ACTIONS CONCERNING INTER-STATE TORTS: RECENT DEVELOPMENTS IN AUSTRALIAN CONFLICTS LAW

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This article deals with three recently decided cases concerning inter-State torts or actions based on a tort. Each case has its own interest and significance. The issues raised by them however, raise for consideration general questions of method and theory in Australian conflicts law. In particular, it is argued that a variety of approaches to problems concerning inter-State torts characterises the law. While there seems to be little point in seeking to impose unity on this diversity, there is a strong argument for removing the determination of the legal consequences of inter-State motor vehicle accidents from its complexities by uniform State or federal legislation.

1. *Carleton v Freedom Publishing Co. Pty Ltd*:[1] Choice of Law in Defamation

The plaintiff alleged that an article published by the defendants in all States and Territories in a weekly news magazine was defamatory of him and sued for damages in the Supreme Court of the Australian Capital Territory. The defendant argued that defences available to it under the law of four of the States and one Territory negated its liability in respect of publication in those places. The plaintiff replied that defences arising under the *lex loci delicti* were inapplicable. Kelly J. heard argument on this issue prior to trial of the action and found for the defendant.

Despite the contrary decision of Begg J. in the New South Wales Supreme Court in *Maple* v *David Syme & Co.*,[2] the *Carleton* decision was

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1 (1982) 45 A C T R 1

2 [1975] 1 N S W L R 97

not unpredictable. The balance of Australian authority in defamation cases supported the defendant's argument.[3] However, the various interpretations by Australian courts of the nature and substance of the rule in *Phillips* v *Eyre*[4] gave the plaintiff a basis for argument on the issue. Moreover, the choice of law question was not fully argued by counsel or considered by the judge in any of the recent defamation cases in which defences under the *lex loci delicti* were held to be available to the defendant.[5]

A fully argued and persuasively reasoned judgment on the point in *Carleton* would have gone a long way toward settling this particular choice of law question in defamation cases. No doubt the decision does contribute certainty to the issue. That contribution is limited however by the inadequacies of Kelly J's reasoning.

It is commonplace to remark, that the variety of factual circumstances and issues brought within the general category of tort, make a single, rigid choice of law rule inappropriate to the resolution of all cases concerning foreign torts. A single judge of a Territorial Supreme Court may well be constrained by High Court authority to do what he or she can with the rule in *Phillips* v *Eyre*. But where the tort in question is defamation, interpretation of the rule in *Phillips* v *Eyre* in its application to defamation cases only, is one way of minimising the problem of pressing an old and ambiguous rule into service for modern problems and conditions. A relatively substantial group of inter-State defamation

3 Gorton v Australian Broadcasting Commission (1974) 22 F L R 238, Allsop v Incorporated Newsagencies Co Pty (1975) 26 F L R 238, Renouf v Federal Capital Press (1977) 17 A C T R 35, Cawley v Australian Consolidated Press [1981] 1 N S W L R 225, see also Musgrave v The Commonwealth (1937) 57 C L R 514

4 In Phillips v Eyre (1879) L R 6 Q B 1 at 28-9 Willes J said 'As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad two conditions must be fulfilled First, the wrong must be of such a character that it would have been actionable if committed in England Secondly, the act must not have been justiciable by the law of the place where it was done"

Debate on the nature of the rule is concerned with the character of both limbs as choice of law or justiciability rules, see E I Sykes and M C Pryles, *Australian Private International Law* (1979) 331, P Nygh, *Conflict of Laws in Australia* 4th ed (1984) 270

Debate on the meaning of the rule is mainly concerned with the interpretation of its second limb There is no support in Australian cases for the not innocent' interpretation adopted in Machado v Fontes [1897] 2 Q B 231 The balance of authority favours a requirement of civil liability according to the *lex loci delicti* between the same parties who are before the forum, see e g Corcoran v Corcoran [1974] V R 164 There is also support for interpreting the second limb as merely requiring some form of civil actionability under the *lex loci delicti* Such actionability need not pertain to the same cause of action as sued on in the forum and nor need it be between the same parties On this view, a defence available to the defendant under the *lex loci delicti* may not be fatal to the plaintiff's claim This interpretation of the meaning of the second limb of the rule tends to coincide with a characterisation of the rule as one of justiciability See e g Hartley v Venn (1967) 10 F L R 151, Schmidt v Government Insurance Office of New South Wales [1973] 1 N S W L R 59 See generally Sykes & Pryles, supra n 4, at 332 ff, Nygh, supra n 4, at 272, C Phegan, 'Tort Defences in Conflict of Laws The Second Condition of the Rule in Phillips v Eyre in Australia' (1984) 58 *A L J* 24, Handford, 'Defamation and the Conflict of Laws in Australia' (1983) 32 *I C L Q* 453

5 In Cawley v Australian Consolidated Press, [1981] 1 N S W L R 225 the plaintiff did not dispute the defendant's right to raise defences arising under the *lex loci delict* Similarly in Gorton v A B C (1974) 22 F L R 238, all parties agreed that such defences were applicable In Allsop v Incorporated Newagencies Co Pty and Renouf v Federal Capital Press, (1977) 17 A C T R 35 Blackburn J accepted the applicability of the *lex loci delicti* without, it seems, appreciating the role of the *lex fori*

cases[6] provided a justification and doctrinal basis for such an approach.

Yet Kelly J. embarked on a lengthy review of English and Australian interpretations of *Phillips* v *Eyre* in its application to the whole gambit of foreign torts in what appears to be a search for the true meaning of the rule.[7] If this failure to confine his reasoning to defamation cases is one unfortunate aspect of his judgment, an even greater anachronism is his finding that the true meaning of the second limb of the rule is contained in the nineteenth century case, *The Mary Moxham*.[8]

The enterprise of seeking a single, correct interpretation of Willes J's dictum in *Phillips* v *Eyre* after a century of notoriously sybilline utterances on it, is questionable even if undertaken by a high appellate court. But to concentrate that search in a review of nineteenth century cases concerning international conflicts, is indefensible as a method of developing contemporary Australian conflicts doctrine. Kelly J. did not ignore recent Australian authority. He considered the High Court decisions in *Koop* v *Bebb*[9] and *Anderson* v *Eric Anderson-Radio and TV Pty Ltd*,[10] but only to conclude that offering no definitive interpretation of the *Phillips* v *Eyre* rule, those High Court decisions left him free to return to *The Mary Moxham*. In contrast to his painstaking review of the early authorities, he then dealt selectively and summarily with Australian cases from State and Territorial Supreme Courts subsequent to *Anderson*. Without giving consideration to the character of the issues involved in these cases, he simply deemed them right or wrong by reference to *The Mary Moxham*.

These criticisms of Kelly J's reasoning do not proceed from set assumptions as to the radical difference of inter-State and international conflicts. Nor is it assumed that nineteenth century English cases are irrelevant or that Australian courts should develop a distinctively Australian conflicts law. The point is rather about the interpretation (or meaning) of rules of law and of choice of law rules in particular. The meaning that an antique verbal formulation such as Willes J's dictum has in contemporary

6 Supra n 3

7 The cases dealt with in the survey are Mostyn v Fabrigas (1774) 1 Cowp 161, 98 E R 1021, The Halley (1868) L R 2 PC 193, Phillips v Eyre (1869) L R 4 Q B 225 (Q B), (1870) 6 Q B 1 (Exchequer Chamber) The Mary Moxham (1876) 1 P D 107, Machado v Fontes [1897] 2 Q B 231, Walpole v Canadian Northern Railway [1923] A C 113, McMillan v Canadian Northern Railway [1923] A C 120, Boys v Chaplin [1968] 2 Q B 1 (C A), [1971] A C 356 (H L), Varawa v Howard Smith (No 2) [1910] V L R 509, Koop v Bebb (1951) 84 C L R 629, Anderson v Eric Anderson Radio & TV Pty Ltd (1965) 114 C L R 20, Hartley v Venn (1967) 10 F L R 151, Kolsky v Mayne Nickless (1970) 72 SR (NSW) 437, Joss v Snowball [1970] 1 N S W L R 59, Warren v Warren [1972] Qd R 386, Schmidt v Government Insurance Office of New South Wales [1973] 1 N S W L R 59, Walker v W A Pickles Ltd [1980] 2 N S W L R 281 Two well reasoned Australian cases which reach different conclusions on the meaning of the second limb of the rule, were not considered These are Kemp v Piper [1971] S A S R 25 and Corcoran v Corcoran [1974] V R 164

8 (1876) 1 P D 107

9 (1954) 84 C L R 629

10 (1965) 114 C L R 20

doctrine, is that which emerges from its current use. Yet it is to current use that Kelly J. pays least attention.

