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Private International Law
Choice of Law in Tort and Delict

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PART V

OUR PREFERRED OPTIONS AS APPLIED TO PARTICULAR TYPES OF TORT AND DELICT

A. INTRODUCTION

5.1 In Part IV we considered the options for reform in general terms, and reached the provisional conclusion that there were in principle two acceptable options for reform among those available, namely the "lex loci delicti with exception" model and the "proper law with presumptions" model, under both of which the law prima facie applicable would be capable of displacement. We sought views on this conclusion and asked which of these two models was, in principle, to be preferred. In this Part we consider further those two models in the context of particular types of tort and delict. Our discussion in Part IV, although phrased in general terms, had primarily in mind the "basic" wrongs of personal injury, death, and damage to property; but we also expressed the view that our reformed choice of law rule should have as wide a field of application as possible, and it is therefore necessary to examine how our proposals would apply to other types of tort and delict. It would, however, not be possible to consider every single category of tort and delict. We therefore confine ourselves to types of tort and delict which are familiar to United Kingdom eyes and also of relatively common occurrence.

5.2 There are two different questions which arise for each category of tort and delict considered. These are -

(1) For the purposes of the lex loci delicti model, whether the locus delicti requires definition for multi-state cases; or, for the purposes of the proper law model, whether the country of closest and most real connection should be the subject of a presumption; and

(2) Whether each of the proposed models, including any definition or presumption thought desirable in response to question (1), is otherwise adequate to deal satisfactorily with the particular type of tort or delict under consideration, or whether further special rules are needed for the purposes of either model.

5.3 It should be borne in mind throughout that any special definition, presumption, or rule would ultimately have to be formulated in statutory language. This may prove difficult, and would also make the final structure more complex. For these reasons we lean against special provisions unless clearly desirable.

B. TWO SPECIAL ASPECTS OF PERSONAL INJURY, DEATH, AND DAMAGE TO PROPERTY

1. Traffic accidents

5.4 It does not appear likely that the definition of the locus delicti will prove difficult in the case of traffic accidents.[505] The applicable law under both the lex loci delicti model and the proper law model would therefore prima facie be that of the place where the accident occurred, whether it was personal injury, death, or merely damage to property that was involved. Both models would permit displacement in favour of the law of a place which had a closer and more real connection with the occurrence and the parties.

5.5 The prima facie applicable law under both of our proposed models is the same as that provided for by the basic rule in Article 3 of the Hague Traffic Accidents Convention. However, that Convention, which has not been signed or ratified by the United Kingdom,[506] contains a detailed system of exceptions to the basic rule, emphasising the law of the state of registration of the vehicle or vehicles. We do not believe it necessary to adopt such a scheme here, or that any special provision need be made for traffic accidents. Comments are invited.

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505 But cf. Sacra v. Sacra 48 Md. App. 163, 426 A. 2d 7 (1981).

506 The Convention has been ratified by Austria, Belgium, Czechoslovakia, France, Luxembourg, the Netherlands and Yugoslavia, and also signed by Portugal and Switzerland. In Canada, the Conference of Commissioners on Uniformity of Legislation in Canada has recommended adoption of a Conflict of Laws (Traffic Accidents) Act based on the Hague Convention. This has been enacted in the Yukon.

2. Products liability[507]

(a) Introduction

5.6 By "products liability" we mean, loosely, the non-contractual liability of manufacturers and others for damage caused by a product. Although this definition is sufficient for the purposes of the following discussion, its vagueness serves to emphasise that any special rule relating to products liability would require a statutory definition of the term. We think that the formulation of such a definition would not be easy.

5.7 The problems which arise in the field of products liability are mainly those of the multi-state case. Where the whole train of events is confined to one country, our proposed lex loci delicti model clearly applies the law of that country in the first instance. Assuming that the claim is for personal injury, death or damage to property, the same result would be reached by the proper law approach, upon applying the proposed presumption that the country with which the occurrence and the parties had the closest and most real connection was that of the injury or damage.[508] In both cases, the law prima facie applicable would be capable of displacement. We see no reason for any different approach in this situation, but comments are invited.

(b) The multi-state case

5.8 However, products liability cases are likely to involve more than one country. For example, the following may all be different -

(i) the country or countries where the product is manufactured or assembled, or from which its components come;

(ii) the country of the producer's place (or principal place) of business;

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507 The literature on this topic is large, but see Cavers, "The proper law of producer's liability", (1977) 26 I.C.L.Q. 703; and Hague Conference, Actes et documents de la Douzième session (1972), Vol. III.

508 See above, para. 4.140.

(iii) the country where the product is put on the market;

(iv) the country where the product is re-sold, or otherwise disposed of (whether foreseeably or not);

(v) the country or countries where the product causes injury or damage;

(vi) the country where the injury or damage becomes apparent, and the further country in which it continues.

5.9 It is quite easy to construct an example which is this complicated. For example, a travel-sickness drug might be manufactured in Italy by a Swiss concern, from chemicals imported from the United States and Japan, and put on the market in Holland. A consumer buys some in Holland but does not use it; instead it is given to another person in England, who while on a car trip through Europe consumes some aboard a French ferry on the high seas and some in Belgium, falls ill in Germany, and remains ill in Austria.

5.10 Cases decided for jurisdictional purposes under R.S.C., O.11, r. 1(l)(h), or its equivalent elsewhere,[509] have tended to emphasise the place of conduct, and have generally not admitted that the place of injury is the place where the tort or delict occurred.[510] Some of those cases have,

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509 There is no direct equivalent to R.S.C., O. 11, r. 1 in Scotland, as service is irrelevant to questions of jurisdiction. Apart from the usual grounds of jurisdiction, such as the defender's residence or carrying on business, jurisdiction in delict is conferred on the Court of Session and the Sheriff if the delict was committed in Scotland or the Sheriffdom, as the case may be: see Law Reform (Jurisdiction in Delict) (Scotland) Act 1971, s. 1.

510 George Monro Ltd. v. American Cyanamid and Chemical Corporation [1944] 1 K.B. 432 (C.A.); Abbott-Smith v. Governors of University of Toronto (1964) 45 D.L.R. (2d) 672 (where it was suggested that a tort was committed within the jurisdiction only if all its elements occurred there); Distillers Co. (Biochemicals) Ltd. v. Thompson [1971] A.C. 458 (P.C); Leigh Marine Services Ltd. v. Harburn Leasing Agency Ltd. (1972) 25 D.L.R. (3d) 604; Macgregor v. Application des Gaz [1976] Qd. R. 175; Castree v. E.R. Squibb & Sons Ltd. [1980] 1 W.L.R. 1248 (C.A.). A different approach was, by contrast, adopted in Moran v. Pyle National (Canada) Ltd. (1973) 43 D.L.R. (3d) 239.

however, defined the conduct in such a way that (as defined) it occurred in the same country as the injury and the forum.[511] In Scotland it has been held[512] that, for the purposes of section 1(1) of the Law Reform (Jurisdiction in Delict) (Scotland) Act 1971, a material breach of duty inside Scotland is sufficient to give jurisdiction to the Scottish courts no matter how substantial the breach of duty might be outside Scotland. For the reasons given in paragraph 4.68 above, cases decided for jurisdictional purposes are however of limited relevance in the context of choice of law.

5.11 Different attempts to solve the problem of choice of law in products liability cases have been made in the Swiss proposals[513] and in the Hague Products Liability Convention.[514] Subject to two exceptions,[515] the Swiss proposals provide for the application, at the claimant's option, of either the law of the wrongdoer's place of business ("établissement") or habitual residence; or the law of the country where the product was acquired, unless the wrongdoer shows that the product was put on the market there without his consent. The approach of the Hague Convention is rather different. The applicable law is chosen according to a sophisticated scheme which relies on the particular

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511 Distillers Co. (Biochemicals) Ltd. v. Thompson [1971] A.C. 458 (P.C.); Castree v. E.R. Squibb & Sons Ltd. [1980] 1 W.L.R. 1248 (C.A.).

512 Russell v. F.W. Woolworth & Co. Ltd. 1982 S.L.T. 428, 431. The rules as to jurisdiction, in England and Wales, in Northern Ireland, and in Scotland, will of course be changed when the Civil Jurisdiction and Judgments Act 1982 comes fully into force: see, in particular, Schedule 1, articles 2, 5(3) and 6; Schedule 4, articles 2, 5(3) and 6; and Schedule 8. The Law Reform (Jurisdiction in Delict) (Scotland) Act 1971 will be repealed by the 1982 Act when the relevant provision is brought into force.

513 Article 131: see Appendix.

514 The Convention has not been signed or ratified by the United Kingdom. It has been ratified by France, the Netherlands, Norway and Yugoslavia, and also signed by Belgium, Italy, Luxembourg and Portugal.

515 Article 14 and article 131(3): see Appendix.

clustering in any individual case of four stated contacts. The result is as follows: by article 5, the law of the habitual residence of the injured party[516] applies if his habitual residence is also -

(i) the principal place of business of the wrongdoer;[517] or

(ii) the place where the injured party acquired the product.

Failing this, article 4 provides that the law of the place of injury applies, provided this is also -

(i) the habitual residence of the injured party; or

(ii) the principal place of business of the wrongdoer; or

(iii) the place where the injured party acquired the product.

If the actual combination of contacts does not correspond with either of these, then, by article 6, the applicable law is that of the principal place of business of the wrongdoer, or (at the claimant's option) that of the place of injury. The application of the law of the habitual residence of the injured party or of the place of injury is also always subject to a test of foreseeability which we mention below.[518]

5.12 We have reservations about both of those schemes. In the first place, and for the reasons outlined in paragraph 4.76 above, we are unhappy about the possibility that the applicable law may be determined by the claimant. Secondly, we believe (for reasons which will appear below[519]) that both the Swiss proposals and the Hague Convention emphasise the principal place of business or the habitual residence of the wrongdoer, or the habitual residence of the injured party, to a greater degree than is appropriate. Finally, in attempting a high degree of sophistication, the scheme of the Hague Convention has also resulted in a

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516 The Convention refers in fact to "the person directly suffering damage".

517 The persons to whom the Convention applies are listed in article 3.

518 Paras. 5.23 - 5.24.

519 Paras. 5.15, 5.17.

high degree of elaboration. It also constitutes a self-contained choice of law system, which attempts to achieve the right choice of law expressly in every case. This may limit its relevance to our own proposals, where any provision on products liability would be intended to fit within a larger scheme and would be intended to provide only a prima facie rule which was capable of displacement.

5.13 Assuming, then, that neither an elective solution nor a scheme as elaborate as that of the Hague Convention should be incorporated into our reformed choice of law rule in order to cater for products liability cases, the question nevertheless remains whether our proposed reforms require to be modified to deal with such cases, despite the difficulties which would be associated with any attempt to define them in statutory form. In the absence of special provision for products liability cases, the prima facie result of either of our proposed choice of law rules would be the application of the law of the country where the claimant was injured or the property damaged. This now requires to be examined more closely, since in some circumstances it may be thought unjust to a producer to apply the law of the country where the injury or damage occurred: the connection between elements in the train of events is generally looser in a products liability case than it is in the case of conduct which produces direct results upon the victim. The producer of a product merely launches it in a given place; where it travels thereafter will depend entirely upon where the final recipient happens to go, which may be outside the producer's control, his knowledge, or even his ability to forecast. Further, the place of injury may be difficult to identify, as for example where the injury is the cumulative effect of the consumption in different places of defectively manufactured pills.[520]

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520 Another example is provided by Continental Oil Co. v. General American Transportation Corp. 409 F. Supp. 288 (1976). This case concerned 46 railway tank cars (31 of which had been delivered in Pennsylvania, 12 in Texas, and 3 in Ohio) which slowly developed cracks while they were being used throughout the eastern United States.

5.14 In the context of products liability, therefore, there would appear to be two remaining questions. The first is whether, in a multi-state case, a country other than the country of injury has a greater prima facie claim to application; the second is whether a test of foreseeability should be introduced into the choice of law rule as it applies in products liability cases. It should be recalled that, under either of our proposed models, the law prima facie applicable would always be capable of displacement in appropriate circumstances, and the law of the country with which the occurrence and the parties had the closest and most real connection applied instead.

(i) Does a country other than the country of injury have a greater prima facie claim to application in a multi-state case?

(a) Claimant's habitual residence

5.15 The claimant's habitual residence does not seem to us to be relevant independently of the circumstances of the occurrence, although it will in many cases (no doubt) be the same as the country of acquisition or the country of injury. But where, for example, a consumer habitually resident in England buys a product in France, it would not appear easy, wherever the injury occurred, to justify the application of English standards of product liability instead of French simply because the claimant had his habitual residence in England. It does not seem to us to be right in principle that a claimant should always be able to carry the products liability law of the country of his habitual residence with him wherever he goes. As between the law of the country of injury and that of the country of the claimant's habitual residence, our view is that it is the law of the country of injury which has the greater prima facie claim to application.[521]

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521 Compare, however, the choice of law rule in tort and delict proposed by the Private International Law Committee of the Civil Code Revision Office of Quebec, whereby the applicable law would (subject to a proviso) be that of the claimant's habitual residence. This rule would not be confined to products liability cases. See Castel, Canadian Conflict of Laws, Vol. 2 (1977), pp. 647-648, and Morse, p. 344.

(b) Country of manufacture

5.16 The country of manufacture is in our view likely to be even less relevant. In the first place, it may well be a country which was selected by the producer for purely commercial reasons and which has no connection at all with the subsequent pattern of distribution of the product. Why, for example, should South Korean standards of product liability apply to goods ordered for and sold by a British concern and intended for the British market, simply because they were made in South Korea? Secondly, there may be no single country of manufacture even for an individual article. Thirdly, it may not be easy or even possible for the claimant to ascertain the country of manufacture. Fourthly, if the law of the country of manufacture were to apply, different laws relating to products liability would routinely attach to different products marketed in the same country,[522] and perhaps even to different examples of the same product (since these may be manufactured in different places).

(c) Producer's place of business

5.17 The final difficulty mentioned in the previous paragraph would also occur here: if the law of the producer's place of business applied, different laws relating to products liability would routinely attach to different products all marketed in the same country. In any event, however, the prima facie application of the law of the producer's place (or principal place) of business does not seem to us to strike the right balance between the interests of the producer and those of the injured party. There may, of course, be circumstances in which it is right to apply a law which is not that of the place of injury. In such a case it may indeed be that the law of the producer's place of business should apply. An example is, perhaps, where the law of the place of injury would make the producer liable, while the law of the producer's place of business (being

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522 This does not in practice necessarily imply different standards; but, to the extent that it does, it has been suggested that the application of different standards may in certain circumstances be contrary to the General Agreement on Tariffs and Trade, article III, and to the European Community Treaty, article 30: see Cavers, "The proper law of producer's liability", (1977) 26 I.C.L.Q. 703, 711 n. 26.

also the country of acquisition) would not, provided it was not foreseeable that the product would find its way to the country where it caused injury. However, as a prima facie rule capable of displacement, the application of the law of the producer's place of business does not seem to us to be justifiable. Many cases are likely in practice to concern products which cause injury in a country where their presence was foreseeable or even intended by the producer.

(d) Country of acquisition

5.18 The application of the law of the country of acquisition represents an intermediate solution. The fact that the place of injury may depend entirely on the movements of the claimant suggests that, at least in the simple case where a finished product is made in one country and marketed to the public in another, there may be an arguable case for the prima facie application of the law of the country where the product was acquired by the claimant. In many cases this will be the same as the country of injury, but where it is not it is arguable that the country of acquisition would be more closely connected with the train of events.

5.19 The rationale of applying the law of the country of acquisition must be that it is reasonable that the products liability standards of the market-place where a product was supplied should prevail, but that it is unreasonable to the producer to allow the determination of the applicable law to be influenced by subsequent events, such as a further private sale or gift, or a "fortuitous" place of injury. A "place of acquisition" rule thus guards against the peripatetic consumer who is injured in a place other than the place of acquisition, and also ensures that all goods marketed in the same country are in principle subject to the same standards. In many circumstances there is in our view much to be said for this approach, but it also suffers from a number of disadvantages.

5.20 If the rationale of a "place of acquisition" rule is to be adhered to, the possibility of a further private sale or gift clearly requires that the place of acquisition should be the last place in the chain of

acquisitions where the product was available through commercial channels.[523] This is easy to apply when the injured party is the person who last acquired the product through commercial channels, but the cases in which he is not give rise to difficulties. These cases include not only the private sale or gift, but also the case of the injured party who has not acquired the product at all - for example, a passenger in a defective aircraft or car. Such a person would have to find out what the country of acquisition was before the applicable law was known, but to apply the law of the country of acquisition in a case where the claimant has no knowledge of the circumstances of the acquisition in our view places too great a burden on him. Further, in the case of products for which there is commonly a second-hand market (such as aircraft or cars), it is not easy to decide on policy grounds whether it should be the new or the second-hand market-place whose standards of products liability should apply in an action against the manufacturer.

5.21 A second problem is that the acquisition may itself be an international transaction, such as the purchase of an aircraft from a foreign manufacturer. In such a case the country of acquisition requires definition, and although it would appear that the rationale of this rule would require that the country of acquisition be the acquiring, and not the disposing, party's country, the identification of the country of acquisition will nevertheless not always be as simple as may at first appear.

5.22 Finally, two matters should be recalled. First, the present discussion is directed to the question whether, in a multi-state products liability case, the prima facie applicable law should be other than that of the country of injury; secondly, whatever law is prima facie applicable, it would (if our proposals in Part IV are accepted) be subject to displacement in appropriate circumstances. Although the application of the law of the country of acquisition is in many circumstances attractive, it would

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523 See Hague Conference, Actes et documents de la Douzième session (1972), Vol. III, pp. 54, 60.

appear likely that in practice this will frequently coincide with the country of injury or damage. Where the country of injury or damage is not significantly connected with the occurrence and the parties, we should expect the law of that country to be displaced in favour of the law of another, more appropriate, country. Since a "country of acquisition" rule has the other practical disadvantages just outlined, our provisional conclusion is therefore that in this difficult area the prima facie application of the law of the country of injury or damage is preferable to the prima facie application of the law of the country of acquisition. We are reinforced in this view by the fact that, if products liability cases were to be singled out for special treatment, it would become necessary to define a products liability case in order to distinguish it from any other type of case. As we have mentioned above,[524] we are not confident that this could satisfactorily be done.

(ii) Foreseeability

5.23 The remaining question is whether a test of foreseeability should be built in to our choice of law rule as it applies to products liability cases. Such a test would appear to be required by the rationale of a "country of acquisition" rule, and in that context is contained in the Swiss proposals. However, a test of foreseeability could be of wider application, and the Hague Convention contains such a test. The Hague Convention test prevents the application of the law of the habitual residence of the injured party or the law of the place of injury, not if these places were unforeseeable as such, but where the wrongdoer -

> "...establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels."[525]

The applicable law is thus always tied to the law of the producer's principal place of business or the laws of the foreseeable market-places of the product in question.

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524 Para. 5.6.

525 Article 7. The Quebec proposal mentioned in n. 521 above contains a similar test of foreseeability.

5.24 Foreseeability is, in our view, more relevant in the field of products liability than in other fields, because of the looser connection between the conduct and the results; but whether or not such a test should be built in to our choice of law rule is another matter. In the first place any test of foreseeability suffers from the disadvantages mentioned above at paragraph 4.80, and would also require a products liability case to be defined by statute. Secondly, it is not easy to see what result a test of foreseeability should be intended to procure in a products liability case. Under both the Swiss proposals and the Hague Convention, where the wrongdoer shows what he is required to show under the test of foreseeability the result is that the law of the producer's place of business applies. However, we do not believe this to be satisfactory, because there may, in the circumstances, be a case for applying the law of some intermediate place in the train of events. Further, the designation, under our general law reform proposals, of the country of injury or damage as supplying the applicable law would in any event only provide a prima facie rule: it would be capable of displacement even in the absence of a test of foreseeability, and we do not see any point in building in such a test merely in order to supply a different prima facie rule which itself could be displaced. We have therefore reached the provisional conclusion that no test of foreseeability should be incorporated.

(c) Conclusions

5.25 Our provisional conclusions relating to products liability are, therefore, as follows:

(1) Products liability cases (even if they could be satisfactorily defined) require no special designation of the locus delicti for the purposes of our proposed lex loci delicti model for a reformed choice of law rule; nor do they require any special presumption as to the country of closest and most real connection for the purposes of the proper law model. The general rule would therefore apply in products liability cases as in others involving personal injury, death, or damage to property, and the prima facie applicable law would be that of the country of injury or damage.

(2) No other special provision applicable only to products liability cases is required; in particular, a test of foreseeability is not necessary.

We invite comments on these conclusions. Commentators who favour special rules for products liability cases are invited also to express views on how a products liability case should be defined.

C. LIABILITY RESULTING FROM THE MAKING OF STATEMENTS

1. Torts and delicts other than defamation: the multi-state case

5.26 We have reached the provisional conclusion that, in the case of torts and delicts other than defamation but which relate to the making of statements, it would not be practicable either to define the locus delicti (for the purposes of our lex loci delicti model), or to formulate a presumption as to the country with which the occurrence and the parties had the closest and most real connection (for the purposes of our proper law model). This is because such torts or delicts may in fact require more than the mere making of a statement. For example, the tort of deceit in England and Wales and in Northern Ireland, or in Scotland an action in delict arising out of a fraudulent misrepresentation, requires not only that the wrongdoer should have made a representation, but also that the claimant should have acted on it and suffered loss in consequence. In such a case there are four possible candidates for the country which would provide the prima facie applicable law:

(a) the country from which the representation originated;
(b) the country to which the representation was sent or in which it was received;
(c) the country where the representation was acted upon;
(d) the country where the claimant suffered loss.

5.27 Of the first two of these countries, we have no doubt that the second is of greater prima facie importance. Where a statement is sent from one place to another it cannot produce an effect until it is received; and it seems appropriate to us that any legal consequences which flow from a statement should prima facie be those provided for by the place of receipt as against the place of despatch. The place where the statement

was committed to paper, or posted, or where the telex was sent from, does not seem to us to have a great deal of relevance. This view is consistent with that taken in a number of English and Canadian cases concerned with applications for leave to serve process out of the jurisdiction.[526]

5.28 However, in the case of a tort or delict which does not end with the making of a statement, we do not believe that it would be useful to try to forecast which element in the train of events will usually be the most important. The circumstances of such torts and delicts are so varied that what is important in one case may be insignificant in another. Further, as in the case of products liability, the places where significant elements in the train of events occur will depend partly upon the activities of the claimant as well as on those of the wrongdoer. The wrongdoer may have intended or foreseen these activities or he may not, and this may be a relevant fact in choosing the applicable law. It is noteworthy that the Restatement Second does not attempt to indicate which law will prima facie be applicable in cases of fraud and misrepresentation, except where the statement was made and received in the same state and the plaintiff's action in reliance on it also took place there.[527]

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526 Original Blouse Co. Ltd. v. Bruck Mills Ltd. (1963) 42 D.L.R. (2d) 174; Diamond v. Bank of London and Montreal Ltd. [1979] Q.B. 333 (C.A.); Cordoba Shipping Co. Ltd. v. National State Bank, Elizabeth, New Jersey [1984] 2 Lloyd's Rep. 91 (C.A.); and see also Composers, Authors and Publishers Association of Canada Ltd. v. International Good Music Inc. (1963) 37 D.L.R (2d) 1 (copyright infringement in Canada by U.S. television transmission). By contrast, in Cordova Land Co. Ltd. v. Victor Bros. Inc. [1966] 1 W.L.R. 793, false representations were contained in a bill of lading, which had been delivered by the master of a ship to the shippers in Boston, Mass., and which had foreseeably been received and acted upon by the buyers in England. It was nevertheless held that the master had not delivered the bill to the buyers in England since the shippers were not to be regarded as the master's agents: therefore any representations which had been made in England had not been made by the master or his employers.

