SOME DEVELOPMENTS OF THE 1960s TOWARDS A NEW APPROACH TO MULTI-JURISDICTIONAL TORT LIABILITY*

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The past few decades have seen a tremendous upswing in inter-jurisdictional travel, which has served as a catalyst for academic and judicial inquiries into the validity of existing rules for determining tort liability for injuries incurred in a multi-jurisdictional setting. The question has repeatedly been raised whether traditional conflicts rules are adequate to satisfy the demands of either the parties involved, or the states whose laws are invoked for purposes of allowing or rejecting a particular claim. The purpose of this paper is to outline some considerations that a lawyer involved in automobile litigation, or indeed any tort litigation, might well take into account in evaluating a client's prospects for recovery, or for avoiding liability, as the case may be.

To put these remarks into perspective, perhaps it would be advantageous to illustrate at the outset three simple, yet classic, inter-jurisdictional problems, each based on the assumption that litigation is commenced in New Brunswick.

Case 1:

> A plaintiff and defendant are resident and domiciled in Quebec at the time of an accident occurring in Quebec. The plaintiff, a gratuitous passenger, is injured while being transported in an automobile driven by the defendant. Subsequent to the accident, the defendant takes up residence in New Brunswick and an action is brought by the plaintiff against the defendant in the New Brunswick Supreme Court. The Court is faced with the question whether, in the absence of proof of gross negligence, the defendant ought to be held liable under the law of Quebec, the *lex loci* of the accident, or whether the defendant should be immunized from liability by virtue of the gratuitous passenger provision in the New Brunswick Motor Vehicle Act.[1]

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* A paper presented at the mid-winter meeting of the Canadian Bar Association (N.B. Branch) in Moncton, N.B., Feb. 20, 1970.

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1 (1955), 4 Eliz. II, c. 13, s.242 (N.B.) ". . . no person transported by the owner or driver of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against the owner or driver for injury, death or loss, in case of accident, unless the accident was caused by the gross negligence or wilful and wanton misconduct of the owner or driver of the motor vehicle and unless the gross negligence or wilful and wanton misconduct contributed to the injury, death or loss, for which the action is brought". A number of Canadian cases have dealt with problems imposed by gratuitous passenger rules, including: *Howells* v. *Wilson* (1936), 69 Que. K.B. 32;

Case 2:

Two New Brunswick residents are travelling in an automobile in the United States. One of the parties dies as a result of an accident which would, had the accident occurred in New Brunswick, give rise to a right in the wife of the deceased to recover damages under the New Brunswick Fatal Accidents Act.[2] On the assumption that the law of the place where the accident has taken place denies recovery to the wife, under its equivalent legislation, where there has been a settlement between the insurer and the deceased prior to his death, is the New Brunswick Supreme Court, in an action based on our statute, permitted to grant recovery? Or does the fact that a valid defence exists under the law of the place where the accident takes place provide an obstacle to relief?

Case 3:

A plaintiff from New Brunswick, travelling on a United States highway, is involved in an accident with a defendant from Ontario. Assuming that the law of the place where the accident occurs has no contributory negligence statute and holds contributory negligence as a total bar to a plaintiff's recovery, is a New Brunswick court required to deny recovery in accordance with the law of the place where the accident has taken place, or may it determine liability by reference to common law and statutory standards in effect in New Brunswick at the time of the accident?[2a]

In approaching these issues, it should be recognized that a strategy-conscious lawyer may be able to avoid some of the choice of law problems by shopping for a suitable forum, one which will

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Lieff v. *Palmer* (1937), 63 Que. K.B. 278; *McLean* v. *Pettigrew*, [1945] S.C.R. 62; and, in New Brunswick, *Johnston* v. *Arbeau* (1960) 24 D.L.R. (2d) 740 (C.A.), and *Martin* v. *Marmen* (1969), 6 D.L.R. (3d) 77 (C.A.). Some U.S. cases are: *Babcock* v. *Jackson*, 240 N.Y.S. 2d 743 (1963); *Clark* v. *Clark*, 222 A. 2d 205 (1966) (Sup. Ct. N.H.); *Kell* v. *Henderson*, 270 N.Y.S. 2d 552 (1966); *Dym* v. *Gordon*, 262 N.Y.S. 2d 463 (1965); *Macey* v. *Rozbicki*, 274 N.Y.S. 2d 591 (1966); *Miller* v. *Miller*, 290 N.Y.S. 2d 734 (1968); *Tooke* v. *Lopez*, 249 N.E. 2d 394 (1969) (Court of Appeals of N.Y.).

