going beyond what common law conflicts' rules and requirements of full faith and credit would permit to State law in an analogous situation, the policy may not necessarily be sufficiently thought out. Perhaps this is only a variation of the central objection to the theory of Jacobs J., that the Australian Capital Territory Ordinance is not "a law of the Commonwealth," for if it were and his interpretation of it were correct, any complaints about its scope would have to be political and not legal.

The main problem of the judgment, then, is that of the meaning of an inconsistent law of the Commonwealth in section 80. A more usual problem of that section concerns the meaning of the direction to apply "the common law of England as modified by the Constitution and the statute law in force in the State in which the jurisdiction exercised is held." The problem came up in the case of *Parker v. The Commonwealth*.[81]

As we have seen, one ground of decision in that case was a possibly creative application of the rule in *Phillips v. Eyre*, Victorian law being the *lex fori* for the purposes of the first part of the rule and general maritime law probably being the *lex loci delicti*. An alternative ground adopted by Windeyer J. was that, in the absence of a law of the Commonwealth covering the situation, he must apply internal Victorian law. For this law was "the common law of England

80 See, generally, COWEN, FEDERAL JURISDICTION IN AUSTRALIA, Ch. 4.
81 (1965) 38 A.L.J.R. 444.

as modified by . . . the statute law in force in" Victoria, particularly the statute law making wrongful death actionable and abolishing common employment as a defence: "It may be that constituting an entirely new right of action is not well described as a modification of the common law. But I think that would be too narrow a view. As was said in *Koop v. Bebb* . . . the mischief which Lord Campbell's Act was intended to remedy 'was revealed as a lacuna in the law of wrongs'. I am prepared to regard the filling of the lacuna as a modification of the common law."[82] What the judge does not consider is the possibility that the statute law in force in Victoria may be statutes other than Victorian ones. But this could be the case either because the reference to "the common law of England" includes common law conflicts' rules and the non-forum statutory law they indicate or because of the operation of full faith and credit which may compel the application of non-forum statute law. Of course, one excellent reason why he does not discuss this point is that it would not make the slightest difference to the actual decision in the particular case; there is no statute law of any other State claiming to be recognised because of full faith and credit, and common law conflicts' rules refer us only to the reasoning that he has made the first basis of his judgment. So the case offers no positive authority either way as to the proper meaning of section 80 (and section 79), nor to whether they compel reference to the law of a non-forum State and if so on what basis.

One other recent case, that of *Pedersen v. Young*,[83] has touched upon the problem, however. A New South Wales resident was injured in Queensland due to the negligence of a Queensland resident. The limitation period by Queensland law was three years.[84] Three years and one month after the accident the plaintiff issued a writ out of the Sydney Registry of the High Court, invoking its original jurisdiction under section 75 (iv) of the Constitution. On the assumption that the Queensland limitation statute was properly characterised as being procedural,[85] what law should the High Court apply in its New South Wales forum? The primary answer was to be found in section 79 of the Judiciary Act: "The laws of each State, including the laws relating to procedure, evidence and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all courts exercising federal jurisdiction

82 *Ibid.*, at 448.
83 (1964) 110 C.L.R. 162.
84 S. 5 of The Law Reform (Limitation of Actions) Act 1956. (Queensland).
85 Windeyer J. discusses this problem: (1964) 110 C.L.R. 162, at 169.