527 Section 148.

5.29 Our provisional view, therefore, is that no special rule should be adopted for torts and delicts (other than defamation) based upon the making of statements. The result would be that the general choice of law rule (either the lex loci delicti model or the proper law model) would apply in unmodified form. Comments are invited.

2. Defamation

5.30 Defamation raises particularly difficult choice of law problems. We deal with the questions which present themselves under three headings. The first is whether a prima facie applicable law should be designated for defamation cases: in other words, for the purposes of our proposed lex loci delicti model, whether the locus delicti should be defined for a multi-state case; or, for the purposes of our proposed proper law model, whether the country with which the occurrence and the parties have the closest and most real connection should be the subject of a presumption. The second question is whether any special rule should be introduced to deal with the case where the statement would give rise to no liability in the country of origin but gives rise to liability under the applicable law. The third question is whether any further special rule is required to deal with statements which would be privileged under our own internal law. We deal with these questions in order.

5.31 This section is intended to cover all actions for verbal injury, and is not intended to be confined to defamation as it is understood in English law, or as differently understood in Scots law. In particular, the word "publication" is not intended to carry any implication that the publication must be to a third party, as would be required in English (although not in Scots) law. By "publication" we include transmission of the statement to the claimant alone in cases where that is capable of founding a claim under a relevant law. Further, we do not intend to confine ourselves to claims which require injury to reputation, as would be the case in English law (although not, again, in Scots law[528]).

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528 See n. 538 below.

(a) The prima facie applicable law

5.32 Defamation involves considerations different from those raised by other torts and delicts concerning statements. In defamation cases it is primarily the statement itself, as distinct from subsequent monetary loss suffered by the claimant, that gives rise to liability; the law of defamation of many countries is aimed primarily at the protection of the claimant's reputation, not at monetary compensation for quantifiable loss. The central issue is thus what an alleged wrongdoer has said; and it is more likely in this area that a potential wrongdoer will take advice as to his potential liability for what he says.

5.33 The types of statement which may form the basis of liability in defamation may be placed in two categories. The first is the single statement, such as one contained in a letter, telephone call, telex or telegram. The second is the multiple statement, reproduced many times or reaching many destinations at once, such as a statement contained in a newspaper, a book, or a radio or television broadcast. We deal with these two types of statement separately.

(i) The single statement

5.34 Where a single statement is written, or posted, or spoken in one country and published in another (whether only to the claimant himself or to a third party), the obvious candidates as the prima facie applicable law are that of the country of origin and that of the country of publication. Other possibilities are considered below in connection with multiple statements, but between these two alternatives it is our view that the law of the country of publication has the stronger prima facie claim to application. It will almost certainly be intended, and will usually be at least foreseeable, that the statement in question would be published in the country where it was in fact published, and we can see no reason why the maker of a statement should be able to shelter behind the law of the country of origin, or (on the other hand) be subject to liability under the law of the country of origin, when the statement in question was directed away from that country and towards the country of

publication. The legal consequences which flow from publication of a defamatory statement in a particular country should, in our view, prima facie be those provided for by the law of that country.

5.35 Our provisional conclusions, therefore, are that in a defamation action based upon a single statement,

(a) where the statement originated in one country and was published[529] in another, the country where the statement was published should be considered as the locus delicti for the purposes of our lex loci delicti model for a reformed choice of law rule;

(b) for the purposes of our proper law model, the country where the statement was published should be expressly presumed to be that with which the occurrence and the parties had the closest and most real connection.

These conclusions are consistent with the view which we have taken immediately above[530] in relation to torts and delicts other than defamation but which relate to the making of statements; and are also consistent with defamation cases decided in the jurisdictional context.[531] They also correspond with the assumption which was made in Church of Scientology of California v. Commissioner of Metropolitan Police.[532] Comments are invited on our conclusions.

(ii) The multiple statement

5.36 We envisage that the approach outlined for single statements could equally well be applied to multiple statements whose publication

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529 See para. 5.31 above.

530 Paras. 5.26 - 5.29.

531 Joseph Evans & Sons v. John G. Stein & Co. (1904) 7 F. 65; Thomson v. Kindell 1910 2 S.L.T. 442; Bata v. Bata [1948] W.N. 366 (C.A.). The rule of the Restatement Second is to the same effect: section 149 (but see below, n. 539).

532 (1976) 120 S.J. 690 (C.A.).

was in fact confined to a single country - for example, if it be possible, a radio broadcast transmitted from one country and received only in one other country. But where the statements complained of reach many different countries, the possibility arises that an action in the United Kingdom based upon publication abroad could involve as many different applicable laws as there were countries in which the statement was published. This possibility is viewed by some as alarming, and may well have prompted the very wide range of special choice of law rules which have been suggested for defamation cases involving a multiple statement. Indeed, one writer has listed ten possible applicable laws, to each of which there is some objection.[533] Certainly under a "country of publication" rule the claimant would either have to prove his case under many different systems of foreign law, or else choose to ignore some of the places where the defamatory matter was in fact published, and concentrate only on some of those places or on one of them.

5.37 There would appear to be two alternatives to the prima facie application of the law of the place of publication in the case of a multiple statement:

(1) to refrain from designating any prima facie applicable law (with the result that no special definition of the locus delicti would be provided for our lex loci delicti model, and no presumption as to the country with which the occurrence and the parties had the closest and most real connection would be provided for the proper law model); or

(2) to designate a prima facie applicable law designed to result in the selection of only one applicable law in respect of a multiple statement, regardless of the number of different countries in which it was published.

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533 Prosser, "Interstate Publication", (1953) 51 Mich. L.R. 959, 971-978.

5.38 It appears to us that the first alternative would not often succeed in avoiding the application of the law of the country of publication, since we believe that in the absence of contrary provision a court is in any event likely to find that the locus delicti, or the country with which the occurrence and the parties had the closest and most real connection, is in fact the country of publication. There seems to us, therefore, to be no purpose in pursuing this alternative. The second alternative could be justified either on grounds of convenience or on grounds of principle, and there appear to be two systems of law which might be selected: that of the country of origin of the multiple statement, or that of the country of the claimant's reputation.

(a) Country of origin

5.39 On grounds of convenience it could be argued that the law of the country of origin of the statements should apply. We have explained above that we do not believe this to be the right answer for single statements; and neither do we consider that it can be justified in principle as a prima facie rule for multiple statements. We do not see why the wrongdoer should enjoy immunity from the law of the country of publication merely because the statement was published in other countries as well, particularly as in this case also it will usually be foreseeable and frequently intended that the statement would be published in the country where it was in fact published. Given that, under either the lex loci delicti model or the proper law model which we propose, the prima facie applicable law could be displaced in appropriate circumstances, we see no reason why a multiple statement should be treated in principle in a way different from a single statement. A "country of origin" rule might also encourage authors or broadcasters to select a country of origin with a conveniently lenient law of defamation.

5.40 A "country of origin" rule also raises a practical difficulty: the country of origin of a multiple statement may itself require definition. For example, in the case of a broadcast, there may be several transmitters; the persons participating in the programme may be in different countries; some material may be on tape recorded in another

country. The country of origin of the particular defamatory statement may in such circumstances be hard to identify. In the case of a printed publication there are different difficulties: for example, according to Prosser, writing in 1953,

> "... the Luce publications, Time and Life, are composed and edited in New York, the plates for the issues are made in Illinois, part of the actual printing is done in Illinois and part in Pennsylvania, and all issues are distributed by Time, Inc., a Delaware corporation."[534]

(b) Country of claimant's reputation

5.41 It has been suggested[535] that liability in defamation should be decided neither according to the law of the country of origin nor according to the law of the country of publication, but, rather, according to the law of the country where the claimant's reputation is situated. This solution can be justified in principle on the basis that the tort or delict of defamation exists primarily to protect the claimant's reputation; and it would be consistent with the view taken above in Part IV (namely that the law of the country of injury is in many cases the most appropriate law to apply)[536] that in a defamation case the law of the country where the claimant's reputation had been injured should apply. If this view were taken it would in our view be inconsistent to confine it to multiple statements: it would apply equally to single statements. However, we are not attracted to this solution.

5.42 In the first place, the idea of a "reputation" is in any event a vague one, which can be localised only by a fiction.[537] It is located, if anywhere, in the minds of those who know, or know of, the claimant, and is injured only upon the publication to those persons of the statement in question. Such people may of course be very numerous and widely

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534 Prosser "Interstate Publication", (1953) 51 Mich. L.R. 959, 975 n. 93.

535 Cheshire and North, p. 289; Morse, p. 123.

536 See paras. 4.61 - 4.91.

537 This is conceded in Cheshire and North, p. 286.

dispersed. In such a case, it would be necessary to try to find a single country where the claimant's reputation could be said to be most substantially located, if a "country of reputation" rule was to have any advantage over a "country of publication" rule. We believe that any attempt to do this would rapidly become unworkable in practice. Secondly, where a claim may be validly made which is not based on damage to reputation, as may happen in some legal systems (including that of Scotland[538]), a choice of law rule founded on the country of reputation would seem inappropriate.

5.43 The difficulty of locating the claimant's reputation has led to the suggestion that the law of the claimant's habitual residence should apply,[539] on the assumption that his reputation is likely to be principally situated there. This seems to us to be a very blunt instrument: it would not, for example, be true of many international celebrities, and it cannot in our view be justified on grounds of principle. The balance of convenience does not seem to us to call for departure from the prima facie application of the law of the country of publication.

5.44 The prima facie application of the law of the country where a person's reputation was located, or where he was habitually resident, may also lead to what in our view is a startling result: where that country was not the country of publication, it would mean that the maker of a statement could be held liable under the prima facie applicable law even

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538 In Scotland, although damage to reputation is often an important element in an action for defamation, it is not necessary in order to found a successful claim: Richie & Son v. Barton (1883) 10 R. 813 (damages recoverable for injured feelings only).

539 Article 135 of the Swiss proposals (which relates only to public defamation) refers inter alia to habitual residence: see Appendix. An analogous solution has also been adopted in at least one case in the United States: Dale System Inc. v. Time Inc. 116 F. Supp. 527 (1953), where the applicable law was that of a corporate plaintiff's domicile (although it was conceded that the law of the principal place of business might also be appropriate). See also Restatement Second, section 150 (2), (3).

though no liability would exist under the law of the country of publication. (The opposite result could of course also occur, but is not so startling.) Thus if, for example, a statement about a person whose reputation or habitual residence was in New York were published in the United Kingdom, having also originated there, under a "country of reputation" approach the law of New York would prima facie apply in a defamation action in the United Kingdom, even though no copies of the statement ever left this country.

(iii) Conclusions

5.45 It should be noted that, even under the present law, the possibility exists of a number of different laws having to be taken into account;[540] but we are not aware that this in fact gives rise to widespread difficulty, and the claimant may of course rely on the presumption that foreign law is the same as the lex fori. The large-scale international defamation litigated in the United Kingdom is likely to be a rare occurrence and we have formed the view (upon which comments are invited) that it would not in practice be worthwhile to create a separate rule or presumption for international multiple statements solely on the ground of theoretical convenience in a small number of cases.

5.46 Our provisional view, (upon which comments are invited) is, therefore, that for all defamation cases, whether based on a single or a multiple statement,

(1) for the purposes of our proposed lex loci delicti model, the locus delicti should be defined as the country of publication in the case of a statement which originated in one country and

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540 Renouf v. Federal Capital Press of Australia Pty. Ltd. (1977) 17 A.C.T.R. 35, 58-59; Cawley v. Australian Consolidated Press Ltd. [1981] 1 N.S.W.L.R. 225; Carleton v. Freedom Publishing Co. Pty. Ltd. (1982) 45 A.C.T.R. 1. This was also a matter of concession in Gorton v. Australian Broadcasting Commission (1973) 22 F.L.R. 181. See Handford, "Defamation and the conflict of laws in Australia", (1983) 32 I.C.L.Q. 452.

was published in another.[541] A third definition of the locus delicti would therefore be added to the two proposed above in Part IV;

(2) for the purposes of our proposed proper law model, the country with which the occurrence and the parties had the closest and most real connection should be rebuttably presumed to be the country of publication, thus adding a third presumption to the two proposed above in Part IV.

(b) Statement gives rise to no liability under law of country of origin

5.47 The possibility exists that under our reformed choice of law rule the applicable law will be one which would impose liability where the law of the country of origin of the statement would not.[542] Where the applicable law is not that of the country of publication but is that of another country more closely connected with the occurrence and the parties, there can (we believe) be no complaint about the application of that law; and the same is in our view true where the applicable law is that of the country of publication and publication there was intended. It is, however, arguable (especially in the case of the public media) that there should be no exposure to potential liability under a foreign law where (a) the statement in question was primarily destined for the home market,

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541 This is consistent with the present law: see the cases cited in the previous footnote and also Kroch v. Rossell et Cie. S.à.r.l. [1937] 1 All E.R. 725 (C.A.); Jenner v. Sun Oil Co. Ltd. [1952] 2 D.L.R. 526; Richards v. McLean [1973] 1 N.Z.L.R. 521.

542 It should be noted that this possibility also exists under our present rules, although it is unlikely to occur since the country of origin will often also be the forum (since that is where the wrongdoer is likely to be) and under the rule in Phillips v. Eyre or McElroy v. McAllister the lex fori is always applicable in addition to the lex loci delicti.

even though it may have been foreseeable that examples of it would be published abroad,[543] or (b) the statement would be privileged in the country of origin.

5.48 It is arguable that, if the applicable law has not seen fit to protect the maker of a statement in such a situation, then there is no reason for us to do so through our rules of private international law. It may be remarked that no such protection appears to exist under our own internal law: a statement which was published in the United Kingdom but which originated abroad would therefore enjoy only such protection as was accorded under our own internal law[544] and the fact that the statement gave rise to no liability in the country from which it originated would be irrelevant.

5.49 It is, however, possible that the applicable law might protect the maker of a statement in this situation, not by means of its internal law, but through its rules of private international law, to which no reference would ordinarily be made in an action in this country. It is, of course, one of the quirks of private international law that the result of an action in our courts may not be the same as that which would have been reached by a foreign court applying the law of the same country. This is accepted in other areas of our private international law, but it is perhaps arguable that in this particular case a reference to foreign law should include a reference to its rules of private international law, thereby introducing in this area the possibility of renvoi (which we have generally

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543 It appears, for example, that the Radio 4 "Today" programme can be heard over a large part of Europe. See also Kroch v. Rossell et Cie. S.à.r.l. [1937] 1 All E.R. 725 (C.A.), which concerned publications in England of two foreign newspapers. In deciding not to give leave to serve notice of the writ out of the jurisdiction, the court took into account that each newspaper circulated almost entirely in its country of origin, and had only a very small circulation in England.

544 In particular, it would appear that the protection afforded by the Defamation Act 1952, s.7 or the Defamation Act (Northern Ireland) 1955, s.7 would not be available. These sections provide for privilege to be accorded to certain categories of newspaper or broadcast report.

rejected in the field of tort and delict).[545] An example may make this clear. Consider a statement contained in a French newspaper of which some copies circulated in Germany. The claimant, a German, sues the author in the United Kingdom. The statement would give rise to no liability under the internal law of France because it is privileged under French law, but does give rise to liability under the internal law of Germany. The German choice of law rule (let us say) is that the applicable law in a defamation case is the law of the country of origin of the statement. The law of Germany is selected by our choice of law rule as the applicable law. If it is the internal law of Germany that is applied in an action in the United Kingdom, the claimant's action would succeed. If, however, it were the whole law of Germany, including its rules of private international law, the claimant's action here would fail.

5.50 Certainly if the applicable law does not make provision for this case at all, either through its internal law or through its rules of private international law, then we do not see any reason for remedying the deficiency ourselves through our own rules of private international law. This being so, and considering the probable rarity of the problem, we have reached the provisional conclusion that no express provision should in fact be made for any case where a statement gives rise to no liability under the law of the country of origin, but does give rise to liability under the applicable law. We invite comment on this view.

5.51 If our provisional view were disagreed with on consultation, there would appear to be two ways of dealing with the problem:

(1) a reference, as described in paragraph 5.49 above, not only to the internal rules of the applicable law, but also to its rules of private international law; or

(2) a double actionability rule whereby the law of the country of origin would apply concurrently with the law selected by our choice

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545 See para. 4.23 above.

of law rule (prima facie the law of the country of publication), and whereby the claimant would succeed in his action only to the extent that he could do so under both systems of law.

We invite comment, from any who may disagree with the provisional conclusion contained in the previous paragraph, on which of these (or what other solution) should be preferred; and also on how the cases to which any special rule would apply should be defined.

(c) Statements privileged under lex fori

(i) Absolute privilege

5.52 Absolute privilege under our own law is intimately connected, not merely with the public interest, but with the proper functioning of United Kingdom public institutions, and we do not believe it would be acceptable to ask a court in the United Kingdom to grant relief in respect of an alleged defamation if the statement in question would under our own internal law attract absolute privilege. We therefore believe that any statement which would attract absolute privilege under our internal law should benefit from this protection even if our choice of law rule were to select a foreign law to govern the question of defamation. It is hard to think of situations in which it would be necessary to invoke this protection, but we discuss below the possibility that a foreign law might apply under our reformed choice of law rule to a tort or delict which occurred wholly within England and Wales, within Scotland, or within Northern Ireland.[546] For example, a statement might be made by a witness in judicial proceedings in the United Kingdom in circumstances where the witness, the person defamed, and the subject matter of the proceedings had no connection at all with the United Kingdom apart from the fact that the litigation was taking place here.

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546 Paras. 5.89 - 5.92.

(ii) Qualified privilege

5.53 We have greater difficulty with qualified privilege. There are several different types of statement to which qualified privilege may apply,[547] and not all of these appear to involve the same policy considerations.

5.54 Where the statement in question is one of a type which is connected with the functioning of a United Kingdom public institution, or an institution in which the United Kingdom has an interest, then the privilege accorded may be seen as involving (in the context of choice of law) the same policy considerations as absolute privilege. Any defamation action based on such a statement raises questions of our own public interest, whatever the applicable law. Examples of the types of statement which we have in mind[548] are fair and accurate reports of judicial proceedings;[549] fair and accurate reports of parliamentary proceedings;[550] extracts from United Kingdom parliamentary papers[551]

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547 See Duncan and Neill, Defamation (2nd ed., 1983), para. 14.01; Gatley on Libel and Slander (8th ed., 1981), para. 442.

548 See Duncan and Neill, Defamation (2nd ed., 1983), para. 14.01 (d) to (g); Gatley on Libel and Slander (8th ed., 1981), para. 442 (4) to (9); Walker, The Law of Delict in Scotland (2nd ed., 1981), pp. 833-837.

549 At common law, this may extend to foreign judicial proceedings: Riddell v. Clydesdale Horse Society (1885) 12 R. 976; Webb v. Times Publishing Co. [1960] 2 Q.B. 535. See Gatley on Libel and Slander (8th ed., 1981), para. 600; Payne, "Qualified privilege", (1961) 24 M.L.R. 178. Section 3 of the Law of Libel Amendment Act 1888, which does not extend to Scotland, provides for certain reports in newspapers or broadcasts to be absolutely privileged: see Gatley, op. cit., para. 631.

550 It is not established whether this privilege extends to proceedings of foreign parliaments: see Gatley on Libel and Slander (8th ed., 1981), para. 635, n. 63.

551 Parliamentary Papers Act 1840, s.3; Defamation Act 1952, s.9(1); Defamation Act (Northern Ireland) 1955, s. 9(1).

or United Kingdom public registers; and statements and reports of the kinds mentioned in the Schedule to the Defamation Act 1952 or the Defamation Act (Northern Ireland) 1955.[552] In such cases we also believe that a defence of qualified privilege which would be available under our internal law should apply whatever the applicable law under our choice of law rule in tort and delict.

5.55 However, other types of statement to which qualified privilege may apply do not necessarily seem to involve our own public interest in the same way as those just mentioned. Whereas a statement concerning or in some way connected with a United Kingdom public institution could be said necessarily to raise questions of United Kingdom public interest, a statement which falls outside that description may well raise no question at all of our own public interest. The defence of qualified privilege is essentially a public interest defence, in that the statements to which it relates "are protected for the common convenience and welfare of society".[553] But where the society in question is not our own, there would appear to be no justification in principle for superimposing our own defence of qualified privilege in circumstances where our choice of law rule selects a foreign law. Consider, for example, the case of a person habitually resident in France, but temporarily posted to the London branch of a French company, whose employers wrote him a reference and sent it to another French company, in France, which was considering engaging him. The choice of law rule which we propose would apply French law in an action in the United Kingdom for defamation. However, in an action in England, there would in such a case appear to be no justification for superimposing on the French law of defamation the

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552 Protection under these Acts for such statements and reports at present exists only if they were contained in a newspaper published in the United Kingdom or broadcast from a station within the United Kingdom: ss.7(5), 9(2).

553 Toogood v. Spyring (1834) 1 C. M. & R. 181, 193; 149 E.R. 1044, 1050, per Parke B.

English defence of qualified privilege, which would be available under English internal law in analogous circumstances. The public interest which may be involved is surely the interest of the French, not the English, public; and the French rules should accordingly apply.

(iii) Conclusions

5.56 We have reached the view that our own defence of absolute privilege should always be available in a defamation action in the United Kingdom, and that some aspects of the defence of qualified privilege should also be available. Comments are invited on this view. However, we also believe that, at least in the case of qualified privilege, it would be unnecessarily complicated to provide expressly for such a defence in any implementing legislation, and that it would be satisfactory to allow these matters to be resolved by application of the general principles of public policy. We invite comments on this view also.

D. ECONOMIC TORTS AND DELICTS

1. The prima facie applicable law

5.57 The question here is whether the locus delicti should be defined for the purposes of our lex loci delicti model for a reformed choice of law rule; or, for our proposed proper law model, whether the country with which the occurrence and the parties had the closest and most real connection should be the subject of a presumption. It is, perhaps, more likely in this field than in any other that a tort or delict will be of a truly multi-state character (and, therefore, it is here that the idea of a locus delicti will be at its most fictitious). Our provisional conclusion is that in the field of economic torts and delicts generally it would be impracticable to designate the prima facie applicable law in advance.

5.58 A solution in terms of "place of acting" or "place of result" does not immediately present itself, since in this field especially there may well be many such places. An alternative solution has been adopted in Austria and in the Swiss proposals. In the case of unfair competition both the Austrian provisions and the Swiss proposals apply the law of the

state where the market affected by the competition is located,[554] and the Swiss proposals contain a similar rule for restrictive practices.[555] In the case of unfair competition, the Swiss proposals provide further that, if the act affects the interests of one particular competitor only, then the applicable law is that of the seat [siège] of the injured concern.[556] However, although the idea of designating as the prima facie applicable law that of the market affected is, in theory, attractive, we doubt whether such a provision would in practice prove useful in the context of our own proposals. It is quite conceivable that more than one market might be affected; and it is also conceivable that the market affected might be a truly supra-national one. Another reason for our conclusion that no provision should be made for a prima facie applicable law in this field is that if there were such a provision it would be necessary to define the types of case to which it applied. We believe that this would be extremely difficult.