In constructing this meaning in the context of a particular matter before a court, it seems more helpful to construe the High Court judgments in *Koop* v *Bebb* and *Anderson* as leaving the door open for differing interpretations of the rule in *Phillips* v *Eyre* in its application to different facts and circumstances, than as failures to provide a definitive interpretation. Indeed the alternative approaches used by the majority in *Koop* v *Bebb* suggest that a definitive interpretation was not considered appropriate.

This need not produce a welter of inconsistent decisions. There can be generalisation at the level of issues or causes of action. There seems to be little reason for giving the same weight to the *lex loci delicti* in an interstate conflict of laws concerned with the mechanisms of loss distribution, as in a conflict of laws concerned with fault allocation. The vested rights theory argued that there was such a reason, but at least in torts, the vested rights theory has been clearly rejected by the High Court.[11]

The place of publication of defamatory material is less likely to be fortuitous to relevant party and state interests than is the place of a motor vehicle accident. This is a reason for giving effect to defences arising under the *lex loci delicti*. The second limb of the rule in *Phillips* v *Eyre* can thus be interpreted in such cases as requiring civil liability under the *lex loci delicti*. Putting that within the distinction Kelly J. fastened on, the second limb in such cases may be said to require that the defendant's act be neither justified nor excused by the law of the place where it was committed.

In the result, Kelly J's decision is certainly defensible. *Carleton* does also add to the list of cases which support the interpretation of *Phillips* v *Eyre* adopted by Lord Wilberforce in *Boys* v *Chaplin*.[12] In this respect too the decision fits within the main tendency of contemporary interpretation of *Phillips* v *Eyre*.[13] What is unfortunate about Kelly J's judgment in *Carleton* is the implicit exclusion of alternative interpretations in appropriate cases.

There is much more to be said on this point for the judgment of Holland J. in the New South Wales Supreme Court in *Lewis* v *Cosh*.[14] In this case the issue was again the availability of a defence under the *lex loci delicti*. The tort, assault, was again an intentional tort. Dismissing the claim on the ground that the second limb of *Phillips* v *Eyre* had not been complied with, Holland J. said:

11 Koop v Bebb (1954) 84 C L R 629 at 643, and see infra at 74ff
12 [1968] 2 Q B 1
13 (1879) L R 6 Q B 1
14 [1983] 2 N S W L R 467

> In applying the second condition there may, in some cases, be room for debate as to what is meant by the word "justifiable". Counsel for the defendant [who cross-claimed for the assault] argued that the Queensland *Criminal Code*, s.345, did not purport to justify the wrong but only provided a defence to the convicted person. He submitted that the second condition of the rule in *Phillips* v *Eyre* did not mean that a mere defence would be imported from the lex loci delicti into the lex fori. In my opinion, whilst the word "justifiable" may have some uncertainty or flexibility of meaning in some cases it has a certain meaning for the present case. At the very least it covers the kind of justification by the law of the lex loci delicti that was held to be a bar to the cause of action to which the principle was applied in *Phillips* v *Eyre* itself.[15]

2. *Borg Warner v Zupan*:[16] Justiciability of a Cause of Action based on a Sister-State Statute

An employee of the plaintiff was injured in Victoria, when the car he was driving was struck in the rear by a car driven by the defendant. At the time of the accident the plaintiff's employee was on his way to work in New South Wales. The plaintiff compensated his employee as required by the *New South Wales Workers' Compensation Act 1926*. He then brought an action against the defendant in the Victorian County Court claiming an indemnity from the defendant under s.64 of the New South Wales act.[17] This claim was made on the basis that the defendant's negligence had caused the damage sustained.

The defendant applied to have the action struck out as disclosing no cause of action enforceable in the Victorian County Court. The judge in chambers stated a special case for the opinion of the Full Court of the Victorian Supreme Court. He asked whether

> on the assumption that the defendant's negligence . . . was a cause of the personal injuries of the worker, the plaintiff's action seeking indemnity from the defendant pursuant to the provisions of the New South Wales *Workers Compensation Act 1926-57* is justiciable in the County Court of Victoria.[18]

15 Id. at 469.

16 [1982] V.R. 437.

17 The Workers Compensation Act 1926 (N.S.W.) s. 64 provides:

> (1) Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof —
>
> (b) if the worker has recovered compensation under this Act, the person by whom the compensation was paid shall be entitled to be indemnified by the person so liable to pay damages as aforesaid.

18 [1982] V.R. 437 at 439.

In separate judgments, Murphy and Marks JJ. held that the plaintiff's claim was justiciable in Victoria. Starke J. agreed with the judgment of Murphy J.

This case then, addresses one of the most perplexing questions of Australian conflicts law. In what circumstances and on what legal basis can a cause of action arising under a statute of one State be sued on in the courts of a sister State? While the case law prior to *Borg Warner* justified the assertion that such causes of action could on occasion be justiciable in the courts of a sister State, it afforded little guidance as to when and why this would be so.[19] *Borg Warner* is a significant case not only in its result, but also in that both judges give careful consideration to the rationalisation of that result. There are moreover, significant differences in the reasoning of Murphy and Mark JJ. which may be relevant in future cases.

The first consideration relevant to the justiciability of a cause of action based on a sister-State statute must be one of statutory interpretation; specifically, whether the statute in question expressly or impliedly gives a cause of action justiciable only before the courts of the State of whose general body of law the statute is part. If the statute is localised in this way, that is the end of the question. Thus in *Gould* v *Incorporated Nominal Defendant and Ors*,[20] the plaintiff, who was injured in a motor vehicle accident in Victoria, sought damages against the second and third defendants as alleged owners of the car with which he had collided. The basis of the alleged liability was a vicarious liability created by s.16(1) of the New South Wales *Motor Vehicle (Third Party Insurance) Act 1942*. Menhennit J. dismissed the claim by interpreting the act as laying down a rule of vicarious liability applicable only in proceedings before the courts of New South Wales.

He supported that construction by reference to the 'well recognised rule that statutes are ordinarily to receive a construction restricted territorially', citing *Mynott* v *Barnard*,[21] *Koop* v *Bebb*,[22] and *Anderson* v *Eric Anderson Radio and TV Pty Ltd*,[23] in support. The authorities cited do support the proposition that statutory rules of or concerned with the law of torts, will prima facie be narrowly localised in this way.

19 In Nominal Defendant v Bagots Executor and Trustee Co Ltd [1971] S A S R 346 (S A Sup Ct), (1971) 125 C L R 179 (High Court), Hodge v Club Motor Insurance Agency Pty Ltd and Australian Motor Insurance Ltd [1974] S A S R 86, Edmonds v James (No 2) [1968] Qd W N 46 and Permanent Trustee Company (Canberra) Ltd v Finlayson (1967) 9 F L R 424 claims based on a sister-State statute were held justiciable Compare Gould v Incorporated Nominal Defendant [1974] V R 84 and Ryder v Hartford Insurance [1977] V R 257 where such claims were rejected Justiciability has been based on the direct mandate of the full faith and credit provisions of the Constitution and the State and Territorial Laws and Records Recognition Act 1901 choice of the sister-State law as the proper law of a quasi-contractual obligation use of a general principle of justiciability and a blunt no-conflict approach

20 [1974] V R 84

21 (1939) 62 C L R 68

22 (1954) 84 C L R 629

23 (1965) 114 C L R 20

In *Borg Warner*, both Marks and Murphy JJ. had no difficulty in holding that the New South Wales *Workers Compensation Act* was explicitly localised by reference to New South Wales contracts of employment (s.7(1A)) and that the right of indemnity given by s.64 was not confined to proceedings before the courts of New South Wales. The construction of s.64 followed from the express provision that the statute applied to accidents occurring outside New South Wales if arising out of or in the course of a New South Wales employment. In such cases a New South Wales court may not be able to assert jurisdiction over the defendant.