in that State in all cases to which they are applicable." There was general agreement that, whatever this section and section 80 may mean, "they have not made applicable the procedural rules of Queensland to an action commenced and pending in the New South Wales Registry of this Court."[86] So at least the view was rejected that these sections can operate so as to make the *lex fori* of the Court (or any court exercising federal jurisdiction) notionally that of the State where the cause of action arose. As Windeyer J. put it: "There is nothing that makes the law of Queensland the *lex fori* for the purpose of the present proceedings before us."[87] Lest this should seem utterly unremarkable, one should point out that some words of Dixon J. in *Musgrave v. The Commonwealth*[88] had created a slight doubt about this point. Discussing the effect of sections 79 and 80, he had said: "Once an intention is discovered, either in section 75 of the Constitution or in Part 9 of the Judiciary Act, that the Commonwealth should be under a substantive liability for tort, it may well be thought to be part of this intention that the liability should be that otherwise flowing from the law of the State or Territory in which the wrongful act or omission is committed or made."[89] The virtue of this view is that the geographical forum, being fortuitous, is unimportant in cases where the Commonwealth is being sued; the measure of liability is the same everywhere.[90] Though Dixon J. in the *Musgrave* case had not purported to extend this approach to other cases where federal jurisdiction is being exercised, such as diversity jurisdiction, the statement had created a doubt significant enough to merit rejection. All the members of the Court, some explicitly and others implicitly by the actual decision they reach, do this.

What, then, of the possible alternative meanings of the section? The first and most obvious is that they take in the conflicts' rules of the forum and all the non-forum law indicated by those rules. This was the alternative approach of Dixon J. in the *Musgrave* case[91] and he restated it in *Deputy Commissioner of Taxation v. Brown*:[92] "In the administration of section 79 the rule is that you take the whole law governing the case of the State in which you sit, that is to say the rules of private international law as well as the rules of municipal law

86 *Ibid.*, at 167, *per* Menzies J.
87 *Ibid.*, at 170, *per* Windeyer J.
88 (1937) 57 C.L.R. 514.
89 *Ibid.*, at 547-548.
90 This same approach is implicit in the judgment of McTiernan J. in Koop v. Bebb, (1951) 84 C.L.R. 629, at 645-651.
91 (1936-37) 57 C.L.R. 514, at 547.
92 (1958) 100 C.L.R. 32.

of the State."[93] In the *Pedersen* case Windeyer J. seems to adopt this approach;[94] Kitto J. impliedly does so, otherwise he would not need to discuss and reject the argument that the Queensland limitation statute is substantive and thus provides a defence;[95] Menzies J. considered that the doubts about the sections have been set at rest by *Musgrave,* by which he must mean the basis of that case set out in this paragraph, for the whole Court, as we have seen, implicitly rejects the other possible meaning that the *lex fori* of the Court is always, notionally, the *lex loci;* and Owen and Taylor JJ. offer no opinion on the problem, contenting themselves with the conclusion that, in any event, a Queensland procedural statute is not applicable to a case commenced out of the New South Wales Registry of the High Court, *i.e.* that the Court is not to treat the *lex loci* as the *lex fori.*[96]

There is, therefore, a substantial body of judicial opinion that sections 79 and 80 should be interpreted as importing the conflicts' rules of the forum and the non-forum law indicated by those rules as well as the forum's municipal law where it is relevant. The justification given by Dixon C.J. in the *Brown* cases was that "otherwise you would make nonsense of the provision and change the basis of decision by changing the place of sitting."[97] But in so far as Commonwealth law does not cover the situation, the variable factors of each forum's procedural law, each forum's substantive statutory modifications of the common law and each forum's statutory modifications of common law conflicts' rules may cause the basis of a decision to be changed as the place of sitting is changed anyhow. The first two variables mentioned are not in any way affected by the intended policy of the *Brown* case, and cannot be as long as Australia is a federal State, and the third variable could positively endorse forum-shopping possibilities where a State or some States have made statutory modifications to common law choice of law rules. Dissatisfaction with this continuing scope for forum-shopping led P. D. Phillips to formulate an alternative theory regarding the proper meaning of the sections.[98]

Starting with section 79 he argues that "the expression 'the laws of each State' means the statute law (and rules made thereunder) and means no more than this."[99] For this opinion three reasons are given,