5.59 One area in which it might, however, seem possible to make special provision is that of passing-off, where it might be suggested that the prima facie applicable law should be that of the country in which the product was passed off. However, we are reluctant to propose any special provision even in this area. The reason for this is that our courts have shown themselves able to find that acts done in the United Kingdom preparatory to passing-off elsewhere themselves amount to tortious or delictual acts which are committed in the United Kingdom.[557] This approach seems to us to be convenient and we should not wish to preclude a court in the United Kingdom from adopting the same approach in future cases.

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554 Austria: article 48(2); Swiss proposals: article 132. See Appendix.

555 Article 133.

556 Article 132(2).

557 John Walker & Sons Ltd. v. Henry Ost & Co. Ltd. [1970] 1 W.L.R. 917; John Walker & Sons Ltd. v. Douglas McGibbon & Co. Ltd. 1972 S.L.T. 128; White Horse Distillers Ltd. v. Gregson Associates Ltd. (1983) 80 L.S. Gaz. 2844.

5.60 We invite comments on our provisional conclusion that in the case of economic torts and delicts no definition of the locus delicti should be provided for our proposed lex loci delicti model, and no presumption provided for our proper law model, and that therefore in this respect each model should apply in unmodified form to economic torts and delicts.

2. Other questions

5.61 The more fundamental question which arises in connection with economic torts and delicts (as with the other types of tort and delict discussed in this Part) is whether any other special provision should be made to cater for them. With one important qualification our provisional conclusion is that no special provision is necessary. The qualification relates to those economic torts and delicts, in particular the ones concerned with unfair competition, restrictive practices, and anti-trust law, which it is arguable are so closely linked to national policy that it would be wrong to allow actions in the United Kingdom based on foreign legislation of this kind. Such causes of action frequently have a strongly territorial approach, and often involve special courts and procedures; and should, perhaps, be excluded from our choice of law rule in tort and delict.

5.62 The present law is not entirely clear. It is possible that a civil action under foreign anti-trust legislation might fall within the principle that our courts will not entertain an action for the enforcement, whether directly or indirectly, of a penal, revenue or other public law of a foreign state.[558] It is also possible that conduct which

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558 Anton, p. 89; Dicey and Morris, pp. 89 ff. The editors of Dicey and Morris assert at p. 94 that anti-trust legislation falls within the term "other public law".

could give rise to a claim under foreign competition, restrictive practices or anti-trust legislation might not be governed by our choice of law rule in tort and delict, but by some other choice of law rule instead.[559] However, it does not seem safe to assume that our tort and delict choice of law rule would never apply to an action based on a breach of foreign competition, restrictive practices or anti-trust law, or that such causes of action would be excluded from our courts; although in the light of British Airways Board v. Laker Airways Ltd.[560] it would seem that an action based upon the United States anti-trust legislation might not in any event succeed in an action in England.[561] Clearly, however, if the choice of law rule in tort and delict does apply, the present rule in Phillips v. Eyre or McElroy v. McAllister would now serve to prevent such an action succeeding in this country; but this would not be true of our proposed models for reform of our choice of law rule.

5.63 Even if it were possible to contemplate an action in the United Kingdom based on foreign anti-trust legislation, there is one feature of some such legislation which would undoubtedly be viewed here as

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559 A claim by Laker Airways Ltd. against British Airways and others in the United States courts alleges, first, "Combination and conspiracy in restraint of trade and to monopolize", and, secondly, "intentional tort". It is only the first of these claims which invokes the United States anti-trust legislation. The complaint of Laker Airways Ltd. in the United States action is set out as an Appendix to the Court of Appea proceedings in British Airways Board v. Laker Airways Ltd. [1984] Q.B. 142, 208.

560 [1984] 3 W.L.R. 413 (H.L.).

561 In Laker it was common ground that the United States claim could not have succeeded in an action in England, partly because "[t]he Clayton Act which creates the civil remedy with threefold damages for criminal offences under the Sherman Act is, under English rules of conflict of laws, purely territorial in its application, ... ": [1984] 3 W.L.R. 413, 420 per Lord Diplock. This legislation was described both at first instance and in the Court of Appeal as "penal": [1984] Q.B. 42, 163 per Parker J; 201 per Sir John Donaldson M.R.

objectionable, namely the remedy of multiple damages. The existence of sections 5 and 6 of the Protection of Trading Interests Act 1980 arguably raises the inference that it would be contrary to public policy for a court in the United Kingdom to grant such a remedy directly, and in any event a right to multiple damages under a foreign law which was being applied in an action in the United Kingdom would no doubt be viewed here as penal and therefore unenforceable. However, as we mention below in paragraph 5.65, even if courts in the United Kingdom were to entertain actions based on foreign anti-trust legislation, it would be possible to provide expressly that multiple damages were not to be recoverable in such an action.

5.64 It should also be pointed out that some of the objections which have been raised in the past to foreign anti-trust legislation do not apply in the context which we are now considering. The objections which have formerly been raised have largely been to the assertion by foreign courts of extraterritorial rights in relation to anti-trust legislation,[562] but these objections would not apply if our new rules of private international law permitted actions based on such legislation to be brought in our own courts.

5.65 In relation to torts or delicts based on competition, restrictive practices or anti-trust law there would therefore appear to be two possibilities.

(1) Our reformed choice of law rule could contain no special provision relating to such torts and delicts. If they fall within the scope of a choice of law rule in tort and delict, such torts and delicts would therefore be dealt with by the new choice of law rule in unmodified form.

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562 See, e.g., Jennings, "Extraterritorial jurisdiction and the United States antitrust laws", (1957) 33 B.Y.I.L. 146; British Nylon Spinners Ltd. v. Imperial Chemical Industries Ltd. [1953] Ch. 19 (C.A.) and [1955] Ch. 37; Protection of Trading Interests Act 1980.

(2) Such torts and delicts could expressly be wholly excluded from any new choice of law rule, with the result that the present law (whatever it is) would continue to apply to them.

Either solution could also be qualified by an additional provision as to the remedies available in an action in the United Kingdom upon such a tort or delict. To the extent that the remedy is an injunction or interdict, it may be that no problem would arise, in view of the degree of discretion available to the courts in respect of these remedies. As regards the remedy of multiple damages, it would be possible to restrict the damages recoverable in an action based on a foreign anti-trust law to such damages as represented compensation, and to exclude the recovery of any other or larger sum. This is the approach which has been adopted in the Swiss proposals.[563]

5.66 We have reached no conclusion on these matters. We therefore invite comments on -

(a) whether one of the alternatives mentioned in the previous paragraph is to be preferred, and, if so, which;

(b) if special provision is to be made for certain kinds of economic tort or delict, the kinds of tort or delict to which the provision should extend, and how such torts or delicts are to be defined for statutory purposes;

(c) in particular, whether any special provision should be made as to the remedies available in an action in the United Kingdom upon a tort or delict based on foreign competition, restrictive practices or anti-trust law.

E. INTERFERENCE WITH GOODS

5.67 By "interference with goods" we mean, in general, cases involving denial of title, such as conversion. As to whether the locus

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563 Article 133(2): see Appendix.

delicti should (for the purposes of our lex loci delicti model) be defined in a multi-state case of interference with goods, or whether a presumption should be made for the purposes of our proper law model as to the country with which the occurrence and the parties had the closest and most real connection, our provisional conclusion is that no such provision need be made. The place of result may in this case suffer from the same disadvantages as the place of acting, in that each may be difficult to identify, and may well have little connection with the train of events taken as a whole. The alternative would appear to be the prima facie application of the law of the place where the goods were situated at the time of the wrongful acts (the "lex situs"). This may appear to have two advantages: the lex situs generally governs also the validity of a transfer of moveables,[564] and the place where the goods are situated may lend itself to easy and objective ascertainment. However, application of the lex situs involves the possibility of introducing what may appear to be an entirely irrelevant law, from which it would then be necessary to escape by resorting to the exception to the general rule (if our "lex loci delicti with exception" model were adopted) or to the general residual rule itself (if our proper law model were adopted).

5.68 We have also reached the provisional conclusion that there is no other special problem arising out of torts and delicts involving interference with goods. In our view, therefore, no special provisions are required in this area. Comments are invited on our conclusions.

F. NUISANCE

5.69 If there is to be provision for a prima facie applicable law in this area, there would appear to be a clear choice between the law of the place from which the nuisance emanates, and the law of the place where

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564 Winkworth v. Christie Manson and Woods Ltd. [1980] Ch. 496. See Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881, 886-887.

it produces the result complained of.[565] If one or the other of these is to be chosen, then we believe it should in principle be the latter;[566] and in so far as a nuisance also gave rise to personal injury or damage to property, it would be desirable to apply the same law in respect of both. However, if there were provision for a prima facie applicable law in this area, it would become necessary to define the cases to which it related; and this, we think, is likely to present a problem. It is, in our view, important where possible to avoid disputes over whether or not a particular rule applies. Difficulties of definition at once raise the likelihood of such disputes.

5.70 It is perhaps more likely in this area than most that the activity complained of will be at least permitted under the law of the place where it is being carried on, and perhaps expressly licensed there. Although we envisage that this fact would be considered by a court as one of the relevant circumstances, such permission or licence cannot extend to producing damage in a foreign country, at least where an action in a foreign court is concerned.[567] We do not however believe it necessary to make special provision for this point, or that any other special provision

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565 The Swiss proposals contain a special provision for certain types of nuisance, which allows the claimant to choose between these two systems of law: article 134.

566 This result has been reached in a jurisdictional context: Town of Peace River v. British Columbia Hydro and Power Authority (1972) 29 D.L.R (3d) 769. In Interprovincial Co-operatives Ltd. v. The Queen (1975) 53 D.L.R (3d) 321, which concerned pollutants introduced into rivers in two Provinces of Canada but which caused damage in a third, Laskin C.J.C. in the Supreme Court of Canada (with whom Judson and Spence JJ. concurred) was clearly of the view that a tort had occurred in the third Province (pp. 339, 343 and 351 respectively), but Ritchie J. appeared to be of the opposite view (pp. 348-349). The views of the remaining three judges are unclear. According to Hurlburt, (1976) 54 Can. Bar Rev. 173, 174 they agreed that a tort had occurred in the place of result, but according to Dicey and Morris, p. 972, n. 53, they were of the opposite view. Compare, in the jurisdictional context, Handelskwekerij G.J. Bier B.V. & Stichtung Reinwater v. Mines de Potasse d'Alsace S.A. [1976] E.C.R. 1735, [1978] Q.B. 708 (European Court of Justice).

567 See Interprovincial Co-operatives Ltd. v. The Queen (1975) 53 D.L.R (3d) 321.

is necessary to deal with cases of nuisance. Comments are invited on our conclusions.

G. TORTS OR DELICTS INVOLVING SHIPS OR AIRCRAFT

1. Collisions on or over the high seas and other like cases

5.71 In certain circumstances an action in this country will under the present law be decided according to the principles of maritime law as applied in England and Wales, in Scotland, or in Northern Ireland, or (in other words) according to the lex fori,[568] and in these circumstances it would appear that our present choice of law rules in tort and delict do not apply at all.[569] The extent of the circumstances covered by these principles is not entirely clear, but it is at least clear that they cover collisions on the high seas, which in practice will be the most important type of tort or delict involving a ship.

5.72 Whatever the present law may be in this limited field, we are not aware that it gives rise to any problem, and we do not propose that our reformed choice of law rule should interfere with any area of the law which now requires the application of the general principles of maritime law or where the existing rule of double actionability does not apply. The result would be that, in practice, our proposals for a new choice of law rule in tort and delict would not affect cases concerning collisions on the high seas, or any other case to which the principles of maritime law extend, or to which our existing choice of law rules do not apply. Whether an express exclusion will be required in any implementing legislation may depend upon whether or not it is safe to assume that our existing choice of law rule does not extend to cases involving the maritime law.

5.73 We invite comment on our conclusions and in particular upon whether it would be desirable to incorporate an express exclusion in any event, and (if so) upon how the area in question should be defined for statutory purposes.

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568 This is explained above at paras. 2.107, 2.108.

569 See above, para. 2.109.

5.74 It also appears likely that our choice of law rule in tort and delict would not apply to collisions of aircraft over the high seas.[570] If our present choice of law rule is of no application we do not propose that our reformed choice of law rule should apply to such cases.

2. The application of our proposed models for reform

5.75 Both of our proposed models for reform require clarification in the context of the remaining torts and delicts involving ships or aircraft. For our "lex loci delicti" model, and also for the purposes of any presumptions included in our "proper law" scheme, the question is: where an event takes place aboard a ship or aircraft, in what country should it be considered as having occurred? A number of different situations can be envisaged. We discuss these first and consider what law should in principle be prima facie applicable. In the light of this we then draw provisional conclusions as to how our proposed models for reform should be adapted. Where we refer to ships only, this is merely for convenience: the same considerations will apply where aircraft are concerned.

(a) Train of events confined to one ship or aircraft

(i) On or over the high seas

5.76 Where a ship is on, or an aircraft is over, the high seas, and the whole train of events is confined to that ship or aircraft, there would seem to be much sense and little difficulty in considering the state to which the ship or aircraft belongs[571] as being, for choice of law purposes, the country where the events occurred. This approach may well be consistent with the present law as it applies to ships, although probably not as it applies to aircraft.[572]

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570 It appears that the lex fori applies to such cases and that the principles of maritime law are not relevant: see McNair, The Law of the Air (3rd ed., 1964), pp. 289-290.

571 We consider this concept below at paras. 5.84 - 5.86.

572 See above, paras. 2.110, 2.113.

(ii) In territorial waters, or over land or territorial waters

5.77 In our view the same solution would be appropriate for the ship in territorial waters, whether ours or foreign; and the prima facie irrelevance of any system of law other than that of the flag is even clearer in the case of a tort or delict committed on board and confined to an aircraft, whether flying over the United Kingdom or a foreign country.[573] "It requires some boldness to contend that because an aircraft happens to be over Switzerland at a particular moment Swiss law should be applicable to events occurring in the aircraft at that time, and that Austrian or Italian law may similarly become relevant a few minutes later."[574] This approach would produce results consistent with decisions in the United States, at least where the dispute involved only the internal running of a ship,[575] and enjoys academic support.[576] Further, this approach commended itself on practical grounds to the court in MacKinnon v. Iberia Shipping Co. Ltd.[577] (which in our view provides a clear example of circumstances in which its use would have been appropriate). However, the court in that case was constrained to reject this approach[578] and to apply instead the double actionability rule in McElroy v. McAllister.

(b) Train of events not confined to one ship or aircraft

(i) Train of events occurs wholly or partly on or over the high seas

5.78 What we envisage here is a case involving, for example, two or more ships on the high seas, or a ship on the high seas and another in

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573 See, e.g., Dicey and Morris, pp. 977-978; Kahn-Freund, pp. 82-83.

574 McNair, The Law of the Air (3rd ed., 1964), p. 267.

575 Patton-Tully Transp. Co v. Turner 269 F. 334 (1920); Lauritzen v. Larsen 345 U.S. 571, 97 L. Ed. 1254 (1953); Romero v. International Terminal Operating Co. 358 U.S. 354, 3 L. Ed. 2d 368 (1959). See Kahn-Freund, p. 81.

576 See, e.g., Dicey and Morris, p. 977; Kahn-Freund, pp. 81-82.

577 1955 S.C. 20.

578 See above, para. 2.45.

national waters, or a ship on the high seas involved in a train of events where other elements occur ashore; but in circumstances where our choice of law rule would apply (and which, therefore, do not call for the application of the general principles of maritime law, and do not involve the continental shelf regime[579]). It must be admitted that it is hard to conceive of such a case, but an example might be a defamatory statement communicated from one ship to another, or from a ship on the high seas to dry land or vice versa; or an injury caused on board one ship as a result of conduct aboard another; but not a collision on the high seas, to which different rules apply.[580] Here again we believe that an event which occurs on board a ship or aircraft may initially be treated, for choice of law purposes as having occurred within the state to which the ship or aircraft belongs.

(ii) Train of events occurs wholly within or over national waters or partly there and partly on or over the adjoining land

5.79 The possibilities under this heading are the most complicated, since, although it is possible to conceive of cases (such as those mentioned in paragraph 5.78 above) which have no prima facie connection with any littoral or subjacent state, it is also possible to conceive of cases where the train of events is not confined to one ship or aircraft but which does have a connection with the littoral or subjacent state. Examples of the latter might be collisions within territorial waters, whether with another ship or with a fixed structure, or injuries caused ashore by part of a ship's machinery.

5.80 In these circumstances a case can be made in principle for adopting a different approach from the one we have suggested above, since here it might not be convenient to view a ship or aircraft as carrying its own law with it: it appears much more likely in these cases than in the others which we have mentioned that the occurrence and the parties will have at least some connection with the littoral or subjacent country. If this view were accepted, there would in this case

579 See above, paras. 2.106 - 2.109.

580 See above, paras. 2.107 - 2.109.

be an exception to the rule relating to ships or aircraft, and the train of events would be treated as having occurred in the littoral or subjacent country. On balance, however, we do not favour the creation of such an exception, for the reason stated below.

(c) Our provisional conclusions

5.81 The conclusion from the foregoing discussion is that, for the purposes of our reformed choice of law rule in tort and delict, an event (whether conduct or result) which takes place aboard a ship or aircraft should be regarded as having taken place in the state to which the ship or aircraft belongs in all circumstances except perhaps where the train of events takes place wholly within territorial waters or over national territory but is not confined to a single ship or aircraft. We are however not persuaded that the degree of refinement represented by the exception would necessarily be justified in any implementing legislation. By way of compromise, there would appear to be two simpler alternative possibilities:

either (1) provide without exception that all events taking place aboard a ship or aircraft are to be treated for choice of law purposes as having taken place in the state to which the ship or aircraft belongs, whether or not the train of events was confined to a single ship or aircraft;

or (2) provide only that a train of events which is confined to a single ship or aircraft is to be considered for choice of law purposes as having taken place in the state to which the ship or aircraft belongs; and make no provision at all for a train of events not confined to a single ship or aircraft.

In view of the likely rarity of a train of events which is not confined to a single ship or aircraft and which is not a collision, our provisional view is that alternative (2) should be preferred, but comments are invited.

5.82 Whether alternative (1) or alternative (2) above were preferred, the result would be to locate, for choice of law purposes, an event which took place aboard a ship or aircraft. This in turn would mean that such events could be brought within our reformed choice of law

rule. For our proposed lex loci delicti model, where a relevant event occurred aboard a ship or aircraft the locus delicti would be defined as the state to which the ship or aircraft belonged,[581] and the lex loci delicti as thus defined would be the prima facie applicable law. For the presumptions attached to the proper law model, the country with which the occurrence and the parties had the closest and most real connection would be similarly identifiable. Both the lex loci delicti and the presumed proper law would then be capable of displacement in the ordinary way, if the occurrence and the parties had in fact a closer and more real connection with another country.

5.83 We invite comments on the scheme which we have outlined for bringing ships and aircraft within the scope of our proposed models for reform of our choice of law rule in tort and delict.

(d) Two problems of definition

(i) "State to which a ship or aircraft belongs"

5.84 In the case both of a ship and of an aircraft, the state to which it belongs may be identified by the state where it is registered.[582] A problem arises, however, where that state itself contains more than one country - for example, the United Kingdom consists of England and Wales, Scotland, and Northern Ireland, which are different countries for choice of law purposes.

5.85 This problem is, we believe, easily resolved in the case of a ship: the appropriate country is that of the ship's port of registry.[583] This, however, will not always work in the case of an aircraft, since (at least in the United Kingdom) an aircraft has no equivalent of a port of registry: instead, aircraft are in this country registered by the Civil

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581 We discuss below, at paras. 5.84 - 5.86, the problem of the state containing more than one law district.

582 Compare Wills Act 1963, s.2(1)(a).

583 As provided for, in the United Kingdom, by the Merchant Shipping Act 1894, s.13.

Aviation Authority on a United Kingdom basis.[584] We understand[585] that it would not necessarily be helpful to refer to the addresses of the registered owners, since an aircraft may have more than one owner and there is no requirement that the owners provide an address in the United Kingdom. Equally, it is not necessarily easy to establish the identity of the "operator"[586] of a particular flight, and there is no requirement that the operator be designated in any document.

5.86 Our provisional view is that the difficulties which may sometimes be associated with connecting an aircraft with a particular country should not lead to the conclusion that aircraft should be excluded from our scheme. Comments are invited on this view, but we also seek views on whether there is a way, consistent with the existing practice on registration of aircraft, of reducing or avoiding the difficulty outlined in the previous paragraph.

(ii) When does an act take place on board a ship or aircraft?

5.87 In any scheme where it may be significant whether or not an event occurs aboard a ship or aircraft, it may be necessary to define what is meant by this expression. Again we believe that no problem will arise in relation to ships, and that the question can be left to judicial interpretation. In relation to aircraft we believe that it would be desirable to confine the application of our special rule to an aircraft in flight, so that if a tort or delict occurred aboard an aircraft on the ground while it was being serviced, no significance would attach to the fact that it occurred on board an aircraft. We do not, therefore, adopt the

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584 Air Navigation Order 1980, S.I. 1980 No. 1965, article 4. The Chicago Convention (1944) (Cmd. 8742), article 17, provides that aircraft have the nationality of the state in which they are registered.

585 We are grateful to the Civil Aviation Authority for their assistance on these matters.

586 Defined in Air Navigation Order 1980, S.I. 1980 No. 1965, article 93(5).

suggestion that any rule which applied to aircraft should extend also to "...the waiting room of an airport reserved for passengers 'in transit' ".[587]

5.88 We are aware of two definitions of "in flight", one in article 93(3) of the Air Navigation Order 1980, the other in section 38(3)(a) of the Aviation Security Act 1982. We understand that difficulties can arise with the former, and we therefore propose a definition based on the latter.[588] Comments are invited.

H. TORTS OR DELICTS OCCURRING IN A SINGLE JURISDICTION WITHIN THE UNITED KINGDOM

5.89 As we have noted above,[589] our present choice of law rule in tort and delict may not apply at all where the locus delicti is the country of the forum; or, if it does apply, it produces the same result as if it did not (except, perhaps, where the Boys v. Chaplin exception is in issue) since in such a case the lex fori and the lex loci delicti are identical. In any event it has not yet been necessary to decide the question whether our present choice of law rule applies or not; but this is a question which will have to be answered for the purposes of our reformed choice of law rule. If our new choice of law rule is not to apply, a tort or delict which occurred within the jurisdiction of the forum would be governed by the lex fori alone.

5.90 It would be possible to exclude such torts and delicts from our proposed lex loci delicti model, which would simply not apply where the locus delicti was the same as the country of the forum. It would be less easy to exclude such torts and delicts from our proposed proper law

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587 Kahn-Freund, p. 83.

588 This reads as follows: "the period during which an aircraft is in flight shall be deemed to include any period from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation, and, in the case of a forced landing, any period until the competent authorities take over responsibility for the aircraft and for persons and property on board".