The second question which arose was one of classification of the plaintiff's cause of action. Again Murphy and Marks JJ. agreed that the action before them was an action *sui generis* for a personal statutory right rather than an action in tort, contract or quasi-contract. The significance of the classification to the subsequent reasoning of each judge however, differentiates the approaches.

For Murphy J. classification of the action arose in the context of justiciability. If the action were classified as non-tortious, then the decision on justiciability could be based on a general principle as to the enforceability of rights created by foreign statutes stated by Gowans J. in *Hall* v *National and General Insurance Co. Ltd.*[24] If it were classified as tortious, then the decision of the Victorian Supreme Court in *Ryder* v *Hartford Insurance Co.*[25] would preclude the claim.

Marks J. rejected the Gowans J. principle as a basis for deciding issues of justiciability. He also rejected the *Ryder* holding that classification of an action as tortious precluded its enforcement unless the action gave rise to civil liability between the parties according to the law of the forum. His consideration of the classification question arose in the context of deciding whether the case stated should be answered by reference to orthodox choice of law theory; specifically, whether the question was best resolved by classifying the cause of action as quasi-contractual and applying the law having the most real and substantial relationship with the obligation in issue. He decided that this was not an acceptable approach.[26]

Assessment of these differing approaches requires analysis of the context in which the classification was placed and is considered below. But insofar

24 [1967] V R 355 at 361, infra at 71ff

25 [1977] V R 257

26 In so doing, Marks J refused to follow the reasoning of Bray C J in Nominal Defendant v Bagots Executor & Trustee Co Ltd and Hodge v Club Motor Insurance Agency Pty Ltd and Australian Motor Insurance Ltd, supra n 19 Though Bray CJ's approach has the advantage of consistency with the traditional use of jurisdiction selecting, bilateral choice of law rules in the resolution of problems of conflict of laws, there is also much to be said for Marks J's reasons for rejecting it He considered that straining to fit a statutory right within a category for which there is an established choice of law rule was artificial if not downright fictitious As such, it was likely to be capricious in result For an extended analysis of Bray CJ's approach see D St L Kelly, Chief Justice Bray and the Conflict of Laws, (1980-81) 7 *Adelaide Law Review* 17 Nominal Defendant v Bagots Executor & Trustee Co is discussed further, infra at 75ff

as it is important to be clear about the purpose for which a classification is made,[27] the distinction between classifying for the purpose of deciding justiciability and for deciding choice of law, may be noted.

Finally Murphy and Marks J. were in broad agreement that the right given to the plaintiff by the New South Wales act ought to be enforced in Victoria. Both judges supported this conclusion by reference to the lack of substantive conflict between the law of the two States, and to the requirements of full faith and credit and public policy. They differed in the use which they made of these arguments. Murphy J. used them merely to reinforce a decision based on the Gowans J. principle. Marks J. used them to warrant the explicit creation of a new conflict of laws principle as the legal basis of his decision.

The differences in reasoning may be thought to be be subtle. Murphy J's judgment had the support of Starke J. and it is easier to follow. If however the justiciability of claims based on sister-State statutes is to become more predictable than Russian roulette, the points of and reasons for the differences need to be spelled out.

Broadly two questions are raised. Is the Gowans J. principle an adequate legal basis for the determination of questions of justiciability? Secondly can *Ryder*, as an exception to this principle be allowed to stand?

(a) The Gowans J. Principle as the Legal Basis of Justiciability

The enforceability of a claim based on a sister State statute was raised in *Hall* v *National & General Insurance Co. Ltd.*[28] by the plaintiff seeking leave to amend a statement of claim. The plaintiff had suffered injuries in a road accident in Victoria. One of the allegedly negligent parties was not identified, but the car he or she was driving was registered in the Northern Territory and was the subject of a third party compulsory insurance policy issued by the defendant in the Northern Territory.

The plaintiff's original claim was based on the *Motor Car Act 1958 (Vic).* The amendment sought to base the claim on s.59(3) of the *Motor Vehicles Ordinance 1949 (N.T.).* This section gave an injured party a right of direct recourse in specified circumstances against an authorised insurer. Gowans J. said:

> In substance the foundation of the cause of action is the existence of a right and liability created by a foreign statute, which, being neither penal, fiscal nor local in its character, is said to be sufficient to support a claim to enforce the right and liability which is justiciable

27 W W Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942) chapter VIII, see also Haque v Haque (No 2) (1964) 114 C L R 98 at 127 ff per Kitto J

28 [1967] V R 355

29 Id at 361

> in Victoria because the defendant is to be found in the State and has appeared in the action.
>
> The principle sought to be sustained is that if a personal right, which is not inchoate or incomplete, is created by a foreign statute, which it is not repugnant to our sense of justice or contrary to our public welfare to enforce, we will lend the aid of our courts to enforce it if the defendant is to be found within the jurisdiction: see *Dicey, Conflict of Laws*, 7th ed., p.175.

His Honour then cited *Loucks* v *Standard Oil Co. of New York*[30] and *Phrantze* v *Argenti*[31] in support of the principle. He discussed the High Court's rejection of the vested rights theory in *Koop* v *Bebb*[32] as arguably denying the principle's theoretical basis. However he decided that the High Court was rejecting the vested rights theory only as the basis of actions in tort. Without fully considering the question, he suggested that the amended claim which the plaintiff sought leave to make, was based on the contract between the authorised insurer and the insured. He accordingly allowed the amendment sought, thus approving the principle argued for by the plaintiff in its application to non-tortious actions.

In *Ryder* v *Hartford Insurance*, Jenkinson J. approved the principle stated in *Hall*, but for different reasons. He also differed on the classification of the statutory right to sue an insurer direct, holding it to be in tort. In *Borg Warner*, Murphy J. followed Gowans J's reasoning step by step. He supported the principle by reference to *Loucks* and similarly confined the High Court's rejection of the vested rights theory to actions in tort. The principle has also been approved and used by Bright J. of the South Australian Supreme Court, sitting at first instance in *Nominal Defendant* v *Bagot's Executor and Trustee Co.*[33]

The difficulty here is that whilst Gowans J's principle might be sustainable in substance, the reasoning with which he supported it is not. In the first place, as Marks J. points out, the reference to Dicey is misleading. The rule cited is a rule relating to jurisdiction in personam over a defendant. No inference as to justiciability or choice of law can be directly drawn from such a rule.

Nor does citation of authority on the exclusion of foreign law support the principle. The rules as to the exclusion of foreign law apply to modify a choice of law made in accordance with ordinarily applicable choice of law rules. In *Loucks* the argument was that the public policy of the forum excluded a choice of the *lex loci delicti* to govern an action in tort. That

30 (1918) 224 N Y 99
31 [1960] 2 Q B 19
32 (1951) 84 C L R 629 at 643 ff
33 [1971] S A S R 346

choice was made via the then well established choice of law rule applied by the New York courts.

Phrantze v *Argenti*, is not so clear a case. The plaintiff, apparently resident in England, claimed dowry from her Greek domiciled father. The right she sought to enforce before the English courts arose under Greek law. Counsel for the plaintiff based his argument on the proposition that 'English courts will entertain actions to protect and enforce foreign proprietary rights arising out of status or relationship which accrue to persons by reason of their domicile'.[34] The judgment of Lord Parker CJ. is mainly addressed to defence counsel's arguments. These were that the absence of a right according to the *lex fori* substantially similar to the foreign right claimed and, or alternatively, the lack of machinery in the forum to enforce the foreign right according to its tenor, precluded the plaintiff's claim. The second argument was accepted and the plaintiff's claim was dismissed on that basis.