93 *Ibid.,* at 39.
94 (1964) 110 C.L.R. 162, at 169-170.
95 *Ibid.,* at 164-166.
96 *Ibid.,* at 166, 170-171.
97 (1958) 100 C.L.R. 32, at 39.
98 (1961-62) 3 MELBOURNE U. L. REV., 170-196 and 348-363.
99 *Loc. cit.,* 185.

one historical, another constitutional, the third logical. The historical one is that, at the time the section was drafted, United States federal law relating to the section of the Federal Judiciary Act 1789 upon which section 79 of the Australian Act was based[1] was controlled by the doctrine in *Swift v. Tyson*.[2] This doctrine denied that 'the laws of the several States' included the general body of judge-made law of each State. In the light of this, "realizing that [courts exercising federal jurisdiction] might need to have recourse to some corpus of law to complete what statute law left incomplete, the draftsman proceeded to draft section 80."[3] Of course, the mere fact that the Supreme Court of the United States took a particular view of a statute of the United States is not, in itself, any reason why an Australian court should interpret an Australian statute couched in comparable, but not exactly similar, terms in a similar way. But the attitude of the Supreme Court was nevertheless important, "because neither Story J. nor his critics had ever supposed that a federal legislature of limited powers could claim a power to prescribe all the legal rules to be applied in federal courts upon a vast and undefined series of subject matters not otherwise committed to its charge."[4] By interpreting the Federal Judiciary Act as compelling adoption of the general law of the particular forum State, the Supreme Court would have showed itself prepared to accept such a claim; in construeing section 79 in a similar way an Australian court would be accepting a similar claim.

This, then, is his second argument, that such a claim would be contrary to the Constitution: "Indeed, if section 79 were interpreted as referring to anything more than the statute laws of the States, and so referring were held to be valid, then it must be that the Commonwealth Parliament may prescribe the whole of the substantive law to be applied in all litigation to be determined by courts exercising federal jurisdiction to be derived alone from the fact that the court is exercising federal jurisdiction."[5] For example, a running-down action between residents of different States involves the exercise of federal jurisdiction, whatever forum is selected. It could not seriously be argued that this mere fact authorises the Commonwealth Parliament to legislate for a federal law of negligence either directly or indirectly by adopting the law of a particular State. Similarly, federal force could not be given to the conflicts' rules of a State simply because

1 S. 34.

2 (1842) 16 Peters 1; 10 Law Ed. 865.

3 *Loc. cit.*, 185.

4 *Ibid.*, at 186.

5 *Ibid.*, at 187.

federal jurisdiction is being exercised, when the Commonwealth Parliament has no general power under section 51 of the Constitution to legislate with regard to conflicts' rules within and between the States. To give to section 79 the wide effect alleged, therefore, is to claim for the Commonwealth Parliament by roundabout means a power which it simply does not have. By contrast, where it has a power and it has either not exercised it at all or has done so only incompletely, section 80 was intended by the draftsman to indicate the substantive law to be applied. Section 79, indeed, is an example of the exercise of a power, conferred by section 51 of the Constitution, that the Commonwealth Parliament could validly exercise, to make laws governing procedure in courts exercising federal jurisdiction.

His final argument supporting his view is less convincing, though less important. In section 80, he says, the phrase 'laws of the Commonwealth' must mean statute laws of the Commonwealth. This is because the common law derives its force from State law, and the fact that the High Court, in its role as an appellate court from the highest court of each State unifies doctrines of the common law current at any given time does not in any way alter this. If, therefore, 'laws of the Commonwealth' refers in section 80 to statute law, so must 'laws of each State' mean statute law of each State, he argues, as Parliament would hardly change the meaning of 'laws' from one section to the next. This seems a somewhat contrived argument; in section 79 two meanings are available and in section 80 only one, so argument by analogy of one to the other is not open. The main force of his view, however, rests on his first two arguments supporting it.