[2] (1969), 18 Eliz. II, c. 6, s. 4(1) (N.B.). One might consider generally, in relation to this problem: *C.P.R.* v. *Parent*, [1917] A.C. 195; *Kilberg* v. *N.E. Airlines Inc.*, 211 N.Y.S. 2d 133 (1961); *Reich* v. *Purcell*, 432 P. 2d 727 (1967) (Sup. Ct. Calif.); *Farber* v. *Smolack*, 282 N.Y.S. 2d 248 (1967) (Court of Appeals of N.Y.).

[2a] Consider in relation to this problem: *Brown* v. *Poland* (1952), 6 W.W.R. (N.S.) 368 (Alta. Sup. Ct.); *Anderson* v. *Eric Anderson Radio and T.V. Pty. Ltd.* (1964), 65 S.R. (N.S.W.) 279, aff'd (1965), 39 A.L.J.R. 357; *Koop* v. *Bebb* (1951), 84 Com. L.R. 629 (High Ct. Australia); Brownlie and Webb, *Contributory Negligence and the Rule in Phillips* v. *Eyre* (1962), 40 Can. Bar Rev. 76; North, *Contributory Negligence and the Conflict of Laws* (1967), 16 Int. L.Q. 379.

apply its own law allowing the claim. Normally, however, the lawyer is hampered in this by restrictions imposed first, on service out of the jurisdiction, and second, on the enforcement of default judgments in foreign jurisdictions in which the defendant may have exigible assets. In other cases, a plaintiff may be forced into suing in New Brunswick simply because it is too expensive or inconvenient to conduct litigation in another forum. In certain cases, these difficulties may be alleviated by such statutory provisions as Sections 243(1)(c) and 24 of the Insurance Act,[3] compelling insurance companies to appear on behalf of their insureds in litigation commenced outside the province; but even these provisions, binding on insurance companies, will be of no benefit to a plaintiff if (a) the defendant is not insured, or (b) if the injury occurs outside Canada or (c) presumably if the plaintiff is unable to get an order for service *ex juris* on the defendant from the court in which the action is commenced, assuming it is not the residence of the defendant. In brief, there are obstacles which cannot be overcome even by tactical litigation, and which can only be overcome through convincing a court to choose, as the applicable law, the law which counsel feels ought to be applied in favour of his client's claim.

What then are the limits within which one may argue choice of law in New Brunswick at the present time? Let me refer initially to the skeletal facts of a recent New Brunswick case, *Martin* v. *Marmen*.[4] Three persons, temporarily resident and working in Ontario, took an automobile trip to New Brunswick in an Ontario car. En route, they were involved in an accident in Quebec. Assuming that ordinary negligence could have been proved (it was not), the question was argued whether the New Brunswick court could take into account the conceded fact that under Quebec law liability would arise? Or would the court be precluded from

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[3] (1968), 17 Eliz. II, c. 6 (N.B.). S. 243(1)(c) provides: "Every motor vehicle liability policy issued in New Brunswick shall provide that, in the case of liability arising out of the ownership, use or operation of the automobile in any province or territory of Canada, the insured, by acceptance of the policy, constitutes and appoints the insurer his irrevocable attorney to appear and defend in any province or territory of Canada in which an action is brought against the insured arising out of the ownership, use or operation of the automobile." S. 24(3) provides: "A license to carry on automobile insurance in the Province is subject to the following conditions: (b) in any action in another province or territory of Canada against the licensed insurer, or its insured, arising out of an automobile accident in that province or territory, the insurer shall appear . . . ."