Parker CJ. did reject defence counsel's first argument and cited *Loucks* in support. However, very arguably, the reference to *Loucks* was for the purpose of clarifying the concept of public policy relevant to accepted exclusionary rules. The Chief Justice accepted that the defendant was domiciled in Greece and that by reason of the relationship or status of the parties, an obligation under Greek law on the father arose on the plaintiff's birth or marriage. He rejected the classification of the right as proprietary and classified it as a right in personam. That left him to deal with the plaintiff's contention as to the basis of the claim and the final proposition of the plaintiff's argument; namely 'that the case does not come within any of the well known exceptions, e.g., as being contrary to public policy, penal in character, etc.'[35]

In the course of defence counsel's argument, Parker CJ. had asked him why in principle the right would not be enforced merely because it was unknown to English law. Counsel had replied that English private international law was empirical and that before a foreign right could be recognised it had to fall within a recognised category. It is suggested that in dealing with this answer to his question by citation of a passage from Cardozo J's judgment in *Loucks* which begins, "If aid is to be withheld here, it must be because the cause of action in its nature offends our sense of justice or menaces the public welfare . . . and ends: "They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep rooted tradition of the common weal."[36], Parker CJ. was rejecting its adequacy as a principle of exclusion.

34 [1960] 2 Q B 19 at 21
35 Id at 31
36 Id at 33 and 34 respectively

It is not clear why Parker CJ. regarded the right as enforceable in English courts. However there is nothing in his judgment inconsistent with the assumption that he accepted the basis on which plaintiff's counsel made the claim, modifying it only by classification of the right in question.

Gowans J's reasoning in *Hall* however, proceeds on the assumption that Parker CJ. accepted the vested rights theory as the basis on which the plaintiff's claim could be enforced. This theory holds that as a general principle 'although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found.'[37] Of this, a majority of the High Court said in *Koop* v *Bebb*: 'Courts applying the English rules of private international law do not accept the theory propounded by Holmes J. in *Slater* v *Mexican National Railroad Co.*'[38] It is of course possible to read this rejection of the vested rights theory as confined to actions in tort. However to do so is to go against virtually unanimous academic authority on the issue.[39] Even more to the point, it goes against the authority of the edition of Dicey cited in support of the Gowans J. principle.[40]

Reasons against acceptance of the vested rights theory as a general basis of the conflict of laws are exhaustively canvassed in the work of Arminjon, Cook and Lorenzen and ably summarized by J.H.C. Morris.[41] One seems to have overwhelming force. That is that the theory is quite inconsistant with the judicial and legislative tendency toward selection of a law which has a real and substantial connection with the issue in dispute to determine its resolution.[42]

If then, the Gowans J. principle can be supported only on the basis of the vested rights theory, there is little to be said for it. There are however other possible bases for it. One is the doctrine of obligation which is seen by Read,[43] as the theoretical basis of the recognition and enforcement

37 Slater v. Mexican National Railroad Co per Holmes J cited in Koop v Bebb (1951) 84 C L R 629.

38 (1957) 84 C L R 629

39 A V Dicey and J H C Morris, *The Conflict of Laws* 10th ed (1980) at 1038, J H C Morris, *The Conflict of Laws* 2nd ed (1980) 502 ff, Cheshire and P. North, *Private International Law* 10th ed (1979) at 25 ff; Sykes and Pryles, supra n 4, at 8, P Nygh, supra n 4, at 12

40 Dicey's formulation of the vested rights theory appeared in the third edition of his *Conflict of Laws* as "General Principle No 1" That principle was modified by the editors of the 6th edition, by adding that a right acquired under a foreign law is enforceable in English courts only if that foreign law is made applicable by an English conflict of laws rule The modification involves a rejection of vested rights theory General Principle No 1 was omitted from the 8th and all subsequent editions of the text; see Morris, supra n 39, at 505

41 Id at 503 ff

42 This tendency encompasses not only established choice of law rules in contract and quasi-contract It takes in the flexibility exception established by Lords Wilberforce and Hodson in Boys v Chaplin to the rule in Phillips v Eyre Its extension to questions of quintessential validity of marriage was proposed by Lord Simon in Vervaeke v Smith [1982] 2 All E R 145 It informs both the legislative bases for recognition of foreign decrees of divorce and annulment in the Family Law Act 1975, and the common law bases developed in Indyka v Indyka [1969] 1 A C 33 The validity and construction of trusts is probably governed by the proper law of the trust This list is not exhaustive

43 H E Read, *Recognition and Enforcement of Foreign Judgments* (1938) in particular at 121-2

of foreign judgments.[44] It is well encapsulated by Blackburn J:

> The judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which judgment is given, which the courts of this country are bound to enforce.[45]

The doctrine of obligation must be distinguished from the vested rights theory. To be recognised, the obligation must have been imposed by a court whose jurisdictional competence is defined by common law rules of international jurisdiction. Furthermore defences to recognition arising under common law rules may be pleaded by the defendant. Thus the right which the foreign judgment creditor seeks to enforce in an Australian court is a right created by the relevant State law and not by the foreign law. The plaintiff can enforce the obligation either by sueing on the original cause of action, or, and commonly, by sueing on the foreign judgment as a debt.

The reasoning of the High Court in *Nominal Defendant* v *Bagot's Executor and Trustee Co.*[46] suggests an analogy with the recognition and enforcement of foreign judgments and thus as basing the enforcement of a right arising under a foreign statute on the doctrine of obligation.

The Nominal Defendant of New South Wales brought an action in the Supreme Court of South Australia against a deceased tortfeasor's estate. It sought indemnity under the *New South Wales Motor Vehicles (Third Party Insurance) Act* 1942-63 in respect of a sum of money it had paid to a person injured by the tortfeasor in a motor vehicle accident. The accident had occurred in New South Wales. Both the deceased and the person injured were resident and domiciled in South Australia and the car in which they were travelling was registered and insured in South Australia. The Nominal Defendant had made the payment to the injured party in consequence of a successful suit brought against it in New South Wales.

At first instance, Bright J. ruled in favour of the plaintiff.[47] On the question of justiciability of the plaintiff's claim, he relied on the Gowans J. principle, quoting it verbatim but citing Dicey, 8th ed., Rule 21 (exclusion of foreign revenue and penal laws) in support.

The case went on appeal to the Full Court where the claim was dismissed by a majority.[48] Mitchell and Hogarth JJ. held that on its true

44 Read's view is supported by Dicey & Morris, supra n 39, at 1038, somewhat equivocally by Cheshire & North, supra n 39, at 630-1 Sykes & Pryles, supra n 4, at 65-5 suggest that recognition and enforcement of foreign judgments is better seen as resting on public interest in limiting relitigation

45 Schisby v Westenholz (1870) L R 6 Q B 155 at 159

46 (1971) 125 C L R 179

47 [1971] S A S R 346

48 Id at 357

construction, the New South Wales act gave the Nominal Defendant no claim against a deceased tortfeasor's estate, Bray CJ. dissented on this point. He then dealt with the justiciability issue by use of the traditional choice of law method. He classified the cause of action as quasi-contractual and justified application of the New South Wales law as the proper law of the obligation in question.[49]

On appeal to the High Court the plaintiff's claim was again upheld. The appeal however was argued on the issue of construction of the New South Wales act. The question of the enforceability of the right in courts outside New South Wales appears to have been conceded. The High Court expressed agreement with the judgments of Bright J. and Bray CJ. on the construction issue and made no reference to the different bases on which the two judges had held the plaintiff's cause of action to be justiciable.

The case is thus an unsatisfactorily authority on the justiciability question. However, arguably, the analogy with the recognition and enforcement of foreign judgments suggested above, is found in the language of the joint judgment of Barwick CJ., Menzies, Windeyer and Walsh JJ. They held that the relevant section of the act imposed a debt on the deceased; that it was within the competence of the New South Wales legislature so to do; and that it was as a debt that the payment made by the Nominal Defendant was recoverable from the estate of the deceased.

The underlying assumption might be, that just as a debt created by a foreign judgment can be sued on in a common law forum if the judgment is final and conclusive, for a fixed sum and made by a court having international jurisdictional competence, so a debt created by a foreign statute can be sued on if the statute is within the legislative competence of the enacting State.

The phrase 'vested and not inchoate' in the Gowans J. principle may be seen to correspond to the requirement of finality and conclusiveness in relation to foreign judgments. The problem of justiciability of a cause of action derived from a foreign statute is met on this analysis by saying that the obligation enforced is based on the forum law of debt.