His argument with regard to section 80 follows on from this. It can be summarised as follows: for the same constitutional reasons as mentioned in relation to section 79, the instruction to the forum to apply "the common law of England . . ." does not include common law conflicts' rules and the substantive non-forum law indicated by those rules; to say this is not necessarily to say that the only "statute law in force" in the forum, modifying the common law of England, is statute law passed by the legislature of the forum; for the constitutional instruction of section 118 means that the out-of-State statutes can have, in appropriate situations, in-State force; these appropriate situations are to be discovered by a criterion of the proper 'local' operation of non-forum statutes. As he puts it: "In any matter in which some statute law of the Commonwealth applies[6] but does not cover the whole field . . . in

[6] Or could apply, if the Commonwealth chose to exercise its legislative power under the Constitution.

the first instance the rules of the common law are resorted to. Each of such rules, however, may have been modified by a valid State statute. This statutory modification will have express or implied a 'local' character or operation though not necessarily a geographically limited operation. . . . When the operation of the statutory modification has been determined as a matter of construction it will be clear whether this modification should be applied to the particular set of facts existing in the particular case being decided by the . . . court."[7]

Phillips now gives several examples of cases when non-forum statutes should properly be treated as 'statute law in force' in the forum. All his examples except, possibly, one[8] concern situations where present common law conflicts' rules would in any case refer one to the law of the same non-forum State as his own test of 'locality' refers him to, *e.g.* "a State statute dealing with the interpretation of wills, if not containing express provisions limiting its operation, would normally apply to wills made by persons dying domiciled in that State."[9] So if it were accepted that either 'the laws of each State' in section 79 or 'the common law of England' in section 80 took in the conflicts' rules of the forum and the non-forum substantive law they indicated, the same result would be achieved as Phillips' test achieves. But this would not be so—and it is this that is the crux of his argument—if a particular State had modified by statute the common law conflicts' rule and a court exercising federal jurisdiction in that forum were compelled by sections 79 and 80 to pick up and apply those modified conflicts' rules. We have seen already his argument that even to compel application of unmodified common law conflicts' rules by courts exercising federal jurisdiction seems positively unconstitutional; that argument, if correct, would be at least equally true of conflicts' rules deriving their force from State statutes. His position, therefore, is that a court exercising federal jurisdiction, whether the subject matter of the suit is or is not within Commonwealth legislative power, should make its own specifically federal choices of law; these should be based upon notions of 'locality' and full faith and credit in the sort of way he has indicated.

The policy behind this persuasive constitutional interpretation is a new version of the old problem of *Swift v. Tyson*[10] and *Erie Rail-*

7 *Loc. cit.*, 352.
8 See later at p. 223.
9 *Loc. cit.*, 352. His other main examples relate to contract situations and can be found at 350-351.
10 (1842) 16 Peters 1; 10 Law Ed. 865.

*road Co. v. Tompkins.*[11] The current American solution is in favour of as much equivalence as possible between federal court decisions and State court decision, even if this is achieved at the expense of possible equivalence of decision between one federal court and another.[12] Phillips evidently thinks that it is more appropriate in the Australian context that as much equivalence of decision as possible should be achieved in all cases where federal jurisdiction is being exercised (wherever that jurisdiction happens to be exercised) at the possible expense of inequality of decision between courts exercising State jurisdiction and courts exercising federal jurisdiction in the same State.[13] Certain anomalies could be produced by this approach, but anomalies could be produced by any approach because of the peculiarity of some heads of federal jurisdiction.

Federal jurisdiction based upon diversity of residence is, of course, the main example of this. Very often diversity jurisdiction exists where there is no Commonwealth power of substantive legislation; all the relevant law, including choice of law rules, is at first sight State law. The fortuitous factor of one party living one side of a State boundary instead of the other may, applying Phillips' theory, cause a different result to be reached from that which would otherwise have been reached. For example, let us say that New South Wales clarifies by statute the question of whether the formal validity of a contract should be tested by the *lex loci contractus,* the putative proper law or either of these by legislating that the putative proper law is the only permissible choice. A contract whose putative proper law is that of Western Australia is made in New South Wales; by Western Australian law it is formally valid, but by New South Wales law, because of some statutory modification of substantive contract rules, it is formally invalid. If both parties to the contract are residents of the same State and an action is brought in New South Wales, the court would have no difficulty in holding that the contract is formally valid. But if there is diversity of residence, a new set of factors will have to be considered, and it may be that the local operation of the substantive statutory modification of the law of contract will be confined, as

11 (1938) 304 U.S. 64.