589 Paras. 2.47 - 2.48.

model, since that model does not rely on the notion of the locus delicti. Some attempt would therefore have to be made to define the torts and delicts which were to be excluded. This could, for example, result in the exclusion of cases where a person was injured or property damaged within the jurisdiction of the forum, and of defamatory statements published at the forum, regardless of where other elements in the train of events had occurred; in all other cases it would presumably result either in the exclusion of those torts and delicts all of whose elements occurred within the jurisdiction of the forum, or in the exclusion of those torts and delicts any one or more of whose elements occurred within the jurisdiction of the forum. Any other solution would appear to detract from the usefulness of the proper law model by introducing into it the very notion of the locus delicti which it is at pains to avoid.

5.91 Where the train of events occurred at the forum it would, no doubt, be highly unlikely (in view of the additional fact that the action was being brought there) that another country would have a closer and more real connection with the occurrence and the parties. Further, it is to be expected that courts in the United Kingdom would be reluctant to apply a foreign law in a case involving a train of events which had occurred at the forum, even if the occurrence and the parties had a closer connection with another country.[590] Nevertheless it is possible to conceive of remote cases where a law other than the lex fori might be appropriate. The case of Szalatnay-Stacho v. Fink,[591] which is usually

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590 This seems, at any rate, to be a lesson which can be learned from the United States: see, for example, Kell v. Henderson 26 A.D. 2d 595, 270 N.Y.S. 2d 552 (1966); Conklin v. Horner 38 Wis. 2d 468, 157 N.W. 2d 579 (1968); Bray v. Cox 39 A.D. 2d 299, 333 N.Y.S. 2d 783 (1972); Milkovich v. Saari 203 N.W. 2d 408 (1973). Cf., for example, Arbuthnot v. Allbright 35 A.D. 2d 315, 316 N.Y.S. 2d 391 (1970) and Hunker v. Royal Indemnity Co. 57 Wis. 2d 588, 204 N.W. 2d 897 (1973), where the lex fori was not applied. It will be recalled, however, that the governmental interest analysis method for choice of law as it was originally propounded by Currie requires the application of the lex fori if the forum has an interest which would be furthered by applying its law: see para. 4.36 above.

591 [1947] K.B. 1 (C.A.). On this case, see Dicey and Morris, pp. 932-933, 945; Kahn-Freund, p. 84; Morse, pp. 294-295.

cited in support of the proposition that English law will apply to torts committed in England, would appear to provide an example of circumstances which might justify the application of a foreign law, although the events occurred wholly in England: it concerned the alleged defamation of the Czechoslovak Acting Minister in Cairo by the General Prosecutor of the Czechoslovak Military Court of Appeal in a letter to the Military Office of the President of Czechoslovakia. The events took place in London since at the time, owing to the occupation of Czechoslovakia, that was where its government was functioning. Another example might be provided by the facts of McElroy v. McAllister: if the action in that case had been in England, and not in Scotland, it might seem appropriate that Scots law and not English should have applied. A final example might be an action in defamation based upon the publication in Scotland of a few copies of a French newspaper which contained an article intended to be read in France although written by a Scotsman.

5.92 It seems to us, therefore, that as a matter of principle the reasons which justify the existence of exceptions to the strict application of the lex loci delicti where the locus delicti is foreign apply just as strongly if the locus delicti is England and Wales, or Scotland, or Northern Ireland, and we can see no reason of principle for excluding such cases from the operation of our proposed new choice of law rule. We have therefore reached the provisional conclusion that our reformed choice of law rule (whether it be the lex loci delicti model or the proper law model) should contain no such exclusion; and that it should be permitted to apply, in an action in England and Wales, or in Scotland, or in Northern Ireland, to torts or delicts which occurred in those respective places.[592] The practical effect of this is, however, likely to be slight, since as we have said it is in practice hard to think of cases where the parties and the occurrence would be more closely connected with another country. Comments are invited on our provisional conclusion. Commentators who disagree with it are invited to define the torts and delicts which should in their view be excluded from the operation of our choice of law rule.

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592 The contrary view is tentatively advanced by Jaffey: "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98, 113-114.

PART VI

PARTICULAR ISSUES

A. INTRODUCTION

6.1 There are certain issues which may arise in a tort or delict case whose classification is a matter of difficulty, and to which it is therefore not immediately clear whether our choice of law rule in tort and delict should apply. We have examined the present law on some of these issues in Part II. In this Part we consider how these issues should be treated in the light of our proposals for reforming the choice of law rules in tort and delict. As we have seen above,[593] courts have sometimes resorted to the device of classifying a particular issue in a case as belonging to a category other than tort or delict, in order to escape from the consequences of applying a rigid choice of law rule in tort or delict to that issue. The appropriate classification of the issues which may arise will remain important under both of our alternative proposals for a new choice of law rule in tort and delict. However, since both of these proposed alternative rules would be capable of taking the particular circumstances of an individual case into account, the desire to avoid classifying a particular issue as one in tort or delict should arise less frequently than it would under a very rigid choice of law rule.

6.2 In this Part we also consider a different question, namely whether a court should be allowed to separate different issues which may arise in the same case but all of which fall within the scope of the choice of law rule in tort and delict, and to apply that choice of law rule separately to each issue, thereby perhaps selecting different laws to govern different issues. We consider finally two other matters which might at first sight be thought to give rise to difficulty: actions with multiple parties, and the problems raised where our choice of law rule selects the law of a country where the civil action has been replaced by a compensation scheme.

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593 Para. 4.17.

6.3 In this Part we use the phrase "applicable law in tort and delict" to mean whatever system of law would be selected as the applicable law by our proposed new choice of law rule in tort and delict.

B. ISSUES RAISING QUESTIONS OF CLASSIFICATION

1. Capacity

6.4 It appears not to be controversial that the delictual capacity of an individual should be a matter for the applicable law in tort and delict,[594] and we see no reason why this should not also be so for corporations.[595] Comments are invited.

2. Vicarious liability[596]

6.5 Two questions arise in this context. The first is the determination of the law which should in principle govern whether one person may be made vicariously liable for the tort or delict of another. The second is whether any further problems remain which may require special provisions.

(a) The law which should in principle apply to the issue

6.6 As far as the first question is concerned, it seems clear that the issue of whether or not vicarious liability may exist should not be

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594 Kahn-Freund, p. 109; Morse, p. 154; Restatement Second, s.161, comment d. This is apparently an all but universal rule: Rabel, The Conflict of Laws, Vol. II (2nd ed., 1960), p. 255.

595 Although it is, no doubt, true that the acts which a corporation may do are also determined by its constitution, it does not follow that "... a corporation cannot be made liable for what, according to the law of its place of incorporation, would be an ultra vires tort." (Dicey and Morris, pp. 957-958). This does not appear to be free from doubt as a proposition of English or Scots domestic law: see, e.g., Gower, Principles of Modern Company Law (4th ed., 1979), p. 169; Smith, A Short Commentary on the Law of Scotland (1962), p. 268; Walker, The Law of Delict in Scotland (2nd ed., 1981), p. 78.

596 By "vicarious liability" we mean liability which arises by virtue of a relationship between the defender or defendant and the actor. In this context the phrase is therefore not confined to vicarious liability according to our internal law.

classified as a procedural matter.[597] Nor do we believe that there is any reason of policy for applying the lex fori alone. The two remaining alternatives appear to be (i) that the issue of whether or not vicarious liability may be imposed should be decided by the applicable law in tort and delict (as appears to be the present law[598]), or (ii) that the issue should be decided by the law which governs the relationship between the person who may be vicariously liable (whom we refer to for convenience as the "defendant"[599]) and the actual wrongdoer, and which is said to give rise to the vicarious liability. The most obvious example of such a relationship is perhaps that of employer and employee.

6.7 The argument in favour of the view that the possibility or otherwise of vicarious liability should be decided by the law which governs the relationship between the defendant and the actual wrongdoer is that only thus can the defendant be protected against an unexpected vicarious liability, and that he should be protected against such liability. We have two reservations about this solution. First, the identification of the law governing the relationship between the defendant and the wrongdoer may prove difficult.[600] A relationship of employer and employee may be easy enough to identify with a particular system of law, but it may be less easy to identify the law governing other types of relationship which may also give rise to vicarious liability: for example, the vicarious liability of the

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597 This possibility was raised in Siegmann v. Meyer 100 F. 2d 367 (1938) in the context of the liability of a husband for the acts of his wife. The rationale and origin of such liability at common law do indeed seem to be different from those of other types of vicarious liability: see Capel v. Powell (1864) 17 C.B. (N.S.) 743, 144 E.R. 298; Edwards v. Porter [1925] A.C. 1; Midland Bank Trust Co. Ltd. v. Green (No.3) [1979] Ch. 496 (aff'd [1982] Ch. 529 (C.A.)); Clerk and Lindsell on Torts (8th ed., 1929), pp. 44-45; op. cit., (15th ed., 1982), p. 132.

598 See the cases cited in n. 137 above.

599 In Scotland, this person will of course be the "defender".

600 An analogous problem has been encountered already in the context of a possible "pre-existing relationship" exception to the basic lex loci delicti rule: see above, paras. 4.103 - 4.109.

owner of a motor vehicle for the acts of its driver; and those of a parent for the acts of a child, and of a husband for the acts of his wife. In the latter two cases it has been suggested that the lex domicilii of the parent or husband should determine whether he may be made liable for the acts of his child or his wife.[601] This, however, is not the law applicable to the relationship, but only to the defendant, even if habitual residence were substituted for domicile; but to apply the law of the common domicile or habitual residence of the spouses or of the parent and child ignores the fact that they may have different domiciles or habitual residences.

6.8 It may be that in practice these difficulties would arise so rarely that they could be ignored, since in practice it is the relationship of employer and employee which is most likely to form the basis of a vicarious liability claim. But we have a second and more important reservation about deciding the issue by the law governing the relationship: we are not persuaded, public policy considerations apart,[602] that the defendant ought, in principle, to be protected from all vicarious liability other than that provided for by the law governing his relationship with the actual wrongdoer. To do so seems to us to ignore the interests of the claimant. Although the law which governs the relationship between the defendant and the actual wrongdoer may give the defendant a right of indemnity or contribution against the wrongdoer, we do not see why their rights inter se should be any concern of the claimant. Equally, we do not see why the claimant should gain a windfall if the applicable law in tort or delict would not impose vicarious liability, but the law of the relationship between defendant and wrongdoer would.

6.9 Our provisional view, upon which we invite comments, is therefore that in principle the choice of law rule in tort and delict should

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601 Kahn-Freund, pp. 104-106. Morse does not, or does not wholeheartedly, share this view: Morse, pp. 150-152. Dicey and Morris seem to suggest at p. 958 that the domicile of the parent or husband may be relevant under the present law.

602 See below, paras. 6.11 - 6.14.

apply to select the law which determines whether or not the defendant may be made vicariously liable.[603] The issue would, in other words, be treated as one in tort or delict.

(b) Qualifications to the law in principle applicable

(i) Which parties should be taken into account in the choice of applicable law?

6.10 Unless special provision were made, one possible consequence of applying our choice of law rule in tort and delict to the issue of vicarious liability is that the law applicable in an action by the claimant against the actual wrongdoer might turn out to be different from the law applicable in an action by the claimant against the vicariously liable defendant. The reason for this is that both of our proposed choice of law rules may take into account not only the occurrence but also the individual circumstances of the parties. However, the system of law applicable in an action by the claimant against the vicariously liable defendant should in our view be the same as that which would have applied in an action by the claimant against the actual wrongdoer. It is for consideration whether implementing legislation would have to provide expressly for this point. Comments are invited.

(ii) Possible public policy exceptions

6.11 If our choice of law rule in tort and delict is the one which should in principle select the law which will apply to the issue of vicarious liability, a question which nevertheless remains is whether any modification of the general rule is required on grounds of public policy. This point might arise in two ways.

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603 In the case of most types of vicarious liability this approach appears to enjoy widespread support: Dicey and Morris, p. 958; Kahn-Freund, pp. 106-109; Morse, pp. 152-153; Restatement Second, s.174; E.E.C. Draft Convention, article 11.7; Hague Traffic Accidents Convention, article 2(3); Hague Products Liability Convention, article 8(7).

6.12 The first is that it might be thought that there are certain types of relationship where to impose vicarious liability by virtue only of that relationship would be so repugnant to our own notions of justice that our courts should on public policy grounds never be faced with having to do so. Our provisional conclusion (upon which comments are invited) is, however, that it would be impracticable and unnecessary to attempt to identify such relationships in advance and provide expressly for them in any implementing legislation. If this problem were to arise in practice it would therefore be dealt with by the general rules of public policy.

6.13 The second possibility is that even though the type of vicarious liability did not offend us, the imposition of vicarious liability in the circumstances of a particular case might be thought to be so repugnant to our own notions of justice that, for reasons of public policy, the foreign law ought not to be applied, and the defendant ought therefore not to be held liable. If it were desired to prevent such a situation from arising by means of express provision, the following are ways in which this might be achieved.

(1) It would be possible to provide that vicarious liability must exist not only according to the applicable law in tort and delict, but also according to the lex fori, thereby in practice re-introducing in this area the existing double actionability choice of law rule. We do not believe this would be justified in relation to vicarious liability alone. Further, any double actionability rule has the disadvantages which we have described above;[604] and such a rule would also have the effect of shielding the defendant from vicarious liability under the applicable law in tort and delict in circumstances where there would be no objection of policy to its imposition: for example, where the defendant had authorised or required the actual wrongdoer to go to the place where the tort or delict occurred, and the lex loci delicti was the applicable law.

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604 Paras. 3.8 - 3.9.

(2) It would be possible to provide that the defendant should never be vicariously liable if the tort or delict occurred in a place which was unforeseeable by the defendant or where the actual wrongdoer had no authority to be.[605] Quite apart from any question of principle, we believe, however, that such a provision would be impracticable if it relied upon notions such as foreseeability or authorisation, which should not in our view be used in a choice of law rule;[606] the resulting rule would, we believe, be too uncertain to be acceptable. Further, such a provision would not appear easy to justify in principle, especially since the vicarious liability which would exist under the otherwise applicable law in tort and delict might be quite acceptable to our own notions of justice, or might even be such that the lex fori would also impose vicarious liability.[607]

6.14 We have therefore reached the provisional conclusion that it would not be practicable or desirable to formulate a special provision whereby the imposition of vicarious liability could be avoided in cases where we should find it so inconsistent with our own notions of justice that for reasons of public policy the defendant should not be held vicariously liable.[608] We invite comment on this point. However, if such a special provision were felt to be desirable, we invite further comment on:

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605 Considerations such as this clearly influenced the court in Young v. Masci 289 U.S. 253, 77 L. Ed. 1158 (1933) and Scheer v. Rockne Motors Corporation 68 F. 2d 942 (1934). See also Siegmann v. Meyer 100 F. 2d 367 (1938).

606 See para. 4.80 above.

607 A defendant may be vicariously liable under English or Scottish law notwithstanding that he has actually prohibited the act of the wrongdoer: see Clerk and Lindsell on Torts (15th ed., 1982), paras. 3.18, 3.19; Walker, The Law of Delict in Scotland (2nd ed., 1981), pp. 145 ff.

608 The application of a foreign law under our general choice of law rule is in any event intended to be subject to the usual public policy exception even if this is not expressly provided for in any implementing legislation: see para. 4.6 above.

(a) what provision should be made; and

(b) the circumstances in which it should operate (in other words, the type of liability to which it would apply).

3. Defences and immunities

6.15 We propose no change in the present law whereby substantive defences are governed by the applicable law in tort and delict. These would naturally be in addition to any jurisdictional immunity (such as state or diplomatic immunity) that the wrongdoer might enjoy here. Under both of our two main proposals the wrongdoer would have available to him only one set of substantive defences, not two as he has under the existing double actionability rule.

4. Damages

6.16 We propose no change in the present rule whereby the applicable law in tort and delict determines what heads of damage are available and the measure or quantification of damages under those heads is governed by the lex fori. Under our proposals for reform of our choice of law rule, the heads of damage available might not be the same as would be available under the lex fori. However, a court in the United Kingdom would not allow recovery under a particular head of damage if to do so would be contrary to public policy - such as, for example, in the case of some (but not all) types of penal damages.[609]

6.17 One question which may arise is that a court in the United Kingdom might be faced with assessing the quantum of damages under a head of damage unknown to its lex fori.[610] Our provisional view is that no express guidance need be given in any implementing legislation on how damages are to be quantified in such a case. We expect the question to

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609 The remedy of multiple damages under some foreign anti-trust legislation is discussed above at para. 5.63.

610 This is not the same problem as that which arises when the court at the forum is able to recognise the claimant's right but has no appropriate remedy at its disposal. In such a case the claimant's action will not succeed: see Phrantzes v. Argenti [1960] 2 Q.B. 19.

arise very infrequently, and its context cannot be foreseen. To seek to resolve such a problem in advance is in our view more likely to result in injustice than would be the case if the court were left to resolve the question on the particular facts of the dispute before it. If the problem should arise it would be little different from that which arises on those occasions when our own internal law is extended to cover new heads of damage. Comments are invited.

5. Limitations on recovery

6.18 This issue has given rise to some difficulty in practice, particularly in relation to wrongful death actions in the United States. Where the applicable law in tort or delict imposes a statutory ceiling on liability, the question arises whether the forum should follow or depart from the applicable law in this respect.

6.19 The United States practice does not appear to be uniform. The issue has been treated as one in tort, and hence governed (under the choice of law rule in tort which then prevailed there) by the lex loci delicti;[611] but also as procedural or as a matter of public policy, and hence governed by the lex fori.[612] Under the flexible choice of law rules which have been applied more recently in tort cases in the United States, the issue has not been separately classified.[613]

6.20 Our view, upon which comments are invited, is that classification of a statutory ceiling on liability as procedural would be hard to defend; and that once it is classified as substantive, such a ceiling would fall to be governed by the applicable law under our choice of law

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611 Loucks v. Standard Oil Co. of New York 120 N.E. 198 (1918).

612 Kilberg v. Northeast Airlines Inc. 172 N.E. 2d 526 (1961); [1961] 2 Lloyd's Rep. 406.

613 Reich v. Purcell 432 P. 2d 727 (1967).

rule in tort and delict,[614] especially since in any one system of law a limitation on recovery may be set at a level which takes into account how easy it is for the claimant to establish the liability of the wrongdoer. For example, if it is easy to establish liability the limitation on recovery may be correspondingly low. In such a case it would be inappropriate to apply the substantive law relating to liability without the corresponding balancing provision.[615] In common with all our other proposals this proposal is, of course, subject to public policy and to any overriding statutory provision which a court at the forum would be bound to apply. The quantification of damages within the limit would remain a matter for the lex fori.

6. Prescription and limitation of actions

6.21 This matter will be regulated in England and Wales by the Foreign Limitation Periods Act 1984 when that Act is brought into force,[616] although the adoption of a choice of law rule in tort and delict which did not have a requirement of double actionability would render section 1(2) of the Act superfluous.[617] The matter is now regulated in Scotland by section 4 of the Prescription and Limitation (Scotland) Act 1984.[618] Both Acts provide in general for the application of the prescription or limitation period of the system of law chosen by the

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614 This conclusion is that of Morse: pp. 200-202. See also Dicey and Morris, p. 962. Cf. Ehrenzweig, A Treatise on the Conflict of Laws (1962), pp. 552-556.

615 See, more generally, para. 6.77 below.

616 The Act follows the recommendations of the Law Commission: Classification of Limitation in Private International Law (1982), Law Com. No. 114, Cmnd. 8570.

617 Section 1(2) was inserted to deal with the existing double actionability rule in Phillips v. Eyre: (1982) Law Com. No. 114, paras. 4.14 - 4.17, and para. 2 of the explanatory notes to clause 1 of the appended draft Bill.

618 The Act (which came into force on 26 September 1984) follows the recommendations of the Scottish Law Commission: Prescription and the Limitation of Actions: Report on Personal Injuries Actions and Private International Law Questions (1983), Scot. Law Com. No. 74, (1982-83) H.C. 153.

appropriate choice of law rule. It is intended that the law of Northern Ireland should be to like effect.[619] In our view this matter does not, therefore, require further consideration here.

7. Transmission of claims on death: the survival of actions

6.22 The questions which we consider in this section arise in two situations. The first is where a potential claimant dies: the question then is whether his claim may be pursued by his estate. This category concerns the "active transmission" of claims. The second is where a wrongdoer dies: may the claimant then sue the wrongdoer's estate? This category concerns the "passive transmission" of claims.

6.23 It does not seem tenable to us to suggest that the question whether a right of action may survive the death of the potential claimant or of the wrongdoer should be regarded as procedural.[620] However, even viewed as an issue of substance, different opinions have been expressed about what law should govern this question.

(a) Substantive questions

(i) Active transmission

6.24 Two questions may arise in this context. The first is simply whether or not an action which could have been brought by a deceased claimant may be brought by his estate after his death. The second question is as to who will benefit from such an action. It is the first question only which we consider here. The question as to who will benefit from an action pursued by the estate of the deceased must be a matter for the law governing succession to his estate.[621]

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619 See n. 152 above.

620 Although the issue was so classified in Grant v. McAuliffe 264 P. 2d 944 (1953), this has subsequently been regretted by Traynor J. (as he then was), the author of the majority opinion: see, e.g., (1976) 25 I.C.L.Q. 121, 143-144.

621 Morse, p. 147.

6.25 It has, however, been suggested that the first question (namely whether or not an action survives the death of the potential claimant) should also be regarded, not as an issue in tort or delict, but rather as a question of administration or succession, to be governed by the law applicable to the administration of the moveable estate of the deceased or by his lex domicilii (which will usually, though not necessarily, be the same).[622]

6.26 On the other hand, there is also support for referring the issue to the applicable law in tort or delict,[623] and this solution has been adopted by the Restatement Second[624] and in a number of international conventions.[625] It is the solution which we provisionally support.

6.27 This issue exemplifies an attempt to escape from the unpopular consequences of a rigid choice of law rule in tort and delict by

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622 It is not always entirely clear whether the matter is seen as a question of administration or of succession, but the following support one or the other: Castel, Canadian Conflict of Laws, Vol. 2 (1977), p. 633; Strömholm, Torts in the Conflict of Laws (1961), p. 185. For Dicey and Morris (pp. 956-957) and for Kahn-Freund (p. 111, n. 31) it is a question of administration. See also Webb and Brownlie, "Survival of actions in tort and the conflict of laws", (1965) 14 I.C.L.Q. 1, 30.

623 Hancock, Torts in the Conflict of Laws (1942), p. 247; Morse, p. 147; Sykes and Pryles, Australian Private International Law (1979), pp. 133-134 (where the Dicey and Morris view is expressly criticised); Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98, 112-113. The reason given by Hancock for preferring the applicable law in tort over the lex domicilii (namely that the defendant could alter the plaintiff's rights by changing his domicile after the harm had been done) seems less than convincing.