If this is the legal basis on which rights arising under sister-State statutes may be enforced in Australia, it is open to three criticisms. First, it makes no distinction between the enforceability of rights arising under foreign and sister-State statutes. Second, it limits justiciability to claims for a fixed sum of money. It would not therefore justify the enforcement of rights to make a direct claim for damages against an insurer. Third, although the requirement that the right be vested and not inchoate may

49. Differing views within the South Australian Supreme Court on this issue were also evident in Hodge v. Club Motor Insurance Agency Pty Ltd. and Australian Motor Insurance Ltd. [1974] S.A.S.R 86.

be seen to correspond to the requirement that a foreign judgment be final and conclusive, the details of that correspondence are not specified. The phrase might mean that the plaintiff has a right to the sum claimed on proof of certain facts and defeasible only to forum defences of fraud, public policy, breach of natural justice etc. But which facts and which court's determination of them, remain relevant and unanswered questions.

None of these criticisms makes a conclusive case against such an approach. It must be acknowledged for example, that different treatment of foreign and sister-State statutes, where appropriate, could be achieved by holding the common law exclusionary rules to be modified in their application to inter-state conflicts by the full faith and credit provisions of the *Constitution* and the *State and Territorial Laws and Records Recognition Act 1901*.[50] Nor is extension of justiciable claims beyond those for a fixed sum of money precluded by any clear rule or ruling that the cause of action must fit within an established legal category, such as debt.[51] Statutory right *sui generis* could suffice as a description of the nature of the claim for the purposes of its enforceability. Were a court to decide that it is, it would be deciding that it has authority to enforce such a right even though it arises under a foreign statute. But then, in the absence of any other legal rule or principle of the forum to provide a basis for such a decision, it must be seen to be grounded in comity.

Comity may indeed be the principle from which questions of justiciability of actions based on sister-State (or foreign) statutes need to be reasoned. Marks J. certainly thought so. Murphy J. may have thought so too if the absence of a reason against enforcing the right is, for him, the meaning of comity. In so far as he explicitly confines the High Court's rejection of the vested rights theory to actions in tort however, it would seem that Murphy J's main basis for decision is vested rights.

The importance of establishing the theoretical basis of the Gowans J. principle relates to the specification of its limits. In particular to the question of whether actions in tort are excluded from its ambit.

(b) Limits on the Gowans J. Principle: The Exclusion of Actions in Tort

In *Ryder* v *Hartford Insurance Co*[52] the plaintiff sought to enforce a right to claim damages for personal injury from the defendant insurer. The right to direct recourse against the insurer was given by s.113 of the South Australian *Motor Vehicles Act* 1959. The plaintiff had been injured when the car in which he was a passenger ran off the road in Victoria. The car was registered and insured in South Australia by the defendant and

50 There is some support for this view of the effect of the full faith and credit provisions, see, e g , Merwin Pastoral Co v Moolpa Pastoral Co (1933) 48 C L R 565, Permanent Trustee Co (Canberra) Ltd v Finlayson (1967) 9 F L R 424, Re E and B Chemicals and Wool Treatment Proprietary Ltd (No 2) [1940] S A S R 267

51 Phrantze v Argenti [1960] 2 Q B 19

52 [1977] V R 257

the driver had died subsequent to the accident. Without establishing whether the conditions upon which the right arose under the South Australian legislation had in fact been met, Jenkinson J. held that the claim was not justiciable in Victoria.

Jenkinson J. approved the Gowans J. principle as governing questions of justiciability. However he classified the cause of action as being in tort and therefore as falling outside the ambit of the principle. He made no direct mention of the vested rights theory but he did approve the reasoning of Menhennit J. in *Gould* v *Incorporated Nominal Defendant*.[53] Menhennit J. had stated that he did not understand the High Court's dictum in *Koop* v *Bebb* as being confined to actions in tort. However he had held that statutory extensions to tortious liability must be construed according to strict notions of territoriality. As such they formed part of the general body of law of the enacting State and were justiciable only before the courts of that State.

In *Ryder*, Jenkinson J. explained this view by reference to *The Halley*[54] and the first limb of the rule in *Phillips* v *Eyre*. The common law, he suggested, had taken an exceptional attitude to obligations in tort as distinct from those in contract or quasi-contract. That exceptional attitude rested on 'the firm conviction that English courts should impose no tortious liability on a defendant . . . except such a liability as his acts would incur in English municipal law.'[55]

In *Borg Warner*, Murphy J. avoided commenting on *Ryder* by classifying the action as non-tortious. Marks J. considered *Ryder* to have been wrongly decided. His reasoning on this point however, is not entirely satisfactory.[56] That, together with the fact that Starke J. agreed with Murphy J. may have the result of leaving the decision of *Ryder* intact. The issues raised by *Ryder* and by Marks J's critical rejection of it thus bear further examination.

It is true that Willes J. prefaced his formulation of the rule in *Phillips* v *Eyre* by saying that he was laying down a general rule for suit in England for a tort committed abroad. However to conclude from that, as does Marks J. that the first limb of the rule is irrelevant to actions concerning tortious acts committed in the forum, misses the point of policy in

53 [1974] V R 488

54 (1868) L R 2 P C 193

55 [1977] V R 257 at 270

56 Marks J thought that the flexible approach taken to the rule in Phillips v Eyre in Boys v Chaplin and Corcoran v Corcoran [1974] V R 164 negated any strict rule requiring liability of the defendant under the municipal *lex fori* This view is sustainable only if those cases as read as substituting a proper law of the tort approach for the rule in Phillips v Eyre It is readily conceded that introduction of the flexibility exception could be the first step toward that end There is no lack of academic support for the view that the law ought to be developed this way But it has not yet been so developed in either England or Australia More specifically, the flexible approach in both cases was instrumental in allowing the *lex fori* to override the *lex loci delicti* Marks J also held that Phillips v Eyre had no applicability to the fact situation before him, since it concerned only foreign torts That of course is true However it misses the point of Jenkinson J's reasoning in Ryder, which is that the first limb of the rule in Phillips v Eyre, is the expression of a common law principle which assigns tortious liability to the governance of the *lex fori*

question. Equally, on the other hand, it would seem to be an unfortunate triumph of formalism and technicality, to follow the *Ryder* ruling. A theme which runs throughout Mark J's reasoning, points out the substantial similarity of State legislative schemes for motor vehicle accident compensation. Such conflicts as do exist, mainly relate to the mechanisms chosen to facilitate recourse to compulsory third party insurance funds.

It is suggested that Kahn Freund's account of the first limb of the rule in *Phillips* v *Eyre*,[57] indicates a resolution of this difficulty. This part of the rule, he suggests, is to be understood as a crystallisation of a principle of public policy. What Jenkinson J. left out of account in *Ryder*, is that public policy in the conflict of laws, is a special type of policy. Its concern is with fundamental social values;[58] in the case of tortious liability, those said to inform the ascription of fault and blame. Where that is not in issue because there is no conflict between State laws on the point, or because the conflict between State laws which is in issue does not concern it, the reason for requiring that the defendant be subject to tortious liability according to the *lex fori*, is absent.

(c) Contacts, Interests and Policy Analysis in Determination of Justiciability

The preceding arguments have drawn attention to problems with the Gowans J. principle as a principle of justiciability. It is inadequately supported by authority. It was proposed by reference to the vested rights theory, which is either no part of Australian conflicts law at all or is not part of Australian conflicts law concerning actions in tort. In the former alternative the authority of the principle is further undermined. In the latter, its functions formalistically, to exclude from justiciability, claims in tort based on a non-forum statute. Finally, although it can be given a theoretical basis in the doctrine of obligation or in comity, uncertainty as to its theoretical basis may be considered as productive of concomitant uncertainty as to its application and limits.

In these circumstances then does Marks J's approach in *Borg Warner* warrant acceptance? Marks J. rejected all previous ways of dealing with the problem. From a basis of public policy and full faith and credit he proposed a new conflicts of law rule for Victoria 'that in the appropriate case, in the interests of justice, it should apply the law of another State or Territory'.[59] The public policy in question he explained as meeting the public interest in accordance with the comity of nations. His full faith and credit argument modified the comity of nations to a comity of federated states. He reasoned that whilst the High Court decision in *Anderson* v *Eric Anderson Radio and TV Pty Ltd*[60] precluded interpretation

57 Kahn Freund, 'Reflections on Public Policy in the English Conflict of Laws' (1953) 39 *Transactions of the Grotius Society* 39 (reprinted in his *Selected Writings* (1968))

58 See, e g , dicta of Cardozo J in Loucks v Standard Oil Co of New York (1918) 224 N Y 99

59 [1982] V R 437 at 462.