12 But see now Byrd v. Blue Ridge Electric Co-operative Inc., (1958) 356 U.S. 525: "The policy of uniform enforcement of State-created rights and obligations . . . cannot in every case exact compliance with a State rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury."

13 *I.e.,* in cases where the High Court's original jurisdiction is not exclusive: see ss. 75 and 76 of the Constitution and ss. 38, 38A and 39 of the Judiciary Act.

Phillips suggests in one of his examples,[14] to contracts whose *locus contractus* is New South Wales. The difference between one party living in Melbourne rather than Sydney could be a difference between the successful and the unsuccessful formation of a contract.[15] In such a case the adoption of the forum's conflicts' rules by the court exercising federal jurisdiction would seem to produce more sensible results.

It can be said, however, that this sort of objection arises not so much because of any weakness of Phillips' theory as because of its operation in the context of the much-criticised device of federal diversity jurisdiction.[16] This may well be so; but if the contract had been made with the Commonwealth, on the one hand, or B.H.P., on the other, different results could be reached in the two cases. In the first federal jurisdiction would exist, in the second it could not.[17] It may be constitutionally desirable that where the Commonwealth is being sued a change in the place of sitting should, as near as possible, produce no change in the basis of decision; but is it also constitutionally desirable that a change in the identity of the defendant should cause a change in the basis of the decision?

These comments on the implications of the theory are not adverse criticisms of it; anomalies are inevitable. The one part of the theory which does draw adverse comment is the (possible) suggestion that criteria of 'locality' may be found in current common law rules indicating choice of law. This criticism proceeds from the fact that his examples of proper local operation of a law mainly coincide with cases where common law conflicts' rules would permit the non-forum law an exactly similar operation. It is probably pure coincidence; but it may be worth pointing out that if the theory involved ossifying the criteria of locality in this way it would be just as objectionable, constitutionally, as the one he rejects. One of his examples, however, goes against the criticism that has been made. In discussing the first instance judgment of Latham C.J. in *Musgrave v. The Commonwealth*,[18] he says: "Latham C.J. treated the matter [of choice of law] as governed by section 79 of the Judiciary Act. He held that in consequence the

14 *Loc. cit.*, 351.

15 But if the contract were with a corporation, it would *not* in any case be diversity jurisdiction: Australian Temperance and General Mutual Life Association v. Howe, (1922) 31 C.L.R. 290.

16 The most convincing attack upon the existence of such jurisdiction is made by Cowen, *Diversity Jurisdiction: The Australian Experience,* (1955) 7 RES JUDICATAE, 1.

17 Australian T. and G. v. Howe, (1922) 31 C.L.R. 290.

18 (1936-37) 57 C.L.R. 514, where a Queensland tort was being sued upon in the High Court's original jurisdiction out of its New South Wales Registry.