624 Section 167.

625 Hague Traffic Accidents Convention, article 8(5); Hague Products Liability Convention, article 8(5); E.E.C. Draft Convention, article 11(5).

reclassifying the issue as belonging to another category;[626] but we believe that the issue of the transmissibility of claims on death is not one that logically belongs exclusively in one category or another. There may at first sight appear to be a number of competing interests involved. In so far as the old common law (which prohibited both active and passive transmission) can be said to have had a policy,[627] it may have been that the heirs of the wrongdoer should not suffer because of what he did,[628] but this argument cannot apply where it is the party wronged who has died. The size of the estate of the deceased is of some concern to the beneficiaries under his will or intestacy, and those who support the application of the law governing the administration or of the lex domicilii look to the interests of the beneficiaries; but the argument that "[i]n enacting any survival statute a legislature is most concerned with the assets and liabilities of the estates of its domiciliaries"[629] does not seem entirely convincing. On the contrary, the primary aim would seem to have been to secure compensation for the victims of torts or delicts.[630] An examination of the interests involved seems to show that the survival of an action in tort or delict has today much to do with compensation for persons injured by the wrongdoer (or for their estates) and relatively little to do with succession or administration.

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626 See, e.g., Webb and Brownlie, (1965) 14 I.C.L.Q. 1, 30: "... it is desirable on the grounds of convenience to remove the question of survivability for the purposes of English litigation from the tentacles of the Rule in Phillips v. Eyre"; and see Castel, Canadian Conflict of Laws, Vol. 2 (1977), p. 633.

627 See above, n. 347.

628 Currie, Selected Essays on the Conflict of Laws (1963), p. 144.

629 Note, "Survival Statutes in the Conflict of Laws", (1955) 68 Harv. L.R. 1260, 1266.

630 This certainly seems to have been the object of the English survival legislation, which is contained in section 1 of the Law Reform (Miscellaneous Provisions) Act 1934: see the first Interim Report of the Law Revision Committee, (1934), Cmd. 4540; Hansard (H.L.), 2 May 1934, vol. 91, cols. 988-995; Hansard (H.C.), 15 June 1934, vol. 290, cols. 2111-2122; and see also Currie, Selected Essays on the Conflict of Laws (1963), p. 143.

6.28 In addition to the arguments in favour of treating the issue as one in tort or delict, there are also arguments against applying the lex domicilii or the law governing the administration of the deceased's estate. To apply the lex domicilii (the law governing succession to the movable estate of the deceased) suffers, in our view, from a number of drawbacks. First, the distribution of the estate of the deceased is different from its collection, but it is with collection that the transmission of claims would seem to be more closely connected.[631] Secondly, the lex domicilii bears no necessary or even likely relation to the circumstances of the tort or delict. Thirdly, to apply the lex domicilii to the question of transmission of claims in the case of a foreign tort or delict would logically require the application of the lex domicilii in the case of the transmission of all other claims for damages of whatever nature and wherever arising, because the rationale of the lex domicilii solution is of universal application.

6.29 The above arguments apply equally to the suggestion that the question should be determined according to the law governing the administration of the deceased's estate. Further, whereas a person can have only one domicile, his estate may be the subject of any number of administrations in different countries. Which administration is to determine the issue of survival of actions? It is suggested by the editors of Dicey and Morris that the law governing the "principal administration" should apply.[632] It is not clear, however, how the "principal administration" is to be identified, or what is to happen if its identity changes from time to time. This solution appears to us to be as unsatisfactory as applying the lex domicilii.

6.30 Either of our proposed choice of law rules should in our view be able to produce an appropriate result in cases where the lex loci delicti would seem to require displacement in favour of the law of some other

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631 See Dicey and Morris, p. 956; Morse, pp. 146-147.

632 Dicey and Morris, p. 956.

place more closely connected with the occurrence and the parties.[633] Our provisional conclusion, therefore, is that the question whether or not a claim may survive for the benefit of a deceased claimant's estate should be treated as an issue in tort or delict, to which our choice of law rule in tort and delict would apply. Comments are invited.

(ii) Passive transmission

6.31 The question which arises here is whether a claimant may pursue an action in tort or delict against the estate of the wrongdoer after the wrongdoer has died. It has been suggested that here also the applicable law should be that governing the administration of or succession to the estate of the deceased;[634] and, again, there is also support for applying the law governing issues in tort and delict.[635]

6.32 Our view is that the arguments which we have advanced in the context of active transmission apply equally to cases of passive transmission, and our provisional conclusion is therefore that our choice of law rule in tort and delict should also apply to this question. Comments are invited.

(iii) Death of either claimant or wrongdoer after action has begun

6.33 A problem may arise if a party dies between the commencement of proceedings and judgment in an action in a court in the United Kingdom based on an applicable law which does not permit the transmission of the claim in issue. Our provisional conclusion is that

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633 For example, in Grant v. McAuliffe 264 P. 2d 944 (1953) and McElroy v. McAllister 1949 S.C. 110 almost every factor in the case pointed to one place, which was also, as it happened, the forum. See Webb and Brownlie, "Survival of actions in tort and the conflict of laws", (1965) 14 I.C.L.Q. 1, 19-21, 29.

634 Castel, Canadian Conflict of Laws, Vol. 2 (1977), p. 633; Dicey and Morris, pp. 959-960; Kahn-Freund, pp. 110-112; Strömholm, Torts in the Conflict of Laws (1961), p. 185. See also Grant v. McAuliffe 264 P. 2d 944 (1953).

635 Hancock, Torts in the Conflict of Laws (1942), p. 245; Morse, p. 163; Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98, 112-113.

whether or not the claim subsists is a substantive question[636] which should be treated in the same way as transmission of a claim before proceedings are commenced.[637] Our procedural machinery for the substitution of parties[638] would therefore operate only if the cause of action subsisted under the law appropriate to determine that question. Comments are invited.

(b) Procedural questions

6.34 The machinery by which the foreign estate of a deceased person is administered will of course depend upon the law governing the administration; but in an action in the United Kingdom one particular question which may arise is whether a person suing on behalf of the deceased's estate should be required to take out a grant of representation[639] at the forum, irrespective of whether or not he has complied or is required to comply with any corresponding requirement under a foreign law. Our provisional conclusions are (a) that a grant of representation at the forum should be required, in accordance with the general rule, on the ground that protection is thus afforded for local creditors of the deceased's estate;[640] and (b) that it is irrelevant whether or not the the person suing has been or is required to be so appointed anywhere else. This probably represents the present law, at least in England and Wales.[641]

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636 There is, however, support in the United States for the proposition that this question is procedural only: see Leflar, American Conflicts Law (3rd ed., 1977), p. 272, n. 4.

637 Cf. Orr v. Ahern 139 A. 691, 692-693 (1928); Restatement Second, s.167, comment d.

638 In England and Wales: R.S.C., O.15, r.7; in Northern Ireland: R.S.C. (N.I.) 1980, O.15, r.7; in Scotland: R.C. 106, Sheriff Court Ordinary Cause Rules, rule 60.

639 By this expression we mean in England and Wales and in Northern Ireland, grant of probate or letters of administration; in Scotland, the issue of confirmation.

640 Dicey and Morris, pp. 603, 954-955; Morse, pp. 143-144; Restatement Second, s.180, comment b.

641 See above, para. 2.63.

Comments are invited on this point, as also on any other procedural implications of our proposals.

8. Wrongful death

(a) Substantive questions

6.35 It does not appear to be controversial that the existence of an action for wrongful death, and the description of those for whose benefit it exists, are matters which cannot be classified as procedural and which should be governed by the applicable law in tort or delict, and we so propose.[642] This appears to be the approach of the present law.[643] Although this issue is another which courts have on occasion classified differently in order to avoid a rigid choice of law rule in tort,[644] there is in our view no reason why this should be necessary if the choice of law rule in tort and delict can be relied upon to produce appropriate results.

6.36 A potential difficulty with this approach has been mentioned already, albeit in slightly different guise, under the heading of vicarious liability:[645] the choice of law rule as applied to the wrongful death action might appear to point to a law different from that which would be indicated in an action by the deceased's estate against the same wrongdoer, and might even point to different laws for different beneficiaries in the wrongful death action. The reason for this is that since both of our proposed choice of law rules will be able to take into account not only the occurrence but also the parties, the same choice of law rule may produce different results in separate actions based on the same occurrence but with different parties.

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642 This view is supported by Kahn-Freund, p. 118, and by Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98, 113; and is not dissented from by Dicey and Morris, pp. 954-955 or by Morse, p. 143.

643 See above, paras. 2.67 - 2.76.

644 See, for example, Kilberg v. Northeast Airlines Inc. 172 N.E. 2d 526 (1961); [1961] 2 Lloyd's Rep. 406.

645 See above, para. 6.10.

6.37 Our provisional conclusion is that the applicable law in a wrongful death action should be that which would have been applied in an action by the deceased or his estate against the wrongdoer. We invite views on this point, as also on our main proposal in this area.

(b) Procedural questions

6.38 As in the case of survival of actions discussed above,[646] it would be necessary to ensure that the machinery of our own domestic court procedure made adequate provision for a person entitled to sue under a foreign wrongful death statute to pursue an action in a court in the United Kingdom.

6.39 Where the claimant here is suing on behalf of the deceased's estate, our provisional conclusion is that (as in the case of survival of actions) the claimant should be required to take out a grant of representation[647] at the forum, but that any corresponding requirement under the law governing the wrongful death claim or any other foreign law may be regarded as procedural only and therefore ignored by a court in the United Kingdom.[648] However, some actions for wrongful death are brought, not on behalf of the deceased's estate, but for the benefit of certain specified persons, usually relatives. Where, as in Scotland, such persons sue directly in their own names, the question of representation does not arise. Where the action, although for the benefit of individuals and not the estate, is brought by and in the name of the executor or administrator, as is usually the case under the Fatal Accidents Act 1976, we do not believe that it should be necessary for the person bringing the action to obtain a grant of representation at the forum. Such a person is merely an agent for those who benefit by the wrongful death action. He

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646 Para. 6.34.

647 See n 639 above.

648 This is, however, not the approach of the Restatement Second, ss. 180, 314, 315.

does not act as personal representative of the deceased (even though that is what he may in fact also be),[649] and the reason for insisting on a grant of representation at the forum before a personal representative appointed abroad may bring an action at the forum does not apply.[650]

9. Intra-family immunities

(a) Husband and wife

6.40 While there would appear to be general agreement that the issue of interspousal immunity should be regarded as substantive rather than as procedural,[651] there is a body of opinion to the effect that such immunities have nothing to do with the law of tort or delict, and are better considered as matters of domestic relations, which should be governed by the law of the parties' domicile.[652] This approach has been supported in both Australia[653] and the United States.[654] The alternative view is that the issue should be regarded as one in tort or delict and

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649 Byrn v. Paterson Steamships Ltd, [1936] 3 D.L.R. 111; Castel, Canadian Conflict of Laws, Vol. 2 (1977), pp. 442-443.

650 Dicey and Morris, pp. 603, 954-955; Morse, pp. 143-144; Restatement Second, s.180, comment b.

651 Dicey and Morris, p. 959; Hancock, Torts in the Conflict of Laws (1942), p. 236; Kahn-Freund, p. 66. Cf. Graveson, Conflict of Laws (7th ed., 1974), p. 594.

652 Dicey and Morris, pp. 958-959; Hancock, Torts in the Conflict of Laws (1942), pp. 235-236 (but cf. (1962) 29 U. Chi. L.R. 237); Kahn-Freund, p. 66; Nygh, Conflict of Laws in Australia (3rd ed., 1976), p. 182.

653 Warren v. Warren [1972] Qd. R. 386 (as one of two alternative grounds).

654 Haumschild v. Continental Casualty Co. 95 N.W. 2d 814 (1959)(now superseded by Zelinger v. State Sand and Gravel Co. 38 Wis. 2d 98, 156 N.W. 2d 466 (1968)).

should be regulated by the choice of law rule in tort and delict.[655] This approach is again supported by authority in Australia;[656] on the facts, however, the choice of law rules in tort which were applied resulted in the selection of the lex domicilii, and the more recent approaches in the United States have produced the same result.[657]

6.41 The reasons advanced in favour of treating the issue as one of family law refer to the policy behind the existence of interspousal immunity. While originally it was presumably a manifestation of the fictional unity of husband and wife, and was also closely connected with the law relating to matrimonial property,[658] different rationalisations have now emerged. The purpose of the immunity has been said to be "to pacify quarrelling couples by drawing the curtain of privacy over unfortunate behavior",[659] and thus to preserve domestic harmony. Alternatively, the immunity might be based upon "a judicial belief that litigation of a certain type between spouses would tend to undermine the community's ideals and detract from the dignity of its courts",[660] or upon the view that "these wife versus husband lawsuits are not genuine adversary proceedings at all but juristic caricatures in which the so-called defendant, because he stands to gain by losing, cooperates with his adversary instead of his insurer who is supposed to be trying to defend him".[661] However, as has been pointed out,[662] the last two of these

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655 Morse, p. 158; Jaffey, "Choice of law in tort: a justice-based approach", (1982) 2 L.S. 98, 113. This approach is adopted by the Restatement Second (s. 169), where it is, however, conceded that the lex domicilii will usually apply: s. 169 (2).

656 Warren v. Warren [1972] Qd. R. 386 (as the other of the two alternative grounds); Corcoran v. Corcoran [1974] V.R. 164.

657 Thompson v. Thompson 193 A. 2d 439 (1963); Johnson v. Johnson 216 A. 2d 731 (1966).

658 See Dicey and Morris, p. 959; Kahn-Freund, p. 66.

659 Hancock, (1962) 29 U. Chi. L.R. 237, 244.

660 Ibid.

661 Ibid., 271.

662 Ibid., 244.

reasons are the concern of the forum alone, and in the United Kingdom such actions are permitted despite these two arguments against them.[663] Doubt has also been cast on the validity of the first reason.[664]

6.42 There are also practical arguments against applying the lex domicilii. First, the lex domicilii may be entirely unconnected with the circumstances of the tort or delict. Secondly, there may be no common domicile at all, and the same is true of the alternative to the lex domicilii, namely the law of the spouses' habitual residence, or the "central location of the family relationship".[665] If there is no such place, its law cannot determine the issue, and it will be necessary to fall back on another rule. Further, even if there is such a place, it is not easy to decide on policy grounds what significance should be accorded to a change in the common domicile or habitual residence between the time when the cause of action arose and the time of trial.

6.43 The core of the argument in favour of deciding the issue of immunity according to a law that is connected with the incidence of family obligations is that family relationships are the concern of that law and of no other. However, it is possible to be sympathetic both towards this view, and also towards the view that "... it is undesirable that the rights, duties, disabilities, and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home",[666] (even if it is agreed that only family relationships should be immune

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663 Indeed, the Law Reform Committee, in its Ninth Report (1961) Cmnd. 1268, did not raise the third argument and referred only tangentially to the second.

664 See Emery v. Emery 289 P. 2d 218, 224 (1955); Balts v. Balts 142 N.W. 2d 66, 73 (1966). Although both of these cases concerned parent-child immunity, the argument used is equally applicable to the case of husband and wife. See also Ehrenzweig, A Treatise on the Conflict of Laws, (1962), s. 221.

665 Morse, p. 158; and see Nygh, Conflict of Laws in Australia (3rd ed., 1976), p. 182.

666 Emery v. Emery 289 P. 2d 218, 223 (1955).

from such change) without necessarily accepting unreservedly the application to such matters of the lex domicilii, or some law other than the law applicable to issues in tort or delict. It is suggested that this issue provides yet another example of an attempted escape from a rigid choice of law rule by means of re-classification. By contrast, we envisage that under both of our proposed choice of law rules in tort and delict the lex loci delicti could be displaced in favour of (for example) the law of a country which was also that of the common domicile or habitual residence, if it were appropriate to do so; but this may not be so in every case.

6.44 Our provisional conclusion is, therefore, that there would be disadvantages in tying the issue of interspousal immunity rigidly to the parties' common domicile or habitual residence, and that it would be preferable to apply the choice of law rule in tort and delict to this issue. Comments are invited on this view.

(b) Parent and Child

6.45 Although there is both opinion[667] and United States authority[668] in favour of applying the law of the parent's (and hence, usually, the child's) domicile to this question, it appears also to be agreed,[669] and it is here suggested, that the issues involved are substantially the same as those discussed in connection with interspousal immunity. Our provisional conclusion is, therefore, that this question also would be better governed by the choice of law rule in tort and delict.[670]

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667 Dicey and Morris, p. 959; Ehrenzweig, A Treatise on the Conflict of Laws (1962), s. 221; Kahn-Freund, p. 67.

668 Emery v. Emery 289 P. 2d 218 (1955); but see Balts v. Balts 142 N.W. 2d 56 (1966), where it does not appear clear that the lex domicilii was applied as such: ibid., at 69-70.

669 Dicey and Morris, p. 959; Ehrenzweig, A Treatise on the Conflict of Laws (1962), s.221; Kahn-Freund, p. 67; Morse, pp. 155-158.

670 This approach corresponds with that of Morse (pp. 155-158) and of the Restatement Second (s. 169).

10. Contribution

6.46 The existence of a right to contribution is, we believe, not properly classified as delictual. It is dependent, not upon any relationship with the victim of a tort or delict, but rather upon an obligation between two people, neither of whom has committed a tort or delict against the other. "For if A is injured by the joint negligence of B and C, and recovers judgment against B, B and C have each committed a tort against A, but C has not committed a tort against B. Hence B's right of contribution from C cannot be delictual."[671] Even clearer is the case where, in the example above, C has not committed a tort or delict against A, but is in breach of another type of obligation to him (for example, C is in breach of his contract with A). In such a case, not only has C not committed a tort or delict against B, he has not committed a tort or delict at all. A right to contribution may nevertheless exist.[672]

6.47 The fact that an issue cannot be classified as delictual does not mean that the choice of law rule in tort or delict should not nevertheless apply to it. However, we do not believe it to be necessary in principle or in practice that the rights inter se of two wrongdoers, or a wrongdoer and a third party, should be determined according to the same law as applies in the claimant's action in tort or delict. Where the claim for contribution is based upon an actual contract, it would in our view be wholly inappropriate to use the choice of law rule in tort and delict to select the applicable law; and it would in our view be equally inappropriate to do so where the claim for contribution was made against a person who had committed no tort or delict. More generally, there appears to be widespread agreement that the question of contribution can (and should) be separated from the tort or delict upon which the claim for

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671 Dicey and Morris, p. 967.

672 The present English law, for example, provides for a right of contribution in such circumstances: Civil Liability (Contribution) Act 1978, ss.1(1), 6(1).

contribution is based; and that, in the absence of an actual contract, a claim for contribution should be regarded as quasi-contractual (or sui generis) and governed by the choice of law rule appropriate to restitutionary obligations.[673]

6.48 It may, of course, be that the system of law most appropriate to govern the question of contribution will, not infrequently, turn out to be the same as the applicable law in tort or delict; and it would no doubt be convenient if this were so. But we are not confident that such coincidence could be relied upon in a sufficiently large proportion of cases to make it acceptable that the choice of law rule in tort and delict should always apply to the issue.

6.49 One problem with applying the choice of law rule in contract or in quasi-contract (as appropriate) to questions of contribution is that, although our choice of law rule in contract is clear enough, our choice of law rule in quasi-contract is not at all certain.[674] Nevertheless, our provisional conclusion, upon which comments are invited, is that for the reasons above stated the choice of law rule in tort and delict should not apply to the issue of contribution. If (as appears likely) this represents the present law,[675] no new uncertainty would be introduced into the law by adopting this proposal. Views are also invited as to whether any implementing legislation should expressly provide that questions of contribution are not governed by our choice of law rule in tort and delict.

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673 Dicey and Morris, p. 967, and see Rule 170; Graveson, Conflict of Laws (7th ed., 1974), p. 614; Leflar, American Conflicts Law (3rd ed., 1977), p. 274; Morse, p. 209; Wade, "Joint Tortfeasors and the Conflict of Laws", (1953) 6 Vand. L.R. 464, 472-478. Cf. Restatement Second, s. 173; and Ehrenzweig, A Treatise on the Conflict of Laws (1962), s.225.

674 As to the choice of law rule in quasi-contract, see Anton, pp. 234-235; Dicey and Morris, ch. 30 and p. 967.

675 See above, paras. 2.82 - 2.84.

11. Indemnity

6.50 For the same reasons as applied to the question of contribution (discussed in the immediately preceding paragraphs) we have reached the provisional conclusion that a right of indemnity which may exist between the wrongdoer and some other person cannot be regarded as a delictual obligation, and that the choice of law rule in tort and delict should not be applied to this issue.[676] A right of indemnity may, for example, be contractual or quasi-contractual, and the choice of law rule in contract or quasi-contract would accordingly apply. Comments are invited.

12. Tort or delict and contract

(a) Contractual defences to claims in tort or delict

6.51 We have suggested above, at paragraph 2.97, that the present law on the inter-relationship of a claim in tort or delict and a contractual defence may be that -

(i) the interpretation and validity of the contractual term are matters of contract, to be decided by the appropriate law; but that

(ii) the effect of the contractual term (if valid), as so interpreted, as a defence to a claim in tort or delict, is to be decided by the applicable law in tort or delict.

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676 This view is supported by Dicey and Morris, pp. 967-968; and Morse, p. 209. See also Leflar, American Conflicts Law (3rd ed., 1977), p. 274. The Restatement Second, however, treats the issue as one in tort (s.173), unless the right to indemnity is contractual (s.173, comment b).

However, whether or not this is in fact the present law, we have reached the provisional conclusion that it is the approach which should be adopted.[677] Comments are invited.

6.52 There is, however, a hidden difficulty in this approach: namely that of deciding whose rules of private international law shall select the law by which the contract should be governed. It would be possible to decide this question according to our own principles in every case: that is, the contract would be governed by its proper law, chosen according to English, Scottish or Northern Ireland principles, and its validity and construction decided accordingly.[678] The opposite view is that the choice of law rules of the country whose law has been selected as the applicable law in tort or delict should be used in order to decide what law governs the contract.[679]

6.53 To use the English, Scottish or Northern Ireland (as the case may be) choice of law rules in contract has the apparently obvious merit of simplicity and convenience. It is for consideration, however, whether the application of a foreign rule would in fact be significantly less simple or convenient; and, further, the application of our own rule means that

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677 The approach here suggested is supported by a number of commentators: see Cheshire and North, p. 283; Kahn-Freund, pp. 141-145; Morse, p. 188 (but cf. p. 194); North, "Contract as a tort defence in the conflict of laws", (1977) 26 I.C.L.Q. 914; see also Collins, "Exemption clauses, employment contracts and the conflict of laws", (1972) 21 I.C.L.Q. 320, 334. Cf. Rabel, The Conflict of Laws, Vol. II (2nd ed., 1960), pp. 293-294. The view of the editors of Dicey and Morris (at pp. 963-964) is not entirely clear. Our conclusion is contrary to that reached by Lord Denning M.R. in Sayers v. International Drilling Co. N.V. [1971] 1 W.L.R. 1176, 1181: see above, para. 2.42.

678 This solution is favoured by Morse, at p. 191 (in the context of the second limb of the rule in Phillips v. Eyre): "To do otherwise would be to introduce an indefensible extension of the doctrine of renvoi in an area where it should have no part to play." See also Collins, "Interaction between contract and tort in the conflict of laws", (1967) 16 I.C.L.Q. 103, 115.

679 North, (1977) 26 I.C.L.Q. 914, 927, again in the context of the second limb of the rule in Phillips v. Eyre.

there must exist a risk that the English, Scottish or Northern Ireland court would reach conclusions about the contract different from those which would have been reached if the court had applied the choice of law rules of the country whose law has been selected as the applicable law in tort or delict,[680] although it may perhaps be that this risk is small. Our provisional conclusion is, nevertheless, that our own contract choice of law rules should be used, but comments are invited on this view.