60 (1965) 114 C.L R 20

of the full faith and credit provisions as directly authorising the application of sister-State law, those provisions were 'linch pin policy of Federation'. They could be given meaning as a 'negative direction of non-obstruction' appropriate for use where State laws were intended to operate as a national scheme and where application of traditional conflicts rules would frustrate that operation.

It might be argued that Marks J. manages to use all the worst defined concepts of the conflict of laws to produce a non-rule for a non-problem. If the Gowans J. principle doesn't bear close scrutiny, why not use a 'robust but common sense' approach and hold a claim justiciable in the absence of good reason against so doing?[61] Arguably because that would be to say both too much for common sense and too little for its defeasibility to legal doctrine. What, it seems, does need clarification is the very notion of justiciability in this context.

I suggest that the justiciability question is a question of whether the forum is prepared to recognise and, in the absence of defences, enforce the plaintiff's claim of right. Classification can answer the question by placing the cause of action within a category of forum law. It can also, by reference to bilateral choice of law rules, indicate the legal system by reference to which the forum will determine whether the facts pleaded by the parties give rise to an obligation on the defendant to which there is no defence.

The classificatory approach to justiciability relies on the existence of a recognised category for which a forum choice of law rule exists. It is not however, the only way in which a court can answer the question. If, for example, the cause of action is given by a forum statute, then as long as the statute extends its provisions to facts occurring outside the jurisdiction, no problem of justiciability arises.[62] Where the cause of action is given by a foreign or sister-State statute, the problem appears to be finding a basis in forum law for applying that statute.

However decisions of courts, as much as legislation are a recognised source of law. The forum's decision to enforce a right given by a non-forum statute needs no further jurisprudential basis. What does have to be determined is whether there are forum rules which preclude such a decision, and if not, what principles should guide the decision.

A preliminary to both these questions with foreign as with forum statutes, must always be whether the statute in question gives the right claimed. One aspect of this will be the intended spatial operation of the legislation in question. The approach taken by Menhennit J. in *Gould*,

61 See [1982] V R 437 at 444 per Murphy J In Edmonds v James (No 2) [1968] Qd W N 46 Lucas J took the view that because the schemes of the Queensland and South Australian Motor Vehicles Acts were complementary, mere technicalities should not prevent the enforcement of the South Australian Act in Queensland

62 See, e g , Plozza v South Australian Insurance Co [1963] S A S R 122

which was approved by Jenkinson J. in *Ryder*, was to integrate this preliminary question with that of whether there are forum rules precluding enforcement of the right claimed.[63]

The reference here is either to forum principles of statutory interpretation or to forum choice of law rules. The reason for that reference is that both are relevant to the determination of the spatial extent of rules of law.[64] The difficulty is that three different questions are in issue. Does the statute itself, either expressly or by necessary implication, state its spatial extension or that of particular sections? If so, will the forum accept this? If not, how and according to what criteria, will the forum localise the statute?

It is not suggested that these three questions can or should be kept quite separate. What is suggested is that none of them are questions of justiciability. They are more precisely choice of law questions. Suppose, for example, forum A dismisses a plaintiff's claim based on a statute of B which implies certain terms in all contracts of sale made in B. If forum A does so on the ground that the law of B is not the proper law of the contract, the action cannot be said to have failed because the claim was not justiciable in A, Similarly if the statute of B makes no reference to the class of contracts to which it applies, and forum A holds that it applies to all contracts whose proper law is B.[65]

The justiciability question is whether the facts pleaded disclose a cause of action recognised by the forum. That is whether they are of a type which can give rise to legal relations. Foreign statutory rights, like foreign contractual rights, are facts of such a type. The forum rules which may preclude this prima facie case for justiciability are the rules concerning the exclusion of foreign law. The principle of recognition may be described as comity or, more in keeping with traditional Anglo-Australian conflicts law, it may simply be said that the right claimed falls within a recognised category of legal rights.

This analysis may also clear the ground on the *Ryder* question. The

63 Menhennit J cited dicta from both Koop v Bebb and Anderson v Eric Anderson in support of his approach

64 The technique in use here, namely localisation, is most thoroughly analysed by D St L Kelly in *Localising Rules in the Conflict of Laws* (1974) An important distinction which Kelly clarifies is between bilateral choice of law rules and unilateral or localising rules Traditional, common law choice of law rules are normally bilateral in that they set limits to the spatial application of both forum and foreign rules falling within a given legal category such as the essential validity of a contract or of a marriage Unilateral rules determine only the spatial applicability of the decisional rule which they qualify A decision on the localisation of a particular statutory rule may be reached by bringing it within the compass of a common law choice of law rule or by construing the rule in light of principles of statutory interpretation The alternative approaches are well illustrated by comparison of the judgments of Dixon J on the one hand and Evatt and McTiernan JJ on the other in Wanganui-Rangitkei Electric Power Board v Australian Mutual Provident Society (1934) 50 C L R 581

65 See, e g , Wanganui-Rangitkei Electric Power Board v A M P Society, Barcelo v Electrolytic Zinc Co of Australasia Ltd (1932) 38 C L R 391 More recent cases such as Kays Leasing Corporation v Fletcher (1964) 116 C L R 124 and Freehold Land Investments Ltd v Queensland Estates Ltd (1970) 123 C L R 418, are not different in the relevant respect The general issue raised by both cases was a choice of law issue Forum statutes being in question no question of justiciability arose The Dixonian approach of Wanganui and Barcelo was not adhered to because the High Court found sufficient indications within the statutes in question to decide the spatial extension of the relevant sections by reference to connecting factors other than the proper law of the contracts in question

exclusionary rules cover penal and revenue laws and those which are against public policy. They do not cover rules of tort law. Public policy may do so insofar as such laws are concerned with fundamental social values such as the ascription of fault and blame. But insofar as the practice of strict territorial construction of statutes forming part of the law of tort of a particular jurisdiction has acquired an existence independent of public policy, it is not relevant to justiciability.

This analysis makes no distinction between foreign and sister-State statutes. Whether such a distinction should be made takes the discussion back to Marks J., his use of full faith and credit and the positive mandate of public policy he derives from it. Marks J's point seems to be that comity, as the theoretical basis of conflict of laws, is given a different meaning in the context of inter-State conflicts by the full faith and credit mandate. That is one way of putting it. It amounts to a principle of facilitating rather than hindering the operation of interlocking state legislative schemes, where there is broad uniformity of purpose, method and result.

Alternatively, using full faith and credit as excluding the public policy exception may, on a more orthodox approach achieve the same result. In both cases where there is a conflict between State statutes, there is no escaping a detailed consideration of the respective schemes. In this respect Marks J's list of considerations of what justice requires[66] is not only useful but essential.

The point then,is this. The legal basis for the justiciability of claims based on sister-State statutes can be theorised by reference to any of the three general theories discussed or the orthodox classificatory reasoning of Anglo-Australian conflicts. However there are reasons for rejecting the vested rights theory and the doctrine of obligation, namely their tendency to exclude actions in tort. Comity or the classificatory approach may avoid that, but they do not afford much guidance as to the circumstances in which such claims will be enforced. Consideration of the nature of the justiciability question and the role of public policy in that context, allows a prediction that if the conflict concerns fault allocation the forum will exclude a claim which imposes a tortious liability unknown to it.

What is left then is a class of cases prima facie justiciable. Decision in such cases must take account of the context within which the conflict of laws arises, analyse the issue raised by the conflict, and determine by

66 There were 1 Whether application of the provision in question accorded with the intended operation of the legislation of the States concerned
2 Comparison of the benefits payable and the criteria for payment under the laws of the relevant States
3 Procedural problems associated with the maintenance of proceedings elsewhere
4 The convenience to the parties of applying sister-State law having regard to the nature of the suit and the contacts with the forum
5 Comparison of the substantive rights under the scheme in question and whether application of sister-State law varied substantive rights held under forum law

reference to the connection of the parties with the States concerned and the purpose of the provision in issue, whether the forum ought to enforce the right claimed. Marks J's five considerations, state more pragmatically the particulars of this inevitable process of interests analysis.