conflicts' rules of the common law as applied in New South Wales provided the choice of law rule for disposal of the case. This involved the view that the primary measure of actionability in the cause was New South Wales law. It is submitted that this is not a satisfactory solution. . . ."[19] *Phillips v. Eyre,* he seems to be saying, is not a correct choice of law in tort where federal jurisdiction is being exercised, for it does not accord with proper notions of locality controlling what is "the common law of England as modified by the Constitution and by the statute law in force" in the forum. This may be an appropriate moment to remind oneself that Jacobs J. in the *Anderson* case, having decided that federal jurisdiction was being exercised because the case was "a matter arising under laws made by Parliament", then set out on a hazardous voyage of discovery to try to find an inconsistent law of the Commonwealth. It was at this juncture that the main problems of his argument arose. But if Phillips' approach is correct, once there is federal jurisdiction there is no room for *Phillips v. Eyre.* The situation should be localised by referring matters of substance to the *lex loci delicti* (for the normal and proper legislative competence of that State would cover wrongs occurring within that State) and matters of procedure to the *lex fori.* Proper criteria of localisation would surely not require that matters of substantive law should, as in *Phillips v. Eyre,* be referred primarily, or indeed at all, to the *lex fori.* But section 79, as we have seen, positively and with constitutional justification[20] requires that procedural law be localised as that of the forum. The only question remaining, therefore, is whether the scope of the defence of contributory negligence is substantive or procedural; if, as seems certain,[21] it were to be regarded as substantive, the plaintiff would succeed in the New South Wales forum. And because at any given moment either federal jurisdiction or State jurisdiction exists the same result would be reached in any court in Australia exercising that federal jurisdiction.[22]

Where federal jurisdiction derives from diversity of residence the same is, of course, true, that it involves federal jurisdiction wherever it is heard. But in such cases the possible anomalies, as usual, abound. If a resident of Victoria is injured in Victoria by a truck driven by a New South Wales resident who is employed by a New South Wales

19 *Loc cit.,* 355-356.

20 S. 51 (xxxix) of the Constitution.

21 See the Anderson case, (1964) 82 W.N. (Pt. 2) (N.S.W.) 121, at 125 *per* Hardie J. See also Fitzpatrick v. International Railway Co., (1929) 252 N.Y. 127, 169 N.E. 112, and a note in (1950) 10 LA. L. REV., 365.

22 In contrast, of course, to the United States, where at any given moment the same case may be subject to both federal and State jurisdiction.

corporation, and he sues the driver and his employer in New South Wales, federal jurisdiction is being exercised and the approach described above is open to the court.[23] If the plaintiff in an accident occurring in exactly similar circumstances happened to be a resident of New South Wales, the court would be exercising merely State jurisdiction, and this approach is not available; apparently, *Phillips v. Eyre* will be the beginning and the end of choice of law rules. The federal interest in who causes the injury or who is injured produces a federal solution to what law governs the injury which, it seems, cannot be produced when there is no such federal interest. The first part of the paper was based on the assumption that, at best, all that can be done in such cases is to tinker with *Phillips v. Eyre* within its own premises. But is this necessarily correct? The effect of the second rule in *Phillips v. Eyre* is to reduce to an absolute minimum the significance of the law with the closest connection to the situation; can this really be said to be in accordance with the constitutional injunction that "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"? The scope of full faith and credit has, of course, never been properly examined in Australia, and it is not proposed to do so here. One can recognise that the clause should not be construed so as to compel forum law to give way to foreign law automatically, and yet see in the first rule a policy of hostility to foreign law which is quite out of tune with constitutional requirements. It is no answer to this to argue that all Australian jurisdictions currently follow the rule, for the constitutional requirement is to give full faith and credit, not to give as much or as little full faith and credit as sister-States happen to give. Australia has gone a very long way in giving full faith and credit to judgments of sister-States;[24] it would have to go only a very short way in the same direction as regards statutes of sister-States relevant

[23] *Cf*: if he only sued the corporate employer: Australian T. and G. v. Howe, (1922) 31 C.L.R. 290. If the plaintiff were a resident of the Australian Capital Territory the problem would arise whether there could be diversity jurisdiction. The wording of s. 75 (iv) seems quite unambiguous in confining it to residents of States; but if its rationale is that a State court might be cavalier in its treatment of a resident of another State the same could be equally true of a resident of a Territory. In fact, of course, the rationale is nonsense: see Cowen, (1955) 7 RES JUDICATAE 1. So perhaps it is just as well that the doctrine does not take nonsense to its logical extreme. WYNES, LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS IN AUSTRALIA, agrees that there cannot be diversity jurisdiction in such circumstances, though he cites only an American case of 1805 in support of his view: see p. 156.