(b) Releases, assignments or assignations, and other post-event transactions

6.54 It has been suggested that the principles outlined above should apply also to contractual releases from claims in tort or delict,[681] and to assignments or assignations of delictual claims.[682] The same principles could be extended to all arrangements between the parties after the tort or delict had occurred and which would affect their rights and liabilities. On this view, it would be for the law governing the tort or delict to decide whether, to what extent, under what conditions and subject to what requirements such releases, assignments or assignations, or other arrangements were permissible; but it would be for the law governing the release, assignment or assignation, or other arrangement to decide questions of the interpretation or validity of the particular instrument or transaction in issue. There would appear to be no reason for departing from this approach when considering the effect of a release or a covenant not to sue given to one wrongdoer upon the liability of others.[683]

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680 Ibid. This is not the only occasion upon which a similar risk exists. Another arises before this stage has been reached, namely the initial classification of a defence as delictual or contractual; and it seems to be the general view that our court will have to make up its own mind about this in accordance with the lex fori. See Dicey and Morris, p. 963; Kahn-Freund, p. 146; Collins, (1967) 16 I.C.L.Q. 103, 115-116.

681 North, (1977) 26 I.C.L.Q. 914, 927-931, and see Morse, p. 210.

682 Dicey and Morris, p. 957; Morse, pp. 147-148. Cf. Hancock, Torts in the Conflict of Laws (1942), p. 203; Kahn-Freund, p. 118.

683 The Restatement Second treats this as an issue in tort: s. 170.

However, where it was relevant under the applicable law in tort or delict whether the instrument in question was, on the one hand, a release, or, on the other, a covenant not to sue, the question would arise whether this point should be decided according to the applicable law in tort and delict or the law governing the instrument, in so far as the question was not purely one of construction. Our view is that this point concerns the nature and meaning of the instrument, and that the question should therefore be determined according to the law governing the instrument.[684]

6.55 There is, however, also a case for suggesting that a release or other arrangement which is arrived at after a tort or delict has occurred should be regarded differently from an antecedent contract. In the latter case the question is the extent to which the outcome of an action in tort or delict should be affected by a prior agreement between the parties in circumstances where the law appropriate to govern the tort or delict is inconsistent with the agreement, and we have suggested that it is the law applicable to the tort or delict which should determine the effect of the agreement or the claim in tort or delict. However, where the issue is, for example, the settlement or release of a claim, in full knowledge of the circumstances, it is arguable that if the parties are able to reach an agreement which is valid by its proper law, the agreement should in principle be upheld, and that there is no reason of policy which would require the effect of the agreement to be governed by the applicable law in tort and delict (which would, therefore, not need to be determined). A release or settlement may, on this view, be regarded purely as a matter of contract, and the fact that the original cause of action was in tort and delict may be seen as irrelevant. The same arguments apply, more generally, to all arrangements between the parties.

6.56 This view may derive support from our proposal that the parties to an action on a foreign tort or delict should be allowed by means of contract to choose the applicable law. If the effect of a release,

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684 The Restatement Second treats this issue also as one in tort: s. 170(2).

settlement or other arrangement were determined only by its own governing law, the applicable law in tort or delict would be irrelevant. However, if the effect of the arrangement were governed by the applicable law in tort or delict, the parties could ensure that their agreement was effective merely by agreeing further what the applicable law in tort and delict was to be. They could, for example, agree that the proper law of the contract was to govern the tort or delict as well. If this device was all that would be required to make the parties' agreement effective, it is arguable that to make it necessary would be an excessive devotion to form at the expense of substance.

6.57 Nevertheless, we have reached the provisional conclusion that agreements and arrangements transacted after the tort or delict had occurred (including releases, settlements, and assignments or assignations) should for reasons of convenience be treated in the same way as antecedent contracts, and that their effect should therefore be determined by the applicable law in tort or delict. Comments are, however, invited on this conclusion. If post-event transactions were to be treated differently from antecedent contracts, our proposal would be that all such transactions (including, for example, waivers and assignments or assignations of delictual claims) should be treated in the same way.

(c) Concurrent classifications

6.58 As we have observed above,[685] under our law as it stands at present, a person who has suffered a wrong which may be both a breach of contract and a tort or delict may choose whether to frame his claim in contract, or in tort or delict, or both.[686] However, this is not true in some jurisdictions, such as France, where the existence of a claim in contract means that no claim in delict may be brought.[687] At present this

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685 Paras. 2.87 - 2.88.

686 Matthews v. Kuwait Bechtel Corporation [1959] 2 Q.B. 57 (C.A.); Coupland v. Arabian Gulf Oil Co. [1983] 1 W.L.R. 1136.

687 See Kahn-Freund, pp. 130-134; H. & L. Mazeaud and Tunc, Responsabilité Civile, Vol. 1 (6th ed., 1965), paras. 173-207.

would probably cause no problem in an action in England and Wales or in Northern Ireland, for the only "foreign" requirement under the existing state of the rule in Phillips v. Eyre is that the wrong complained of should give rise to civil liability at the place of the wrong, and contractual liability may well be sufficient.[688] In Scotland, however, the rule in McElroy v. McAllister seems to require that the wrong should be actionable as a delict under the lex loci delicti. If that is correct, an action founded on delict would not succeed before a Scottish court on the basis only of contractual liability at the place of the wrong.[689]

6.59 Under our reformed choice of law rule a claimant in the United Kingdom who had the option of framing his claim in terms of tort or delict or of contract might choose the former, frame his claim in terms of tort or delict, and then find that the applicable law proved to be (for example) French law. The court would then have to decide whether or not to apply the French rule, which would prohibit an action in tort or delict. If the rule were held to apply, it might be that the claimant's action would not succeed as formulated, and that he would have to reformulate his claim in terms of contract.[690]

6.60 We have reached the provisional conclusion that this phenomenon should not in fact create any peculiar problems except one. A problem might in theory arise if the claimant, having been forced to sue in contract instead of in tort or delict, found that by the proper law of the contract the rule was the reverse of the French rule, and was that contractual claims were excluded if there was a delictual claim. Whether this could ever occur in practice is not known. We invite comment on whether or not it might; and, if it might, on whether or not the possibility should be provided for in any implementing legislation, and on what solution should be adopted.

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688 See above, para. 2.17.

689 See above, para. 2.42.

690 The French rule was discussed in The Sindh [1975] 1 Lloyd's Rep. 372, but the decision does not appear to illuminate the matters here raised.

13. Direct action by third party against insurer

6.61 The possibility of a direct action against an insurer by the victim of a wrong presents one of the most intractable problems in the field of choice of law in tort and delict, for the wrong has not been perpetrated by the insurer, and the insurer may not be in a contractual relationship with the third party. Nevertheless, even if the action is neither an action in tort or delict nor an action in contract, this would not preclude the application to such an action of the choice of law rule in tort and delict or that in contract. The direct action could, however, be said to be quasi-contractual in nature and therefore subject to the appropriate choice of law rule; or it could be regarded as a statutory cause of action which does not fit within any traditional category.[691] In any event it seems clear that the direct action cannot be said to be merely procedural.[692]

6.62 There is a body of opinion to the effect that the possibility of a direct action should be governed by the applicable law in tort and delict,[693] and this view is supported by some authority in Australia.[694] It also seems to be the solution adopted in France.[695] The main alternative

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691 It has also been suggested that the insurer's liability could be classified as a debt, situated at the domicile of the debtor and subject to the laws prevailing there: Strömholm, Torts in the Conflict of Laws (1961), p. 165.

692 Although the contrary conclusion has been reached in some United States decisions: see Leflar, American Conflicts Law (3rd ed., 1977), p. 243, n. 19.

693 Morse, p. 166; Rabel, The Conflict of Laws, Vol. II (2nd ed., 1960), pp. 264-265; and see Strömholm, Torts in the Conflict of Laws (1961), p. 184.

694 Li Lian Tan v. Durham and General Accident Fire and Life Assurance Corporation Ltd. [1966] S.A.S.R 143; Ryder v. Hartford Insurance Co. [1977] V.R. 257.

695 Cass. civ. 13.7.1948, D.1948.433 (lex loci delicti did not permit direct action; French direct action statute not applied even though contract of insurance was French). Cf. Trib. Paris 16.6.69, Rev. crit. d.i.p. 1971.67 (accident occurred in Germany but the French direct action statute held to apply because the insurance contract was governed by French law). This decision has been criticised: ibid., at p. 74. See Kahn-Freund, pp. 151-155.

solution is that a direct action should be governed by the proper law of the contract of insurance,[696] which is of course also the law which in any event regulates the liability of the insurer to the insured. This solution has found rather more support in Australia.[697] The United States practice does not appear to be uniform.[698] There does not appear to us to be an unanswerable argument of principle in favour of one or other of these approaches. Any solution must represent a balance between the interests of the claimant, on the other hand, and the interests of the insurer, on the other.

6.63 One argument of principle in favour of applying the law governing the insurance contract to the question of the direct action is that the direct action cannot exist in the absence of a contract of insurance, and that it is most appropriately described as "a statutory extension to contractual liability".[699] This extension of contractual liability operates entirely in favour of the claimant, who is not deprived of his ordinary rights against the wrongdoer, and who therefore receives a bonus which (so the argument runs) should not exist if it is not provided for under the law governing the contract. On the other hand, it may also be argued that no claim at all would exist in the absence of a tort or delict. Since the direct action exists for the purpose of protecting

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696 Advocates of this solution include Beitzke, "Les obligations délictuelles en droit international privé", [1965] II Hague Rec. 65, 128-129; Dicey and Morris, pp. 960-961; Kahn-Freund, p. 155.

697 Plozza v. South Australian Insurance Co. Ltd. [1963] S.A.S.R. 122; Hall v. National and General Insurance Co. Ltd. [1967] V.R. 355; Stewart v. Honey (1972) 2 S.A.S.R. 585; Hodge v. Club Motor Insurance Agency Pty. Ltd. (1974) 7 S.A.S.R. 86. See above, para. 2.104.

698 See Kahn-Freund, pp. 155-157; Lüer, (1965) 12 Nederlands Tijdschrift v.i.r. 124, 141-144; Morse, p. 164.

699 Plozza v. South Australian Insurance Co. Ltd. [1963] S.A.S.R. 122, 128.

claimants who are the victims of a tort or delict against the risk that it may be impossible to recover against the wrongdoer, it would (so this argument goes) be more appropriate to tie the direct action to the tort or delict, not to the contract, and to decide the issue according to the law selected by the choice of law rule in tort and delict.

6.64 Another argument in favour of applying the law of the insurance contract, and against applying the law governing the tort or delict, is that it would be unfair to expose the insurer to liability under any law other than that which governed the insurance contract, since such liability might not correspond with the insurer's expectations, or might be greater than that contemplated under the law of the contract, especially if the contract itself prohibited direct actions. However, we do not believe this argument to be wholly valid, since in this context (as in every other) the insurer's expectations are not necessarily confined to the law which governs the insurance contract. If the activities of the insured take place in a jurisdiction to which the insurance cover extends, the insurer's expectations might reasonably be expected to include not only the potential liability of the insured under the law of that jurisdiction, but also any potential direct liability.

6.65 It is, however, true that the applicable law in tort or delict under either of our proposed models for reform could be that of a jurisdiction to which the insurance cover did not extend - in other words, the applicable law may not be the lex loci delicti (although we believe that in this context this would be rare in practice). We believe the application of a law other than the lex loci delicti to be appropriate in some circumstances in the context of substantive liability, and our general proposals for reform reflect this. It is arguable that this should also be acceptable where the issue is not substantive liability but merely the existence or not of a direct action. Further, while it is possible that the legal system of the country whose law is selected by our choice of law rule in tort and delict might also provide for a direct action when the lex loci delicti or the proper law of the insurance contract does not, the opposite may also occur: an insurer may find that there is no direct action under the legal system of the country whose law is selected by our

choice of law rule in tort and delict, even though the lex loci delicti or the proper law of the contract does provide for it. The rights inter se of the insurer and the insured would, of course, always be determined by the proper law of the contract.

6.66 A further, and more practical, consideration is the likely construction of the direct action legislation which a court in the United Kingdom may be asked to apply. If the direct action issue were governed by the proper law of the insurance contract, a question could arise whether the direct action legislation so selected extended to torts or delicts which had occurred outside the country whose legislation it was.[700] On the other hand, if our choice of law rule in tort and delict were used, it would usually select the lex loci delicti, and the question could arise whether a direct action provided for under that law extended to foreign insurance contracts.[701] In some cases, our choice of law rule in tort and delict could select a law which was not the lex loci delicti, and here the question could arise whether a direct action provided for under the system of law selected could apply to a case involving a foreign insurance contract and a foreign accident.[702] It would clearly be preferable, other things being equal, that the choice of law rule used to

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700 The Australian cases cited in n. 697 above indicate that the legislation there under consideration did apply to accidents which had occurred abroad, as does the Louisiana direct action statute (Webb v. Zurich Insurance Company 205 So. 2d 398 (1967)). The French direct action, on the other hand, is confined to accidents in France: Cass. civ. 13.7.1948, D.1948.433 (although Trib. Paris 16.6.61, Rev. crit. d.i.p. 1971.67 is to the contrary).

701 The Australian legislation would not so apply, but the Louisiana statute can do so (Watson v. Employers Liability Assurance Corporation Ltd. 348 U.S. 66, 99 L. Ed. 74 (1954)) and so, it appears, can the Wisconsin statute (e.g. Hunker v. Royal Indemnity Co. 204 N.W. 2d. 897 (1973)). The French statute may also apply to a foreign insurance contract: Cass. req. 24.2.1936, S.1936.1.161, D. 1936.1.49.

702 In Esteve v. Allstate Insurance Company 343 So. 2d 353 (1977) it was held that the Louisiana legislation could not apply in these circumstances.

select the law which will apply to the issue of the direct action should tend to select a law which does as a matter of construction apply to the facts of the case. Our tentative view (upon which comments are invited) is that a direct action provided for under the proper law of the insurance contract is more likely to apply to foreign accidents than a direct action provided for under the applicable law in tort or delict is to apply to foreign insurance contracts; and that this particular consideration therefore favours the use of the proper law of the contract to determine the issue, and not the applicable law in tort and delict.

6.67 The question whether to apply the proper law of the contract or the applicable law in tort and delict to the issue of the direct action has been described as an "insoluble dilemma".[703] Although we realise that "no dogmatic solution will satisfy everyone",[704] we have on balance reached the tentative view that, if the issue of direct liability is to be governed by one system of law only, that system should be the proper law of the insurance contract. We invite comments on this view.

6.68 A different solution, which avoids a choice between the two competing candidates, has however been adopted by both the Swiss proposals[705] and the Hague Traffic Accidents Convention.[706] These provide that an action may be brought directly against the insurer if such an action is provided for under either the law applicable to the tort or delict or the law applicable to the contract of insurance.[707] Although

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703 Kahn-Freund, p. 151.

704 Morse, p. 166.

705 Article 137: see Appendix.

706 Article 9.

707 Article 9 of the Hague Traffic Accidents Convention is in fact slightly more complicated than this.

such a scheme involves the possibility that both systems of law referred to may permit the direct action, under the Hague Convention the potentially applicable laws are arranged in order of priority of application, whereby the law governing the contract of insurance appears last. We invite comment on whether a scheme of this kind should in principle be adopted in our own proposals. If it were thought to be desirable, our provisional view is that the order of priority of applicable laws should reverse that of the Hague Convention, so as to apply the proper law of the insurance contract unless it provided for no right of direct action, in which case any direct action provided for by the applicable law in tort and delict could be used.

6.69 Finally, our provisional conclusions must be seen in the light of a potential complication. We have no doubt that a direct action, whichever system of law it is governed by, should be subject to any substantive preconditions to liability which that law imposes.[708] As we have mentioned above,[709] a likely condition is that the insurer will not be liable unless the insured would himself be liable to the claimant. The meaning of this requirement of liability will depend upon the foreign law in question (or, perhaps, upon the construction of the contract of insurance). It may, for example, mean that the liability of the insured should be determined according to the lex loci delicti,[710] and that it would not be necessary that liability should be capable of being established under any other law. However, it might alternatively mean that liability should be capable of being established by action in the

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708 This view has been taken in Australia: Plozza v. South Australian Insurance Co. Ltd. [1963] S.A.S.R. 122, 128-129; Hall v. National and General Insurance Co. Ltd. [1967] V.R. 355, 364; and is also the rule of the Restatement Second: s.162, comment b. A precondition which is regarded as procedural only will, however, be ignored: General Steam Navigation Co. v. Guillou (1843) 11 M. & W. 877; 152 E.R. 1051. See Cheshire and North, pp. 702-703; Dicey and Morris, p. 1192

709 Para. 2 105.

710 As was held in Plozza v. South Australian Insurance Co. Ltd. [1963] S.A.S.R 122, 127.

country of the forum. This latter alternative would involve the use of a choice of law rule in tort and delict to select a system of law by which to determine the liability of the insured to the claimant. The question which then arises is whether the choice of law rule which should be used for this purpose by a court in the United Kingdom is the United Kingdom choice of law rule in tort and delict, or that which would have been used by a court in the country whose direct action legislation is being applied in the United Kingdom.

6.70 The corresponding problem in the context of contractual defences to claims in tort or delict has been discussed above.[711] We there concluded that, in the corresponding situation, our own choice of law rule should for reasons of convenience be used in preference to that of the foreign law. However, in the context of selecting the governing law of a contract, it is in practice unlikely that the two approaches would yield different results. In the tort and delict context, however, it is more likely that the choice of law rules of two different countries would yield different results.

6.71 The more complicated, but in our view analytically correct, solution would be to use the choice of law rule in tort and delict of the country whose direct action legislation was being applied in an action in the United Kingdom. A further argument in favour of this solution is that a right of direct action created by a foreign law should be exercised as far as possible within the limits set by the foreign law. However, this solution could lead to an odd result, since the foreign choice of law rule in tort and delict and our own corresponding rule might well select different laws to determine the liability of the insured to the claimant. In such a case it is possible that the insured might be liable under one such law but not the other. If he was liable under the law selected by the foreign choice of law rule, but not our own, the result would be that in an action in the United Kingdom the claimant could succeed against the insurance company but not against the wrongdoer.

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711 Paras. 6.52 - 6.53.

6.72 Our tentative view is that this result is not sufficiently likely to be worth avoiding by adopting the United Kingdom choice of law rule for all purposes; and that in this context, where the foreign direct action legislation requires the use of a further choice of law rule, the rule used in an action in the United Kingdom should be that which would be used by a court in the foreign country.[712] Comments are invited.

C. DEPECAGE AND THE IMPORTANCE OF THE ISSUE IN THE CASE

6.73 Any one tort or delict case may present a number of different questions which require an answer. Some of these questions may not be issues in tort or delict at all - for example, we have suggested that questions of contribution or indemnity should not be so regarded;[713] procedural questions are always governed by the lex fori; and incidental questions such as the determination of who, as a matter of law, is a person's wife or employer, or who are the heirs of a deceased wrongdoer, are clearly not ones which should be governed by the applicable law in tort or delict. However, even within the confines of tort and delict a single case may raise more than one issue, and the question arises whether our reformed choice of law rule in tort and delict should select a single system of law which would apply to all the substantive issues in tort and delict arising in any one case, or whether the individual tortious or delictual issues in the case should be identified and the choice of law rule in tort and delict applied separately to each. The splitting of issues involved in the latter process is known to Continental lawyers as "dépeçage", and it may result in different tortious or delictual issues in the same case being governed by different systems of law, notwithstanding that the occurrence and the parties are identical, and that the same choice of law rule is applied.

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712 Dicey and Morris appear to take the opposite view, and say that before an insurer could be made liable in an action in England, it would be necessary that the act of the insured should give rise to liability under the rule in Phillips v. Eyre: pp. 960-961.

713 See above, paras. 6.46 - 6.49 and 6.50 respectively.

6.74 By way of example, consider two English students who go for a motoring holiday in a foreign country where (a) there is strict liability for motor accidents, but (b) the transmission of tort or delict claims on death is not permitted. In England, by contrast, liability is for negligence only, and the transmission of tort claims on death is permitted. Both of these issues may be regarded as issues in tort or delict, to which our choice of law rule in tort and delict would accordingly apply. While in the foreign country the passenger in the car is killed in an accident caused, without negligence, by the driver. The driver would be liable under the foreign law, but not under English law, as he had not been negligent. If either English law or the foreign law applied to both issues in an action in England by the estate of the deceased passenger against the driver, the action would not succeed. On the other hand, if the issues were split, it would be possible (for example) to use the choice of law rule in tort and delict in such a way as to apply the foreign law to determine the required standard of liability, and English law to the question of the transmissibility of the deceased victim's action. If this were done the claim of the deceased passenger's estate against the driver would succeed.

6.75 There is clearly some support in Boys v. Chaplin for allowing the choice of the applicable law to be influenced by the particular issue under consideration,[714] and the proper law approach as advocated by Dr. Morris would do likewise.[715] This is also inherent in the rule-selecting approaches which have found support in the United States; and the Restatement Second contemplates the application of its choice of law rules to each issue separately rather than to the case as a whole.[716]

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714 [1971] A.C. 356, 380B per Lord Hodson, 389 ff. and especially 391 ff. per Lord Wilberforce.

715 See Morris, "The proper law of a tort", (1951) 64 Harv. L.R. 881, 892-893; and The Conflict of Laws (3rd ed., 1984), pp. 304-305, 528-529.

716 See, for example, s.145(1), and comment d thereon.

6.76 If dépeçage is to be permitted, however, there must be some way in which our choice of law rule could not only take into account the locus delicti, the occurrence and the parties, but also distinguish between particular issues. While the locus delicti, and also the occurrence and the parties and the place with which they are most closely connected, lend themselves to objective ascertainment (although there may, perhaps, be some room for differences of opinion as to what the "occurrence" was), we find it hard to see how an issue can be connected with a particular place or system of law except by reference to the purpose or policy behind the rule of law in question. This is indeed the main argument in favour of permitting dépeçage;[717] by splitting the case up into issues it may be possible to give effect to the policies or purposes of a number of different rules of law, derived from different systems of law and relating to different issues.

6.77 However, we have observed above[718] that it may be difficult or impossible to ascertain the purpose or policy of a rule of law, and we do not believe it would be justifiable to speculate about such purposes or policies in the absence of evidence, even if the speculation were plausible. Further, it is conceded that in certain circumstances it would be unjustifiable to split rules of law which properly belong together,[719] and if it is difficult to determine the policy or purpose of an individual rule, it

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717 See Boys v. Chaplin [1971] A.C. 356, 392, per Lord Wilberforce; Wilde, "Dépeçage in the choice of tort law", (1968) 41 S. Calif. L.R. 329; Cavers, "Contemporary conflicts law in American perspective", [1970] III Hague Rec. 75, 137-140; Reese, "Dépeçage: a common phenomenon in choice of law", (1973) 73 Col. L.R. 58. Reese argues that dépeçage may also further other choice of law values.