3. *Pozniack v Smith*:[67] Remitter of Diversity Suits to Supreme Courts

The plaintiff, a resident of New South Wales, commenced proceedings in the High Court against the defendant, a resident of Queensland. He claimed damages for personal injuries suffered in a motor vehicle accident which occurred in Queensland. Both parties made application to the court for remitter of the proceedings to a State Supreme Court. The plaintiff asked that the matter be heard by the Supreme Court of New South Wales. The defendant wanted it heard by the Queensland Supreme Court. The applications were referred by Stephen J. to the Full Court.

All four members of the Full Court held that the case should be remitted to Queensland. The reasoning of the majority however, differed on a significant point to that of Mason J. Because of differing discount rates on lump sum compensation for future loss applied by the Queensland and New South Wales courts, the measure of the parties rights and liabilities was dependent on the court to which the action was remitted. In these circumstances, Gibbs CJ., Wilson and Brennan JJ., held that the case should be remitted to the Supreme Court of the *locus delicti*. Mason J. held that in general, remitter should be to the State which had the most significant relationship with the occurrence and the parties. In personal injury cases this would normally be the *locus delicti*.

The legislative and precedential background to this case and an analysis of the reasoning of the two judgments in it are the subject of a recent article by M.C. Pryles.[68] They may thus be quite shortly summarised here.

The High Court was given a widely discretionary power to remit cases pending before it to a federal, State or Territory court having jurisdiction over the subject matter and the parties, in 1976 by amendment to s.44 of the *Judiciary Act* 1903.[69] In practice, this power has been very largely exercised in cases brought within the diversity jurisdiction of the High Court.

67 (1982) 56 A L J R 707

68 Pryles, 'The Remission of High Court Actions to Subordinate Courts and the Law Governing Torts' (1984) 10 *Syd L R* 352

69 The section now reads c4-"Any matter that is at any time pending in the High Court, whether originally commenced in the High Court or not, may, upon the application of a party or of the High Court's own motion, be remitted by the High Court to any federal court, court of a State or court of a Territory that has jurisdiction with respect to the subject matter and the parties, and, subject to any directions of the High Court, further proceedings in the matter shall be as directed by the court to which it is remitted"

Litigation concerning the interpretation and exercise of the power given by the amended section may be seen to have settled several points. First, the High Court is not limited by the section to remit cases to courts having original jurisdiction in those cases.[70] Second, the High Court does not have the power to give directions as to the law to be applied to the court to which it remits a matter.[71] Consequently, in all cases where s.79 of the *Judiciary Act* is applicable, remitter to the courts of a particular State or Territory will effect a choice of the law of that State or Territory to govern the matter.[72] Third, where the rights and liabilities of the parties under the laws of the competing forums are substantially the same, the balance of convenience is the primary determinant of the place to which the matter will be remitted.[73]

The problematic aspect of the *Pozniack* litigation was the determination of criteria relevant to a decision on remitter where the rights and liabilities of the parties did differ substantially under the laws of the competing forums. The majority, having found no guidance in either the constitutional grant of power in diversity cases, or s.44 of the *Judiciary Act*, based their decision on dicta of Brennan J. in *Robinson* v *Shirley*.[74] Speaking of factors relevant to the exercise of the discretion in tort cases, Brennan J. had said:

> If it were not for the existence of an obligation under that law (the *lex loci delicti*), no cause of action would be enforceable under any other body of law which might be made applicable to the resolution of the matter. The law of the place where the tort was committed is the law which first gives rise to the cause of action, and it is material that the courts of a State or Territory other than the State or Territory in which the tort was committed would not have jurisdiction unless the defendant were served within the State or Territory or unless he entered an unconditional appearance, for the plaintiff could not otherwise make the defendant amenable to that court's jurisdiction.

70 Johnstone v The Commonwealth (1979) 143 C L R 398 Thus the fact that the defendant would not be amenable to the writ of a State or Territory court, or that as in Johnstone, only the courts of the State or Territory in which the cause of action arose have original jurisdiction to hear a case, does not limit the High Court's choice of courts to which to remit

71 Pozniak v Smith (1982) 56 A L J R 707 The High Court held that the power to give directions contained in s 44 was limited to matters of pre-trial and trial procedure

72 It may be that this includes all cases in federal jurisdiction to which there is no applicable Commonwealth law, other than the Judiciary Act There is authority for the view that in actions in tort or contract against the Commonwealth, s 56 of the Judiciary Act (with or without s 64) implicitly directs a choice of the law of the place where the cause of action arose Musgrave v The Commonwealth (1937) 57 C L R 514, Suehle v The Commonwealth (1967) 116 C L R 353 It is submitted however, that this view has been undermined by Maguire v Simpson (1976) 139 C L R 362 Persuasive arguments against it are made by M Pryles and P Hanks, *Federal Conflict of Laws* (1974) 197-9

73 Pozniack v Smith, supra n 67 Earlier cases on the amended s 44 are not inconsistent with this view, but a rather bewildering variety of other considerations are adumbrated by them, see Weber v Aidone (1981) 55 A L J R 657 (balance of convenience favouring forum of plaintiff's residence), Guzowski v Cook (1981) 56 A L J R 40 (lack of *in personam* jurisdiction over the defendant relevant as a criteria for the exercise of the discretion), Robinson v Shirley (1982) 56 A L J R 237 (*locus delicti*, possible difference in measure of damages in competing forums not relevant)

74 Id at 239

This reasoning persuaded the majority that 'the only safe course' was to remit to the *locus delicti*. Indeed only in that forum would the parties have their dispute determined 'consistently with justice according to law'.

The rhetoric of justice should not conceal the inadequacy of this reasoning. Brennan J's language is that of vested rights theory. It is not true that a common law forum will hold a defendant subject to tortious liability only where he or she is subject to such a liability under the *lex loci delicti*.[75] Jurisdiction is relevant to choice of law, but traditionally, it is not a ground which allows for service *ex juris*, which is regarded as the principal jurisdictional basis of an action. It is the presence of the defendant in a forum where the plaintiff chooses to sue. Insofar as that has been modified in recent decades, the natural forum may be regarded as that which has the most real and substantial connection with the matter litigated.[76]

In contrast, Mason J's reasoning was firmly sited by reference to the exercise of federal jurisdiction and the theory and practice of choice of law in tort. He considered four possible approaches to the problem before him; use of the balance of convenience, the *locus delicti*, the most significant relationship, and the notion of original or inherent jurisdiction. He accepted the third approach after a careful analysis of the incoherence of the other three with the federal nature of the diversity jurisdiction, the rationale of *Johnstone*[77] and contemporary views on the limitations of the *locus delicti* as an appropriate connecting factor for the resolution of conflicts in tort laws.

Particularly when compared with Mason J's reasoning, the majority judgment in *Pozniack* is a bad example of short sighted pragmatism. Given the High Court's notorious impatience with its diversity jurisdiction, it may well be the case, as a matter of practice, that a plaintiff will commence such an action in the High Court only where he or she seeks an advantage of convenience or law not accorded by litigation in the State of the defendant's residence or the *locus delicti*.

Both the decision in *Johnstone* as to the width of the discretion as to remitter, and the acceptance of the criterion of *forum conveniens* as the principal consideration relevant to its exercise where the parties' rights and liabilities are substantially similar in the competing forums, suggest

75 For one thing, application of the flexibility exception in Boys v. Chaplin may dispense with such a requirement Kemp v Piper, [1971] S A S R 25, Corcoran v Corcoran [1974] V R 164 Secondly, only on one interpretation of the second limb of the rule in Phillips v Eyre is it necessary to show the existence of civil liability between the parties before the forum according to the *lex loci delicti* (supra n 4) If Brennan J's reference to an obligation under the *lex loci delicti* means an unassigned duty of care in respect of certain acts or omission, his dictum is not inconsistent with this interpretation of Phillips v Eyre Given his reference in the next paragraph to enhancing and diminishing the plaintiff's and defendant's rights and obligations, it would appear however that this is not his meaning

76 MacShannon v Rockware Glass Ltd [1978] A.C 795, Castanho v Brown & Root (UK) Ltd and Anor [1981] A C 557, Smith Kline & French Laboratories Ltd v Bloch [1983] 2 All E R 72

77 The rationale of Johnstone is stated by Mason J (at 364) as 'a recognition of the desirability of minimizing the effects of the strict jurisdictional limits of State and Federal Courts.. '

that where the advantage sought is one of convenience, commencing in the High Court is a permissible tactic of litigation. Here indeed is a sensible justification and use of federal diversity jurisdiction. If the plaintiff brings suit in the High Court, common law rules as to jurisdiction and their supplementary extension by statutory provisions for service *ex juris*, may be circumvented.