[24] See the Service and Execution of Process Act, 1901-1963, ss. 20-26. See also the Interstate Maintenance Recovery Acts of the various States and the Matrimonial Causes Act 1959, s. 103.

to choice of law problems to hold the rule in *Phillips v. Eyre* to be inapplicable to intra-Australian tort situations involving the exercise of State jurisdiction. If this happened, and if Phillips' 'localisation' approach were adopted in cases involving the exercise of federal jurisdiction, the discrepancy of result in the two sorts of cases would not necessarily be great. The discrepancy of result between these two sorts of case and cases where the foreign element is a non-Australian one could, of course, be tremendous, for in this area *Phillips v. Eyre* would still normally hold sway.[25]

Leaving aside this latter sort of situation, it may be useful to give an example of how the localisation approach to a case involving federal jurisdiction and the full faith and credit approach to one involving State jurisdiction can produce disparate results even though the cases are essentially similar. Suppose a State were to legislate that its choice of law in tort cases involving a foreign element should be the *lex loci delicti* as regards not only substantive but also procedural law, except where the law selected turned out to be contrary to the forum's public policy.[26] If a case arose in that State involving the exercise of State jurisdiction, obviously the statutorily-decreed choice of law would be applied, for it could hardly be alleged that it denied full faith and credit to the out-of-State law. But if federal jurisdiction were being exercised, Phillips' approach would require, on 'locality' grounds and on section 79 grounds, that the procedural law of the forum be applied. To apply this to facts similar to those in the *Pedersen* case, if New South Wales had such a choice of law statute and both the plaintiff and the defendant were residents of New South Wales, the defendant would succeed; but if one were a resident of New South Wales and the other a resident of Queensland the plaintiff would succeed.

To summarise this section which has been provoked by Phillips' theory: the adoption of his theory for federal jurisdictional cases and the acceptance of traditional *Phillips v. Eyre* for State jurisdiction cases could produce, in tort situations, enormous discrepancies of result between essentially similar cases; Phillips' approach side by side with a full faith and credit approach to State jurisdiction cases

25 Except where the jurisdiction being exercised is federal: *e.g.*, an Australian destroyer on a courtesy visit to an Italian port rams and sinks an Italian vessel. The owner sues the Commonwealth in the High Court, the Commonwealth waives its sovereign immunity, and the issue is tried.

26 This is not as far-fetched as it may sound. See the judgment of McTiernan J. in Koop v. Bebb, (1951) 84 C.L.R. 629, at 645-651.

could still produce discrepancies, though as a practical matter they probably would not be as numerous or as great.

Let us return, at last, to the *Pedersen* case. Two further problems arise from the High Court's discussion. The first is this: if on its clear construction the Queensland limitation statute purported to apply only to actions commenced in Queensland State courts, then would the limitation period be picked up by section 79 and applied to an action in the original jurisdiction of the High Court begun in *Queensland*? Secondly, if the Hight Court exercised its power[27] to transfer the case to Brisbane, would the applicable law change with the change of venue?

As regards the first problem, if one treats section 79 as making federal law by reference and adoption, can a State legislature defeat this exercise of Commonwealth legislative power by framing its procedural laws in purely State terms? Can one, perhaps, argue that the phrase "in all cases to which they are applicable" in section 79 supports the argument that State procedural laws passed in terms applicable to State courts are simply not applicable to federal courts exercising jurisdiction within that State? It would certainly be peculiar if the State statute were regarded as applying to State courts exercising federal jurisdiction but not to federal courts sitting within the State and exercising the very same jurisdiction, even though the Judiciary Act purported to adopt State law in terms of the jurisdiction being exercised, not in terms of the court in which it is being exercised. Menzies J. seems to take this view: "As at present advised I do not think that the laws of a State relating to proceedings in State courts cannot apply in this Court by virtue of sections 79 and 80 merely because, upon their true construction, they relate only to the courts of that State. It may well be part of the office of sections 79 and 80 to make applicable in this Court some State statutes which . . . apply of their own force only to courts governed by the laws of the State in which the court is exercising its federal jurisdiction."[28] Owens J. shares this view.[29] But Kitto J. disagrees: "The defendant's reliance upon . . . the Queensland Act would necessarily fail even if the action were to be tried and decided in Queensland, because the Judiciary Act does not purport to do more than pick up State laws with their meaning unchanged. . . . It cannot give the Queensland statute a new meaning. . . ."[30] The opinion of Menzies and Owen JJ. seems preferable,