718 Paras. 4.41 - 4.43.

719 Morris, The Conflict of Laws (3rd ed., 1984), pp. 528-529; Wilde, (1968) 41 S. Calif. L.R. 329; Cavers, [1970] III Hague Rec. 75, 137-140; Reese, (1973) 73 Col. L.R. 58, 66 ff., (whose view (expressed at p. 73) is, however, that "... dépeçage should not always be avoided simply because its use would distort or threaten to distort the purpose of one of the rules applied.")

may be even more difficult to decide whether two rules are related in purpose. We have identified above two types of rule which may be related,[720] but it would be impossible to produce a catalogue of related rules. In the absence of such a catalogue, however, we also believe that it would be difficult to define, for the purposes of any implementing legislation, the degree of relation which should be required of two rules to justify their being kept together.

6.78 In any event, we do not consider that the interests of justice (whether in the individual case or at the choice of law level) necessarily require of the choice of law process that it should result in advancing the policy or purpose of the maximum possible number of competing rules, and either of our proposed choice of law rules would in our view select an appropriate law without the use of dépeçage. It is true that the use of dépeçage would permit some issues in tort or delict to be dealt with by (for example) the lex loci delicti, and others by (for example) the law of the place with which, owing to their individual circumstances, the parties as opposed to the occurrence had the closest and most real connection.[721] It is also true that both of our proposed choice of law rules would in practice start with a consideration of the occurrence, and hence with the lex loci delicti. However, both of our proposed choice of law rules would, without dépeçage, also permit the parties to be taken into account in selecting the applicable law; and where the importance to be attached to the characteristics of the parties or of their relationship outweighs that to be attached to the occurrence, there are in our view strong arguments for deciding all of the substantive issues, and not just some of them, by reference to the law thus indicated. This would accord more closely with the expectations of the parties; and, if the parties were indeed so closely connected with a particular country, it would seem appropriate to expect

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720 The standard of liability and a ceiling on the recovery of damages: para. 6.20.

721 This is the sort of distinction which has been used to illustrate the desirability of dépeçage; see, e.g., Restatement Second, s.145(1), comment d; Cavers, "Contemporary conflicts law in American perspective", [1970] III Hague Rec. 75, 137-140.

them to accept all the consequences of that fact. It should also be remembered that where the lex loci delicti is departed from in respect of the substantive issues, there will nevertheless be some matters which it continues to regulate, namely foreign rules of conduct, which a court here will take into account whatever the applicable law.[722]

6.79 For these reasons we believe that the introduction of dépeçage into our choice of law rule would be impracticable, unnecessary and over-complicated. It would also give rise to other practical difficulties, since the isolation of different issues in a single case requires that those issues be defined. While (as we have remarked) the locus delicti, the parties and the occurrence lend themselves to objective identification, the same is less true of the issues, which may be capable of several different formulations.

6.80 It is true that the E.E.C. Convention on the Law Applicable to Contractual Obligations (1980) contemplates dépeçage in the sense that different parts of a contract may be governed by different laws by the choice of the parties,[723] and the same is true of a severable part of the contract in the absence of such choice.[724] However, the position in contract is not, in this respect, analogous to that in tort or delict. An agreement between the parties may be best reflected by applying different systems of law to different issues; and even where there is no express agreement to this effect, the agreement as a whole may as a matter of construction or implied intention contain provisions capable of severance. In tort or delict there is no such agreement, but only a dispute, and the same considerations do not apply. It is relevant that even in the case of the contract convention no delegation on the working group which drew up the draft wished to encourage the idea of dépeçage, at least in

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722 For example, an action in England in respect of a motor accident in France would use as data a relevant French speed limit and the French rule requiring vehicles to drive on the right, even if English law was selected as the applicable law by our choice of law rule. See Dicey and Morris, p. 950.

723 Article 3(1).

724 Article 4(1).

the absence of express choice.[725] Further, none of the Continental systems of law which we have considered for the purposes of this paper provides for dépeçage in tort or delict cases.[726]

6.81 Our provisional conclusion, therefore, is that our reformed choice of law rule should not provide for the choice of law to be made separately for different substantive issues in tort or delict: in other words, our choice of law rule should not provide for dépeçage. Comments are invited on this view.

D. MULTIPLE PARTIES

6.82 Where there are three or more parties to a single action the question arises whether the applicable law should be determined separately for each pair of opponents or whether all parties should be taken into account in choosing a single applicable law.

6.83 Although the fact that many people were involved in a incident might be relevant to a description of the "occurrence" for the purposes of either of our proposed choice of law rules, and to this extent may influence the determination of the applicable law, the particular combination of parties in any one action will be determined by entirely unrelated factors and may merely be an accident of procedure. Although it might be convenient to have a single applicable law in a multi-party case, it would in fact be possible for each claimant to bring a separate action against each wrongdoer, and it would not in our view be acceptable that a claimant or a wrongdoer should be able to manipulate the determination of the applicable law by procuring a particular combination of parties.

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725 Report on the Convention by Professor M. Giuliano and Professor P. Lagarde, O.J. 1980 C.282: para. 2 of comment 8 on article 4 (O.J. 1980 C. 282 at p.23), and see also comment 4 on article 3 (ibid. at p. 17).

726 It may, nothwithstanding the absence of express provision, be permitted under the draft Benelux Uniform Law and under Austrian law (see below, Appendix): see Morse, "Choice of Law in Tort: a Comparative Survey", (1984) 32 Am. J. Comp. L. 51, 63, 69.

6.84 Our provisional conclusion is, therefore, that (except in cases of vicarious liability[727]) the determination of the applicable law should be made separately for each pair of opponents.[728] This conclusion is not inconsistent with the present law, although the question does not appear to have arisen in practice. Comments are invited.

6.85 The cases in which such a rule may at first sight appear startling are (a) where many claimants suffer what is in effect the same injury from the same incident (for example, an aircraft crash); and (b) where several wrongdoers act in concert (for example, a conspiracy). Nevertheless, we believe that our proposal is the correct one in these cases also. The first case is startling only because of the numbers involved. The idea that the same wrongdoer may be liable to more than one person each according to a different law is not, we believe, one that in principle causes any difficulty, and it could perfectly well arise elsewhere - for example in contract, where each claimant had a contract with the wrongdoer and each contract was governed by a different proper law. In any event, we believe that such a case would be unlikely to arise in practice. In the second case also we believe it to be unlikely in practice that the conspirators would be liable according to different laws, but we see no reason of principle why they should not be. For example, where a person in England conspires with a person in France to do acts respectively in England and France which injure an English claimant's interests in those respective places, and the acts would be lawful in France but not in England, it seems appropriate that the liability of the conspirator in England should be decided according to English law, but it does not seem self-evident that the liability of the conspirator in France should also be so decided.

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727 See para. 6.10 above.

728 This is the rule provided for in respect of multiple wrongdoers by article 136 of the Swiss proposals: see Appendix. The accompanying commentary says that it is self evident that the same rule would apply to multiple claimants: para. 284.4.

E. COMPENSATION SCHEMES

6.86 Under our revised choice of law rule in tort and delict, it is possible that the applicable law may turn out to be that of a country where the arrangements for compensating victims rely not upon establishing the civil liability of the wrongdoer in tort or delict, but rather upon a claim by the victim against an insurance company (his own or the wrongdoer's) or a compensation fund. This question could, indeed, arise under our present law, since both the rule in Phillips v. Eyre and that in McElroy v. McAllister refer to the lex loci delicti; and it is thought that the right to compensation under a compensation scheme would not necessarily be enough to satisfy the double actionability rule in so far as it requires that liability should exist under the lex loci delicti.[729]

6.87 The schemes concerned could be of several kinds.[730] For example, one type is the administrative compensation scheme run by a central authority. The best known example of such a scheme is perhaps that in force in New Zealand.[731] Another is a system of compulsory insurance, the terms of which are regulated by law.[732] A compensation or insurance scheme may or may not be complemented by the abolition or curtailment of the victim's right to recover damages from the wrongdoer.

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729 See above, paras. 2.17, 2.42.

730 Volume 3 of the Report of the Royal Commission on Civil Liability and Compensation for Personal Injury ((1978) Cmnd. 7054-III) contains descriptions of a number of overseas systems of compensation.

731 Accident Compensation Act 1982 (Act No. 181 of 1982), consolidating earlier enactments. See Webb and Auburn, "New Zealand conflict of laws - a bird's eye view", (1977) 26 I.C.L.Q. 971, 983-991.

732 For example, the "no-fault" schemes in force in some of the United States. The Report of the Royal Commission on Civil Liability and Compensation for Personal Injury, Vol. 3 ((1978) Cmnd. 7054-III) contains, at paras. 144 ff., an account of such schemes. See also Kozyris, [1972] Duke L.J. 331 and [1973] Duke L.J. 1009.

6.88 There are therefore four possible combinations of circumstances which may arise in an action in this country, and the question is whether our reformed choice of law rule would be capable of dealing satisfactorily with these four cases.

Case 1 Claimant's right of action for damages not curtailed, and he has no rights under compensation scheme

6.89 This case does not, in our view, give rise to any difficulty. It is true that, where the right of action for damages is merely the residual tort or delict law of a country where it is rarely used owing to the existence of a compensation scheme, it may be that the court here would be "... drawing on frozen rules no longer subject to statutory reform and common law development".[733] To the extent that this is unsatisfactory, however, it is no more so than where the action is brought in the courts of the place whose law is being applied; and in our view there is no reason for us to make up the deficiency. No new problem would be created by either of our proposed choice of law rules.

Case 2 Claimant's right of action for damages not curtailed, but he is also able to recover under the compensation scheme

6.90 The further difficulty that arises in this case is whether any provision need be made here to prevent the claimant from recovering twice: by action here, and again under the compensation scheme. In our view no such provision is necessary. Whether or not the claimant is permitted to recover under the compensation scheme and also by action in tort or delict is, in our view, a matter for the applicable law, and not a matter arising from the rules for choosing the applicable law.

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733 Shapira, "New Zealand accident compensation and the foreign plaintiff: some conflict of laws problems", (1980) 12 Ottawa L.R. 413, 423.

Case 3: Claimant's right of action for damages is curtailed or abolished, but he is entitled to recover under the compensation scheme instead

6.91 This is probably the most likely case. It would seem clear that, in general, the courts in this country will be unable to grant the claimant a remedy based on the compensation scheme, except in the unlikely event that the compensation fund or insurance company was before the court, and the scheme permitted the claimant to sue the fund or company directly. In most cases it would therefore follow that the claimant's claim would not succeed here, either for want of a defendant or defender, or (if the claimant sued the wrongdoer instead of the compensation fund or insurance company) because the wrongdoer would under the applicable law benefit from the abolition or curtailment of the right of action in tort or delict. The claimant would therefore have to recover against the fund or insurance company elsewhere - probably in the country of the fund.

6.92 We do not, however, believe this to be in principle an unacceptable result. If a particular country chooses to abolish the civil action and to substitute for it some other way of compensating victims which happens not to be within the power of our courts to operate, we can see no reason why the scheme of the country in question should be circumvented. The alternative would be to allow an action here by the victim against the wrongdoer to proceed and, perhaps, to succeed. However, this would involve injustice to the wrongdoer, since he would be exposed to liability in tort or delict under some law other than that which would otherwise apply, and against which liability he may well have had no practical chance to insure.[734] No converse injustice to the claimant would be brought about by our proposed choice of law rule, since he would always have his claim in the foreign country against the compensation fund.

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734 See Shapira, (1980) 12 Ottawa L.R. 413, 434, citing Cavers, (1971) 9 Duq. L.R. 362, 365.

6.93 Further, to depart from our proposed choice of law rule in this case would involve a logical anomaly, since it would mean that, in order to allow the claimant's action to succeed, the choice of law rule would in this one case have to take into account not only the locus delicti, the occurrence, and the parties, but also the result of any given choice. Although, as we have said,[735] it may be idle to suppose that the court will in fact never be aware of these results, we do not believe it would be right to build such a factor into our choice of law rule in this one case.

6.94 For these reasons we also do not believe it right to make special provision here to cover the case where the compensation to which the claimant would be entitled was, in our eyes, inadequate.[736]

Case 4: Claimant's right of action for damages is curtailed or abolished, and he is not covered by the compensation scheme either

6.95 Although at first sight this may seem the most startling case (and we do not know whether it could in fact ever arise in practice), we believe that the same arguments as in Case 3 apply, and that no modification of our choice of law rule would be required. If, for example, the potential claimant has gone to a country where such a rule prevails, having failed to take out adequate insurance, and the law of that country would be applicable in an action here, there seems no reason why our choice of law rule should be adjusted in his favour where he would be denied recovery in the courts of that country. The only case where our choice of law rule could in theory result in injustice is where the

735 Para. 4.17 above.

736 An example of potentially inadequate cover, coupled with the abolition of common law rights, is that provided under the New Zealand scheme to a visitor to New Zealand who is not a New Zealand earner (i.e. who is employed, or whose income arises, outside New Zealand). Such a person is not entitled to the 80% compensation for loss of earning capacity which is otherwise provided for under the New Zealand scheme: Accident Compensation Act 1982, ss. 52(2)(j), (3)(j); 53(1); 59. See Webb and Auburn, (1977) 26 I.C.L.Q. 971, 985-986; and Shapira, (1980) 12 Ottawa L.R. 413, 417-418.

claimant's rights were restricted by the operation of our choice of law rule, not by the operation of the domestic law selected, but we cannot think of a situation in which this could occur.

6.96 We have, therefore, reached the provisional conclusion that neither of our proposed choice of law rules in tort and delict requires modification in cases where it selects the law of a place where an insurance or compensation scheme is in force. Comments are invited.

PART VII

SUMMARY OF PROVISIONAL CONCLUSIONS AND PROPOSALS

Introduction

7.1 Throughout this consultation paper we have used a number of Latin phrases, including "lex fori" (the law of the forum), "locus delicti" (the country where the tort or delict occurred) and "lex loci delicti" (the law of the country where the tort or delict occurred). We used these phrases for reasons of convenience only, and it would not be appropriate to use them in any implementing legislation. We have therefore not used them in this summary of provisional conclusions and proposals, but have used their English equivalents instead.

The main issue:

7.2 The essential proposal in this consultation paper is that our existing choice of law rule in tort and delict be abolished and replaced by one or other of two alternatives. The main questions upon which comment is invited are -

(a) whether either or both of these alternatives is acceptable; and

(b) if both, which is to be preferred; or, if neither, what other rule should be adopted.

The broad outline of the alternative proposals as they would be if all our provisional conclusions were accepted is as follows:

Model 1: The application, subject to an exception, of the law of the country where the tort or delict occurred.

General rule

The applicable law is that of the country where the tort or delict occurred.

Definition, for multi-state cases, of the country where the tort or delict occurred

(i) personal injury and damage to property:
the country where the person was when he was injured or the property was when it was damaged;

(ii) death:
the country where the deceased was when he was fatally injured;

(iii) defamation:
the country of publication;

(iv) other cases:
the country in which the most significant elements in the train of events occurred.

Rule of displacement

The law of the country where the tort or delict occurred may be disapplied, and the law of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection applied instead, but only if the occurrence and the parties had an insignificant connection with the country where the tort or delict occurred and a substantial connection with the other country.

Model 2: The proper law

General rule

The applicable law is that of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection.

Presumptions

In the case of the following types of tort or delict, the country with which the occurrence and the parties had the closest and most real connection is presumed to be, unless the contrary is shown-

(i) personal injury and damage to property:
the country where the person was when he was injured or the property was when it was damaged;

(ii) death:
the country where the deceased was when he was fatally injured;

(iii) defamation:
the country of publication.

A presumption may be departed from only if the occurrence and the parties had an insignificant connection with the country indicated by the presumption and a substantial connection with another country.

Our provisional conclusions and proposals in detail

7.3 The two models outlined above have been built up from a large number of individual conclusions, and we have also made provisional proposals on many matters of detail which do not appear in the above outline of our two alternative models. Accordingly we set out here a summary of the provisional conclusions reached and proposals made in Parts IV to VI of this consultation paper. We invite comment on all of them.

PART IV: THE OPTIONS FOR REFORM

Agreement as to the applicable law

1. (a) It should be possible (before or after a tort or delict has occurred) to agree by means of contract what law should govern the parties' mutual liability in tort or delict. Such agreement should be effective whether or not it results in the application of the law of the forum.

(b) We invite comment on our provisional view that any implementing legislation should expressly provide for this proposal.

[paragraph 4.21]

Options for reform which we have provisionally rejected

2. We have provisionally concluded that the following are not acceptable options for reform:

(i) application of the law of the forum alone;

[paragraphs 4.24 - 4.29]

(ii) application of the law of the forum with exceptions;

[paragraphs 4.32 - 4.34]

(iii) the governmental interest analysis or comparative impairment approach;

[paragraphs 4.36 - 4.45]

(iv) the application of principles of preference;

[paragraphs 4.46 - 4.50]

(v) the application of choice-influencing considerations.

[paragraphs 4.51 - 4.54]

The alternative options for reform which we provisionally propose

Model 1: the application, subject to an exception, of the law of the country where the tort or delict occurred

3. The law of the country where the tort or delict occurred is in many cases the most appropriate law to apply. As the prima facie applicable law, it provides a suitable starting point for a choice of law rule in tort and delict, whether or not the train of events was confined to a single country.

[paragraphs 4.55 - 4.60]

4. In a multi-state case, the country where the tort or delict occurred should be defined as follows-

(i) for cases of personal injury or damage to property, as the country where the person was when he was injured or the property was when it was damaged;

[paragraphs 4.78 - 4.82]

(ii) for cases of death, as the country where the deceased was when he was fatally injured;

[paragraphs 4.78 - 4.82]

(iii) for cases of defamation, as the country of publication.

[paragraphs 5.30 - 5.46]

No other type of tort or delict in our view requires an individual definition of the country where the tort or delict occurred.

5. In all multi-state cases other than those expressly provided for, the country where the tort or delict occurred should be defined in terms of the country where the most significant elements in the train of events occurred.

[paragraphs 4.83 - 4.89]

6. The application in all cases, without exception, of the law of the country where the tort or delict occurred would not be acceptable. Exceptions to the basic lex loci delicti rule could be specific or general. We discuss three possible specific exceptions. We provisionally conclude that none of them would be satisfactory by itself, and that it would be impracticable to adopt more than one.

[paragraphs 4.92 - 4.117]

7. We conclude that instead of specific exceptions there should be a single general exception. The general exception would permit the disapplication of the law of the country where the tort or delict occurred; instead, the law of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection would apply. It would in our view be impracticable to define the concept of "closest and most real connection".

[paragraphs 4.118 - 4.121]

8. A threshold or trigger requirement should be built in to the general exception which would serve to prevent departure from the application of the law of the country where the tort or delict occurred in the absence of strong grounds for doing so. Our tentative view as to the terms of the threshold requirement is that the law of the country where the tort or delict occurred should be displaced in favour of the law of the country with which the occurrence and the parties had the closest and most real connection only if their connection with the country where the tort or delict occurred was insignificant and their connection with the other country substantial.

[paragraphs 4.122 - 4.123]

9. We do not believe that a scheme incorporating both specific exceptions and a general exception would be practicable.

[paragraph 4.124]

Model 2: the proper law model

10. A proper law approach, combined with rebuttable presumptions as to the proper law for particular types of tort and delict, is the second of the two alternative options which we provisionally propose for reform of our choice of law rule. We reject a pure proper law rule, without more, as unacceptably uncertain, and we conclude also that the addition to a basic proper law rule of a list of factors or guidelines stated in general terms would not be sufficient to introduce into the basic rule an acceptable degree of certainty, and would also be unsatisfactory for other reasons.

[paragraphs 4.126 - 4.142]

11. The basic proper law rule should be that the applicable law is that of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection.

[paragraph 4.140]

12. The rebuttable presumptions to be added to the basic proper law rule should be as follows: the country with which the occurrence and the parties had the closest and most real connection would, unless the contrary was shown, be presumed to be -

(i) in a case of personal injury or damage to property, the country where the person was when he was injured or the property was when it was damaged;

[paragraph 4.140]

(ii) in a case of death, the country where the deceased was when he was fatally injured;

[paragraph 4.140]

(iii) in a case of defamation, the country of publication.

[paragraphs 5.30 - 5.46]

We also conclude that no further presumptions need be added to this list.

13. A threshold requirement should be introduced which would prevent the presumptions from being rebutted except where there were strong grounds for doing so: our tentative view is that the presumptions should not be departed from unless the occurrence and the parties had an insignificant connection with the country indicated by the presumption and a substantial connection with another country.

[paragraph 4.141]

PART V: OUR PREFERRED OPTIONS AS APPLIED TO PARTICULAR TYPES OF TORT AND DELICT

Traffic Accidents

14. No special addition to either of our proposed models would be required to deal with traffic accidents.

[paragraphs 5.4 - 5.5]

Products liability

15. No special addition to either of our proposed models would be required to deal with products liability cases whether or not the train of events was confined to a single country.

[paragraphs 5.6 - 5.25]

Liability resulting from the making of statements

16. Apart from defamation, no special addition to either of our proposed models is required to deal with torts and delicts which relate to the making of statements.

[paragraphs 5.26 - 5.29]

17. In a defamation action, whether based upon a single statement or upon a multiple statement,

(i) where the statement originated in one country and was published in another, the country where the statement was published should be considered as the country where the tort or delict occurred for the purposes of our first alternative model for reform (which would apply, subject to an exception, the law of that country);

(ii) for the purposes of our proper law model, the country where the statement was published should be presumed to be that with which the occurrence and the parties had the closest and most real connection.

[paragraphs 5.30 - 5.46]

18. No express provision should be made to deal with any defamation case where a statement would give rise to no liability under the law of the country of origin, but would give rise to liability under the law selected by our choice of law rule.

[paragraphs 5.47 - 5.50]

19. (a) Any statement which would attract absolute privilege under our own internal law should benefit from this protection even if our choice of law rule were to select a foreign law to govern the question of defamation; we invite comment on whether express provision would be necessary or desirable to achieve this result in any implementing legislation, or whether it would be satisfactory to leave this matter to the application of principles of public policy.

[paragraphs 5.52, 5.56]

(b) Although there are some cases in which our own internal defence of qualified privilege should also be available in an action in the United Kingdom, whatever the applicable law, there are others in which it should not; and it would be unnecessarily complicated to provide for such a defence in implementing legislation. It will be satisfactory to leave this matter to the application of principles of public policy.

[paragraphs 5.53 - 5.56]

Economic torts and delicts

20. No special definition of the country where the tort or delict occurred should be formulated in this area for the purpose of our first alternative model for reform; and no presumption should be provided for our proper law model.

[paragraphs 5.57 - 5.60]

21. We invite comment on whether actions based on economic torts or delicts should be wholly or partly excluded from our proposed new choice of law rule, and on whether the damages obtainable should be restricted.

[paragraphs 5.61 - 5.66]

22. If special provision is to be made for economic torts and delicts, we invite comment on the types of economic tort and delict to which such provision should apply, and on how these torts and delicts are to be defined for statutory purposes.

[paragraph 5.66]

Interference with goods

23. No special addition to either of our proposed models would be required to deal with cases of interference with goods.

[paragraphs 5.67 - 5.68]

Nuisance

24. No special addition to either of our proposed models would be required to deal with cases of nuisance.

[paragraphs 5.69 - 5.70]

Torts or delicts involving ships or aircraft

25. Our reformed choice of law rule in tort and delict should not apply to cases concerning collisions on the high seas, or to any other case to which the general principles of maritime law extend or to which our existing choice of law rules in tort and delict do not apply. We invite comment on whether it would be desirable expressly to exclude such cases in any implementing legislation, and if so upon how the area in question should be defined for statutory purposes.