Concomitantly, the choice of forum is brought wholly within the High Court's determination. The plaintiff retains the traditional privilege of commencing in a forum which affords an objective legal advantage, if he or she sues in a State or Territory court having jurisdiction over the defendant.[78] So one way of looking at the question posed in *Pozniack* is to ask what criteria are relevant to a request for remitter to a forum which gives the party an objective legal advantage but which, apart from a remitter to it, cannot assert jurisdiction over the defendant.

The point of putting the question this way is to call attention to the fact that in the conflict of laws, the legal relations of litigants are determined by an interplay of jurisdictional and choice of law rules. Choice of forum is of fundamental importance in this interplay. In Anglo-Australian conflicts, it amounts to a choice of procedural law, of choice of law rules and, through the public policy exception, of the legal system with ultimate control in determining the parties' legal relations. Where choice of law rules give substantial or controlling effect to the *lex fori*, the importance of choice of forum is increased.

It may be defensible, in the context within which it makes this choice, for the High Court to refuse the plaintiff any wider scope for seeking an objective legal advantage. It is not defensible to make the choice by reference to a rigid criterion selected by an outmoded theory. That the remitter power is discretionary, and that the Court remains free to exercise that discretion according to some other criteria when an appropriate case arises, is of course true. That is rather cold comfort for an Australian resident who might look for a reasonably certain and predictable answer to problems raised by so everyday an occurrence as an inter-State motor vehicle accident. The rhetoric of 'justice according to law' is merely pretentious, if such expectations are naive.

4. Conflicts of Tort Law in Australia: An Overview

Australian conflicts doctrine emerges in the interstices of British and American example. The basic body of doctrine and the traditional approach to its application, is inherited from the practices of English courts

78 This assertion makes no quarrel with Lord Denning's summation in the Smith Kline Case (at 78). "The plaintiff has no longer an inborn right to choose his own forum He no longer wins the toss on every throw The decision rests with the courts." However if the plaintiff can show that he or she gains an objective personal or juridical advantage if the matter is litigated in the forum chosen, then it is likely that the plaintiff's choice of forum will be sustained

dealing with international conflicts. On the other hand, like America, Australia is a federation of States. Most cases before the Australian courts concern inter-State conflicts. It is evident that a body of doctrine evolved in the context of conflicts of law between sovereign nations at arms length, is likely to need some adaptation to serve the purposes of a federation.

One aspect of the Australian experience is unique. The common law of the Australian states is either uniform or unitary. Thus all inter-State conflicts concern statutes. The inclusion of express localising rules in such statutes, or judicial localisation aimed at facilitating their purpose, may exclude common law choice of law rules as determinants of the spatial reach of statutory rules.

Rather than mount polemics against established doctrine or construct theories or methods hardly less obscure than the doctrine in question, it is suggested that most conflicts problems in Australia are amenable to resolution by being situated within an appropriate methodological context. Accepting the basis of traditional conflicts method, it should further be accepted that where that method seems inappropriate, either in the result or because established categories and choice of law rules are inapposite, other methods such as interest analysis and localisation can be used.

Arguably it is the method of interests analysis which has received least attention from Australian courts. Partially this is a legacy of the traditional method. It is also relevant to note that in most cases in which the courts have used a unilateral or localising approach, their concern has been with the spatial extension of a forum statute.[79] Thus whilst the readiness of the High Court to resolve a conflicts problem by localisation is a noticeable feature of the Australian approach, it is a technique which has been developed mainly within the rubric of statutory interpretation.

A forum statute must be applied in accordance with its express of implied terms. These may exclude the operation of common law choice of law rules. However, despite the full faith and credit provisions of the Constitution, the High Court has appeared unaware of the negation of conflicts law which this approach entails if sister-State statutes are not treated similarly. In the result, the patent evaluation of interests and policies in resolution of a conflict of State statutes, has been neglected.

Taking an approach to a conflicts problem which is appropriate to it, further requires an appreciation of the interaction between the concepts of jurisdiction, justiciability and choice of law. Each area of doctrine contributes toward identification of the legal system or systems by reference to which the parties' legal relations will be determined. Each

79 See, e g , Mynott v Barnard (1939) 62 C L R 68, Kays Leasing Corporation v Fletcher (1964) 116 C L R 124, Freehold Land Investments Ltd v Queensland Estates Pty Ltd (1970) 123 C L R 418, Goodwin v Jorgensen (1973) 1 A L R 94, Plozza v South Australian Insurance Co [1963] S A S R 122

does so however, by reference to different aspects of that fundamental question.

Mention of two particular points of interaction is prompted by the cases considered in this article. First, where a choice of law rules selects the *lex fori*, a choice of forum achieves a choice of law. The combination of rules for service *ex juris*[80] and a well developed doctrine of forum conveniens, can rationalise what may otherwise be a parochial choice of law rule.

Second, common law choice of law rules have both justiciability and choice of law functions. Judicial determination that a particular set of facts, including in some cases, a rule or doctrine of foreign law, fall within a juridical category specified in a choice of law rule, is recognition that the facts pleaded give a cause of action in the forum. The legal system designated by the connecting factor is then referred to for determination of the parties rights and liabilities. This latter process takes account of rules constitutive of both claim and defence.

The justiciability interpretation of the rule in *Phillips* v *Eyre* is an isolated example of the separation of these two functions of a common law choice of law rule. As the judgment of Windeyer J. in *Anderson* v *Eric Anderson Radio and TV Pty Ltd*[81] makes clear, forum law relevant to the question of justiciability, determines only whether the plaintiff has a good cause of action. Whether or not there exists any matter of defence which may defeat it is governed by the *lex causae*.

Cases such as *Borg Warner* show that common law choice of law rules do not constitute an exclusive area of forum law for the determination of questions of justiciability. What has to be grasped before this approach can accommodate conflicts between statutory rules of State law, is the necessity to develop complementary, unilateral techniques for the determination of the parties' rights and liabilities.

Substituting a proper law of the tort approach for use of the rule in *Phillips* v *Eyre*, is an option which may be said to be waiting in the wings.[82] Such an approach is itself a synthesis of the conventional method and a more finely calibrated analysis of contacts, interests and policies. If only because all conflicts of State statutes cannot be readily classified as conflicts of tort law however, it can only facilitate the resolution of some such conflicts.

Overall then, it will be a rare case indeed in which an Australian court is actually constrained by conflicts doctrine to reach a decision which frustrates the purpose of State legislative schemes. It is unjustified

80. Under both the State Rules of the Supreme Courts and the federal Service and Execution of Process Act 1901, most grounds for service *ex juris* specify a connection between the subject matter of the cause of action and the forum

81 (1965) 114 C.L.R 20.

82. It is mentioned by Mason J in Pozniack v. Smith as a possible solution to the choice of law problem in tort. For a recent academic reaffirmation of the desirability of the approach see Pryles, supra n.68, at 376 ff

suppositions, such as that the rule in *Phillips* v *Eyre* has one correct interpretation, or that classification of an action as being in tort automatically attracts either the *lex fori* or the *lex loci delicti*, that raise such constraints.

An overview of Australian conflicts law concerning actions in or based on torts, finally necessitates a post-script. The only short answer to problems of inter-state conflicts is uniform State or federal legislation. The relatively large number of cases arising out of inter-state motor vehicle accidents, is one indicator of the desirability of a legislative solution in this area. Such cases raise the whole gamut of problems of conflict of laws, and may also raise problems of federal jurisdiction.[83] There is little reason to be sanguine about their resolution in the courts. There is even less to be said in support of the complexity of the doctrine produced, when it is recalled that the State legislative schemes in issue are substantially similar.

83 Scotland v Bargen (1982) 41 A L R 65 is a particularly bad example of extended litigation on a motor vehicle accident claim