27 High Court Procedure Act 1903-1950, s. 25.
28 (1964) 110 C.L.R. 162, at 167-168.
29 *Ibid.*, at 170-171.
30 *Ibid.*, at 165-166.

because otherwise the intention of the Commonwealth Parliament to exercise its undoubted legislative power to make procedural laws for courts exercising federal jurisdiction could be frustrated by the whim of every individual State legislature.

The second problem is only hinted at in the judgment, and then only in the context of the problem that has just been discussed. Can a change of venue, the motive for which ought to be one purely of detailed convenience, effect an alteration of the substantive law to be applied? As we have seen, if the localisation approach is taken towards section 80 a change of venue would make no difference at all. In one case where the High Court thought that it might do so, *Re Oregan,*[31] it had proceeded on the erroneous basis that the only statute law that could be in force in the forum by virtue of section 80 was forum statute law, even though by its clear and unambiguous terms the forum statute law did not purport to cover the situation.[32] Certainly it would be an unedifying spectacle to watch the High Court shuffling itself from forum to forum as the only means of being able to justify application of the law with the greatest claim to control the situation, and the incongruity would be heightened by the fact that a State court exercising the very same federal jurisdiction would not have the same change-of-law device open to it. The suggestion, therefore, would seem too absurd to be taken seriously, despite *Re Oregan.* The one possible exception is in such fact situations as that which was before the Court in *Parker's* case. There is no localising factor at all, unless, perhaps, one could say that it was the domicile or residence of the deceased; if one cannot say this, there would seem to be room for a change of law induced by a change of venue, just as, initially, there is room for forum-shopping by the plaintiff. Whether a change of venue causes a change of procedural law is less clear. To put it another way, does the procedural law of the forum which is originally selected and which attaches under section 79 adhere throughout the suit, wherever in the end it happens to be heard? Can the defendant retaliate to any possible procedural law forum-shopping with forum-shopping of his own in the guise of an application for a change of venue for administrative convenience? Two wrongs do not make a right; and if the original raison d'etre of substantive/procedural characterisation was the difficulty which the local court would have in applying unfamiliar foreign procedural laws, this reason does not apply to limitation periods in general nor to an itinerant High Court

31 (1957) 97 C.L.R. 323.

32 See P. D. Phillips' discussion of the case: *loc. cit.,* 357-359 and 361-362.

in particular. Procedural law, once attracted to the suit by section 79, should attach throughout the case, wherever the case is subsequently heard.

## Conclusions.

The sooner a way can be found to extricate Australian conflicts' problems from the rule in *Phillips v. Eyre* the better it will be for a legal system that wants to cope flexibly with social needs. A possible way out in cases where federal jurisdiction is being exercised has been examined and commented upon; a slightly different way, likely but not certain to produce substantially similar results, may be open where State jurisdiction is being exercised and the tortious situation is intra-Australian. But where the situation is international and the jurisdiction is not federal, *Phillips v. Eyre* seems to have an iron grip, subject to the sort of tinkering with the rule, within its own premises, that we have seen in the first part of this paper. But at least there is an awakening awareness in Australian courts that *Phillips v. Eyre* may not necessarily represent the beginning, the middle and the end of wisdom in tort choice of law problems.

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