[paragraphs 5.71 - 5.73]

26. Our reformed choice of law rule should not extend to those cases involving aircraft to which our present choice of law rule does not apply.

[paragraph 5.74]

27. (a) Where a train of events is confined to a single ship or aircraft, it should be considered for choice of law purposes as having taken place in the state to which the ship or aircraft belongs.

(b) No provision should be made for a train of events not confined to a single ship or aircraft.

[paragraphs 5.76 - 5.83]

28. The state to which a ship or aircraft belongs should be the state where it is registered.

[paragraph 5.84]

29. (a) If the state where a ship is registered contains more than one country, the state to which the ship belongs should be identified by its port of registry.

(b) We invite comment on whether there is a satisfactory way of connecting an aircraft with a single country within a state which contains more than one country.

[paragraphs 5.84 - 5.86]

30. For the purposes of our choice of law rule as it applies to aircraft, an event should be taken to have occurred aboard an aircraft only if the aircraft was in flight. "In flight" should be defined in terms similar to those used in section 38(3)(a) of the Aviation Security Act 1982.

[paragraphs 5.87 - 5.88]

Torts or delicts occurring in a single jurisdiction within the United Kingdom

31. Our reformed choice of law rule should apply, in an action in England and Wales, or in Scotland, or in Northern Ireland, to torts or delicts which occurred in those respective places.

[paragraphs 5.89 - 5.92]

PART VI : PARTICULAR ISSUES

Capacity

32. The delictual capacity of an individual and of a corporation should be governed by the applicable law in tort or delict.

[paragraph 6.4]

Vicarious liability

33. Whether or not it is possible to impose vicarious liability should continue to be governed by the applicable law in tort or delict.

[paragraphs 6.6 - 6.9]

34. The law applicable in an action by a claimant against a vicariously liable defendant or defender should be the same as that which would have applied in an action by the claimant against the actual wrongdoer. We invite comment on whether this point needs to be expressly provided for in implementing legislation.

[paragraph 6.10]

35. It would not in our view be practicable to formulate a special provision (apart from the rules of public policy generally applicable) whereby the imposition of vicarious liability could be avoided in cases where we should find it so inconsistent with our own notions of justice that for reasons of public policy the defendant or defender should not be held vicariously liable. However, if such a provision were felt to be desirable, we invite comment on what provision should be made, and the circumstances in which it should operate.

[paragraphs 6.11 - 6.14]

Defences and immunities

36. Substantive defences should continue to be governed by the applicable law in tort and delict.

[paragraph 6.15]

Damages

37. The applicable law in tort or delict should continue to determine what heads of damage are available; and the measure or quantification of damages should continue to be governed by the law of the forum. No express guidance need be given in implementing legislation on the question of assessing the quantum of damages under a head of damage unknown to the law of the forum.

[paragraphs 6.16 - 6.17]

Limitations on recovery

38. A ceiling on the amount of damages recoverable should be governed by the applicable law in tort or delict.

[paragraphs 6.18 - 6.20]

Prescription and limitation of actions

39. We make no proposal in this area.

[paragraph 6.21]

Transmission of claims on death: the survival of actions

40. Whether or not an action in tort or delict survives the death of the potential claimant should be governed by the applicable law in tort or delict.

[paragraphs 6.24 - 6.30]

41. Whether or not a claimant may pursue an action in tort or delict against the estate of the wrongdoer after the wrongdoer has died should also be governed by the applicable law in tort or delict.

[paragraphs 6.31 - 6.32]

42. Whether or not a claim in tort or delict subsists after the death of either party after the action has begun should be treated in the same way as transmission of a claim before proceedings are commenced.

[paragraph 6.33]

43. A person suing in the United Kingdom on behalf of the estate of a deceased person should be required to take out a grant of representation at the forum. This expression means, in England and Wales and in Northern Ireland, a grant of probate or letters of administration; in Scotland, the issue of confirmation. It is irrelevant whether or not such a person has complied or is required to comply with a corresponding requirement under any foreign law.

[paragraph 6.34]

Wrongful death

44. The existence of an action for wrongful death, and the description of those for whose benefit it exists, are matters which should continue to be governed by the applicable law in tort and delict.

[paragraph 6.35]

45. The applicable law in a wrongful death action should be that which would have been applied in an action by the deceased or his estate against the wrongdoer.

[paragraphs 6.36 - 6.37]

46. The claimant should be required to take out a grant of representation at the forum (see no. 43 above) if he is suing on behalf of the estate of the deceased, but not otherwise; it is irrelevant whether or not the claimant has taken out or is required to take out a grant of representation under any foreign law.

[paragraphs 6.38 - 6.39]

Intra-family immunities

47. Whether or not there is interspousal immunity, or immunity between parent and child, should be governed by the applicable law in tort or delict.

[paragraphs 6.40 - 6.45]

Contribution

48. Rights of contribution should not be governed by our choice of law rule in tort and delict. Views are invited on whether any implementing legislation should expressly exclude the question of contribution.

[paragraphs 6.46 - 6.49]

Indemnity

49. Rights of indemnity should not be governed by our choice of law rule in tort and delict. Views are invited on whether any implementing legislation should expressly exclude the question of indemnity.

[paragraph 6.50]

Tort and contract

50. The interpretation and validity of a term in a contract which purports to provide a defence to a claim in tort or delict should be decided by the proper law of the contract (as determined by the forum's rules of private international law); the effect of the term (if valid), as so interpreted, as a defence to the claim in tort and delict should be decided by the applicable law in tort and delict.

[paragraphs 6.51 - 6.53]

51. For reasons of convenience, agreements (including assignments or assignations) transacted after the tort or delict has occurred should be treated in the same way as antecedent contracts (see no. 50 above). However, if post-

event transactions were to be treated differently from antecedent contracts our proposal would be that all such post-event transactions should be treated in the same way, regardless of the nature of the transaction.

[paragraphs 6.54 - 6.57]

52. The rule which forms part of some systems of law that a claim cannot be brought in tort or delict if the claimant could bring a claim in contract will (with one possible exception) not give rise to problems in actions in this country. The possible exception is that if a claimant were forced to sue in contract instead of in tort or delict, he might then find that, by the proper law of the contract, contractual claims were excluded if there was a delictual claim. We invite comment on whether this could ever occur and, if so, whether any provision to cater for the phenomenon should be included in our choice of law scheme.

[paragraphs 6.58 - 6.60]

Direct action by third party against insurer

53. We invite comment on whether it is in practice more likely that a direct action provided for under the proper law of an insurance contract will extend to foreign accidents, or that a direct action provided for under the applicable law in tort and delict will extend to foreign insurance contracts (and perhaps also foreign accidents). Our tentative conclusion is that the former is more likely.

[paragraph 6.66]

54. On balance we have reached the view that if the issue of direct liability is to be governed by one system of law only, that system should be the proper law of the insurance contract; but we invite comment on whether it would, as an alternative, be desirable to provide that an action may be

brought directly against the insurer if this is permitted either by the proper law of the insurance contract or, failing that, by the applicable law in tort or delict.

[paragraphs 6.61 - 6.68]

55. Where the direct action legislation in question itself requires the use of a choice of law rule in tort or delict (for example, where it is necessary to determine whether the wrongdoer would have been liable if he had been sued in an action at the forum), the choice of law rule to be used in a direct action in the United Kingdom should be that of the country whose direct action legislation is being applied in the United Kingdom.

[paragraphs 6.69 - 6.72]

Dépeçage and the importance of the issue in the case

56. Our reformed choice of law rule should not provide for the choice of the applicable law to be made separately for different substantive issues in tort or delict: in other words, our choice of law rule should not provide for dépeçage.

[paragraphs 6.73 - 6.81]

Multiple parties

57. Where there are three or more parties to a single action, the choice of the applicable law should be made separately for each pair of opponents.

[paragraphs 6.82 - 6.85]

Compensation schemes

58. No amendment of either of our proposed models for reform is necessary to cater for an applicable law under which the arrangements for compensating victims rely upon a compensation scheme rather than upon establishing the civil liability of the wrongdoer.

[paragraphs 6.86 - 6.96]

APPENDIX[737]

Provisions on the choice of law in tort and delict cases from selected foreign countries and from the E.E.C. Draft Convention

Austria

Statute on Private International Law[738]
Enacted 15 June 1978; in force 1 January 1979.

Article 1

(1) Factual situations with foreign contacts shall be judged, in regard to private law, according to the legal order to which the strongest connection exists.

(2) The special rules on the applicable legal order which are contained in this Federal Statute (conflicts rules) shall be considered as expressions of this principle.

Article 48

(1) Noncontractual damage claims shall be judged according to the law of the state in which the damage-causing conduct occurred. However, if the persons involved have a stronger connection to the law of one and the same other state, that law shall be determinative.

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737 The material in this Appendix is largely taken from a paper prepared for the Joint Working Party by Mr. C.G.J. Morse of King's College London. An article based on that paper, "Choice Of Law In Tort: A Comparative Survey", has appeared at (1984) 32 Am. J. Comp. L. 51.

738 Translation by Palmer, "The Austrian Codification of Conflicts Law", (1980) 28 Am. J. Comp. L. 197, 222, 234.

(2) Damages and other claims arising from unfair competition shall be judged according to the law of the state where the market affected by the competition is located.[739]

Austria has ratified the Hague Traffic Accidents Convention.

France

There is no provision of French law expressly directed to the choice of law in delict cases, but the courts have deduced from article 3(1) of the Civil Code[740] that the lex loci delicti applies.[741]

France has ratified the Hague Traffic Accidents Convention and the Hague Products Liability Convention.

Germany (Democratic Republic)

Act Concerning the Law Applicable to International Private, Family and Labour Law Relationships as well as to International Commercial Contracts[742]

In force 1 January 1976.

Article 17 (Law Applicable to Non-Contractual Liability)

(1) The liability for injuries inflicted outside of contractual relationships, including competency and other personal prerequisites

739 It should be noted that the Austrian rules provide for renvoi (article 5), which is not excluded in tort and delict cases.

740 "Les lois de police et de sûreté obligent tous ceux qui habitent le territoire."

741 Lautour c. Guiraud Cass. civ. 25.5.1948, D.1948.357, S.1949.1.21, (1949) 38 Rev. crit. d.i.p. 89; Kieger c. Amigues Cass. civ. 30.5.1967, (1967) Rev. crit. d.i.p. 728.

742 Translation by Juenger, "The conflicts statute of the German Democratic Republic: an introduction and translation", (1977) 25 Am. J. Comp. L. 332, 359.

as well as the measure of damages, is governed by the law of the state in which the injury was caused.

(2) Injuries inflicted in connection with the operation of a vessel on or aircraft over the high seas are governed by the law of the state whose flag or national insignia the vessel or aircraft displays.

(3) If the person who inflicted the injury and the injured party are nationals or residents of the same state, the law of that state shall apply. This rule also applies to enterprises whose legal status is controlled by or which have their principal place of business in the same state.

Germany (Federal Republic)[743]

In principle the lex loci delicti applies, but is subject to the following restrictions.

EGBGB (Introductory Law to the Civil Code) (1896)[744]

Article 12

By reason of an unlawful act committed in a foreign country, no greater claims can be enforced against a German than those created by German law.

Regulation of 7 December 1942[745]

Claims for extracontractual damages based on an act or omission of a German national committed abroad are governed by German law, insofar as a German national has been damaged.

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743 The law of the Federal Republic of Germany is currently undergoing revision.

744 Translation by Drobnig, American-German Private International Law (2nd ed., 1972), p. 401.

745 Ibid., p. 215, n. 16.

Hungary

Decree on Private International Law[746]

In force 1 July 1979.

Article 32

(1) Unless this Decree orders otherwise, the liability for damages inflicted outside of a contractual relationship shall be determined by the law controlling at the time and place of the tortious act or omission.

(2) If it is preferable to the injured party, the law of the State in which the damage occurred shall control.

(3) If the domicile of the tortfeasor and the injured party is in the same State, the law of that State shall be applied.

(4) If, according to the law governing the tortious act or omission, liability is conditioned on a finding of culpability, the existence of culpability can be determined by either the personal law of the tortfeasor or the law of the place of injury.

Article 33

(1) The law of the place of the tortious conduct shall determine whether the tortious conduct was realized by the violation of traffic or other security regulations.

(2) If the tortious act or omission occurs on a registered water vehicle or aircraft, the infliction of tortious damages and its consequences shall be determined by the law of the State under whose flag or markings the vehicle was operated at the time of the legal injury - which occurs outside of the national jurisdiction of that State.

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746 Translation by Gabor, "A socialist approach to codification of private international law in Hungary: comments and translation", (1980) 55 Tulane L. R. 63, 98.

Article 34

(1) The Hungarian Court shall not determine liability for such conduct which is not unlawful under Hungarian law.

(2) The Hungarian Court shall not determine the legal consequences for infliction of tortious damages, which are not known under Hungarian law.

Italy

Civil Code (1942)[747]

Provisions on the law in general, Article 25

Non-contractual obligations are governed by the law of the place where the facts from which they arise took place.

Italy has signed, but not ratified, the Hague Products Liability Convention.

The Netherlands

The Dutch choice of law rules in tort and delict are judge-made but are based on the proposal for a Benelux Uniform Law on Private International Law,[748] which provides in relevant part as follows.

Article 14

(1) The law of the country where an act takes place shall determine whether this act constitutes a wrongful act, as well as the obligations which result therefrom.

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747 Translation from Beltramo, Longo and Merryman, The Italian Civil Code (1969).

748 Originally promulgated in 1951; revised (without change in the tort and delict provisions) in 1969; never formally entered into force. See Nadelmann, "The Benelux Uniform Law on Private International Law", (1970) 18 Am. J. Comp. L. 406. Courts in Luxembourg have adopted these rules, but the Belgian courts have not: the lex loci delicti rule largely prevails there.

(2) However, if the consequences of a wrongful act belong to the legal sphere of a country other than the one where the act took place, the obligations which result therefrom shall be determined by the law of that other country.[749]

The Netherlands has ratified the Hague Traffic Accidents Convention and the Hague Products Liability Convention.

Poland

Code on Private International Law (Law of 12 November 1965)[750]

In force 1 July 1966.

Article 31

(1) Obligations, which do not arise from legal transactions, are subject to the law of the state in which the event giving rise to such obligations occurred.

(2) However, the national law applies where the parties are citizens of the same state and have their domicile in that state.

(3) The proper law defined in the preceding paragraphs shall determine whether a person having a limited capacity to enter into legal transactions shall be liable for the damage caused through an illicit act.

Portugal

Civil Code (25 November 1966)[751]

In force 1 June 1967.

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749 Translation by Nadelmann, (1970) 18 Am. J. Comp. L. 406, 424.

750 Translation by Lasok, Polish Family Law (1968), p. 294.

751 French text at (1968) 57 Rev. crit. d.i.p. 369. This translation is partly by Morse and partly from Cavers, "Legislative choice of law: some European examples", (1971) 44 So. Calif. L.R. 340, 353-354.

Article 45

(1) Non-contractual liability, whether based on an unlawful act, on the creation of a risk or any other conduct, shall be governed by the law of the state where the principal activity causing the damage took place; in the case of liability for omissions, the applicable law shall be the law of the place where the party responsible should have acted.

(2) If the law of the state of injury holds the actor liable but the law of the state where he acts does not, the law of the former place shall apply, provided the actor could foresee the occurrence of damage in that country as a consequence of his act or omission.

(3) If, however, the actor and the victim have the same nationality or, failing that, have the same habitual residence, and they happen to be ["se encontrarem ocasionalmente"] in a foreign country, the applicable law shall be that of the common nationality or habitual residence, without prejudice to provisions of local state laws which must be applied to all persons without differentiation.

Portugal has signed, but not ratified, the Hague Traffic Accidents Convention and the Hague Products Liability Convention.

Spain

Civil Code

Preliminary Title, Article 10(9) (as revised 1974)

Non-contractual obligations shall be governed by the law of the place where the event from which they derive has occurred.[752]

752 Unofficial translation from (1974) 21 Ned. Tijd. v. I.R. 367, 372.

Switzerland

The private international law of Switzerland is at present undergoing revision, and the following are the proposals relating to tort and delict cases.[753]

Article 14 ("Clause d'exception")

(1) The law selected according to this enactment is exceptionally not applicable if, in the light of all the circumstances, it is clear that the action has but a very loose connection with that law and has a much closer connection with another law.

(2) This provision does not apply if the parties have agreed the applicable law.

Article 129 (Applicable law: in general)

(1) Where the wrongdoer and the victim have their habitual residence in the same country, a claim based upon a wrongful act is governed by the law of that country.

(2) Where the wrongdoer and the victim do not have a common habitual residence, such a claim is governed by the law of the country where the wrongful act was done. However, where the result occurred in a different country, the law of the latter is applicable if the wrongdoer could have foreseen that the result would occur in that country.

(3) Notwithstanding the preceding clauses, where a wrongful act constitutes an infringement of a pre-existing legal relationship between wrongdoer and victim, a claim based upon that act is governed by the law applicable to that legal relationship.

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753 The French text of these proposals, together with an explanatory commentary, is to be found in a document (ref. no. 82.072) entitled "Message concernant une loi fédérale sur le droit international privé", dated 10 November 1982. The translation which appears here is our own.

(4) The wrongdoer and the victim may agree at any time after the harmful event that the lex fori shall apply.

Article 130 (Applicable law: in particular - traffic accidents)

Claims arising out of traffic accidents are governed by the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents.[754]

Article 131 (Applicable law: in particular - products liability)

(1) A claim based upon a defect in, or a defective description of, a product is governed, at the victim's choice:

(a) By the law of the country in which the wrongdoer has his place of business ["établissement"] or, if he has no place of business, his habitual residence; or

(b) By the law of the country where the product was acquired, unless the wrongdoer proves that the product was put on the market in that country without his consent.

(2) Where a claim based upon a defect in, or a defective description of, a product is governed by a foreign law, no damages may be awarded in Switzerland other than those which would be awarded for a similar injury under Swiss law.

(3) Article 129(3) of this enactment applies.

Article 132 (Applicable law: in particular - unfair competition)

(1) A claim based upon an act of unfair competition is governed by the law of the country upon whose market the result occurred.

(2) If the act affected the interests of a particular competitor only, the applicable law is that of the seat ["siège"] of the affected concern.

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754 Switzerland has signed but not yet ratified this Convention.

(3) Article 129(3) of this enactment applies.

Article 133 (Applicable law: in particular - restrictive practices)

(1) A claim based upon a restrictive practice is governed by the law of the country upon whose market the restrictive practice directly affects the victim.

(2) Where a claim based upon a restrictive practice is governed by a foreign law, no damages may be awarded in Switzerland other than those which would be awarded under Swiss law in respect of a restrictive practice.

Article 134 (Applicable law: in particular - nuisance)

A claim based upon a harmful nuisance coming from a building ["immeuble"] is governed, at the victim's choice, by the law of the country in which the building is situated or by the law of the country in which the result occurred.

Article 135 (Applicable law: in particular - defamation)

A claim based upon a public defamation by means of the press, radio, television or any other public mass medium is governed, at the choice of the victim:

(a) By the law of the victim's habitual residence;

(b) By the law of the country where the author has his place of business or habitual residence; or

(c) By the law of the country where the defamation had its effect.

Article 136 (Applicable law: special rules - multiple actors)

Where more than one person participated in a wrongful act, the applicable law shall be determined separately for each of them, whatever their role.

Article 137 (Applicable law: special rules - direct action against insurer)

The victim may bring his action directly against the wrongdoer's insurer if this is permitted by the law governing the wrongful act or by the law governing the contract of insurance.

Article 138 (Applicable law: scope)

(1) The law governing the wrongful act determines, in particular, delictual capacity, the conditions and extent of liability, and also the party liable.

(2) The rules relating to conduct and safety ["règles de sécurité et de comportement"] of the place of the act shall be taken into account.

Turkey

Statute on Private International Law and International Procedure[755]

Enacted 20 May 1982.

Article 25

(1) Non-contractual obligations arising out of wrongful acts are governed by the law of the country where the act was done.

(2) Where the act giving rise to liability occurs in a different country from the damage, the applicable law is that of the country where the damage occurs.

(3) Where the wrongful act gives rise to a stronger legal connection with another country, the law of that other country may be applied.

755 Our own translation from French text in (1983) 72 Rev. crit. d.i.p. 141.

Yugoslavia

Statute on the resolution of conflicts of law[756]

Enacted 15 July 1982.

Article 28

(1) Subject to contrary provision in particular cases, non-contractual liability is governed either by the law of the country where the wrongful act was done or the law of the country where its results occurred, whichever is more favourable to the victim.[757]

(2) ...

(3) Whether or not an act is wrongful is determined according to the law of the country where the act was done or of the country where its results occurred; if the act was done or the results occurred in a number of places, it is enough that the act should be wrongful according to the law of one of those places.

Article 29

If the event which gives rise to liability occurred on board a ship, on the high seas, or on board an aircraft, the law of the country in which the ship or aircraft is registered shall be taken as the law of the country in which the event occurred.

Yugoslavia has ratified the Hague Traffic Accidents Convention and the Hague Products Liability Convention.

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756 Our own translation from French text in (1983) 72 Rev. crit. d.i.p. 353.

757 It should be noted that the Yugoslav rules provide for renvoi (article 6).

Extracts from the E.E.C. Preliminary Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations (1972)[758]

Article 10

(1) Non-contractual obligations arising out of an event which has resulted in damage or injury shall be governed by the law of the country in which that event occurred.

(2) However, if, on the one hand, there is no significant link between the situation arising from the event which has resulted in damage or injury and the country in which that event occurred and, on the other hand, the situation has a closer connexion with another country, then the law of that other country shall apply.

(3) Such a connexion must normally be based on a connecting factor common to the victim and the author of the damage or injury or, if the liability of a third party for the acts of the author is at issue, it must normally be based on one which is common to the victim and the third party.

(4) Where there are two or more victims, the applicable law shall be determined separately for each of them.

Article 11

The law applicable to non-contractual obligations under Article 10 shall determine in particular:

1 the basis and extent of liability;

2 the grounds for exemption from liability, any limitation of liability, and any apportionment of liability;

3 the existence and kinds of damage or injury for which compensation may be due;

4 the form of compensation and its extent;

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758 These extracts are taken from a consultative document on the E.E.C. Draft Convention produced in August 1974 by the Law Commission and the Scottish Law Commission.

5 the extent to which the victim's heirs may exercise his right to compensation;

6 the persons who have a right to compensation for damage or injury which they personally have suffered;

7 liability for the acts of others;

8 rules of prescription or limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of this period.

Article 12

Irrespective of which law is applicable under Article 10, in the determination of liability, account shall be taken of such rules issued on grounds of security or public order as were in force at the place and time of occurrence of the event which resulted in damage or injury.

Article 13[759]

Non-contractual obligations arising from an event which does not result in damage or injury shall be governed by the law of the country in which that event occurred. However, if, by reason of a connecting factor common to the interested parties, there is a closer connexion with the law of another country, that law shall apply.

Article 14

The provisions of Articles 10 to 13 shall not apply to the liability of the State or of other legal persons governed by public law, or to the liability of their organs or agents, for acts of public authority performed by the organs or agents in the exercise of their official functions.

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759 This article was directed primarily at quasi-contracts.

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