[4] (1969), 6 D.L.R. (3d) 77 (N.B.C.A.).

awarding damages because of the gratuitous passenger provision in our Motor Vehicle Act? An argument was made by counsel for the plaintiff that the law of Quebec should be applied in determining liability arising out of a Quebec accident. In the course of judgment, Bridges C.J.N.B., speaking for the Court of Appeal said:

> The accident took place in the Province of Quebec and it was agreed by counsel at the trial that under the laws of that Province it was not necessary for a gratuitous passenger to establish gross negligence in order to recover from the driver. It was submitted that Quebec law should apply and that the plaintiffs, even if only gratuitous passengers, were entitled to recover if they could establish ordinary negligence on the part of the defendant . . . . It has been clearly laid down that an action will not lie in one province for a wrong committed in another unless two conditions are fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in the Province of the forum and, secondly, it must not have been justifiable under the law of the Province where it was done.[5]

In a sense, Bridges C.J. was quite correct when he said that the rule governing liability for a foreign tort has been clearly laid down. The traditional approach to solving problems of a multi-jurisdictional nature has been to invoke a definitive rule formulated to simplify the solution of cases and to provide for the lawyer an element of predictability. Nevertheless, the rule referred to, commonly known as the rule in *Phillips* v. *Eyre*,[6] has for years been viewed with a certain amount of question. What, for example, is the precise meaning of such words as "actionable", "justifiable", "act", and "wrong", all used in the formulation of the rule? Is the rule calculated to provide the court with a basis for choosing which law is to be applied in determining the question of liability, or does the rule simply establish a jurisdictional threshold, a prerequisite to a court's adjudicating upon a tort committed in another jurisdiction?[7] Is the rule partly a jurisdictional rule and partly a choice of law rule, in the sense that the requirement that the wrong be actionable in the forum is calculated to provide the court with jurisdiction, and the condition that the act must not have been justifiable under the law of the place where it was committed is calculated to lead the court to apply the law of the place where the tort was committed in the actual determination of the substantive

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[5] *Ibid.*, at p. 80.

[6] (1870), L.R. 6 Q.B. 1 (Exch. Ch.).

[7] See Spence, *Conflict of Laws in Automobile Negligence Cases* (1949), 27 Can. Bar Rev. 661.

issues affecting liability?[8] Or does the rule require "double actionability", in the sense that the act must give rise to a cause of action both in the forum and in the place where the tort occurred, before the forum may give relief?[9] Or is the forum entitled to give relief in respect of any foreign tort which it recognizes as being actionable, as long as the act is not justifiable, meaning not legally innocent, under the law of the place where the act was committed? Each of these interpretations of the rule has received some support. However, it is the last interpretation which seems to have received the strongest judicial support. The English Court of Appeal, in *Machado* v. *Fontes*[10] imposed liability for a libel which had taken place in Brazil, even though the statement did not give rise to civil liability under the law of Brazil. The fact that it might give rise to criminal liability in Brazil was held sufficient by the Court to satisfy the requirement of non-justifiability. This proposition was carried to an extreme in Canada in the case of *McLean* v. *Pettigrew*.[11] There the Supreme Court of Canada was prepared to attribute non-justifiability to a non-actionable act taking place in Ontario, not on the basis that the act had given rise to conviction under the Ontario highway legislation (because in fact the defendant had been acquitted of responsibility under the statute) but because, in the opinion of the Court, the act did amount to a breach of that legislation, the acquittal notwithstanding.[12]

It would appear then that in applying the traditional approach to the hypothetical claims outlined at the outset, one should take into account the following considerations:

(1) Whether the facts, as outlined, give rise to liability under the law of New Brunswick, on the assumption that the facts surrounding the injury all occurred in New Brunswick;

(2) Whether the law of the place where the conduct occurred provides a defence to a claim of civil liability, and also, what the implications of the conduct are in terms of condemnation by the state through criminal or quasi-criminal legislation.

Dissatisfaction with this approach lies, first, in the idea that, if strictly applied, it may lead irresistibly to solutions which are un-

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8 See Yntema (1949), 27 Can. Bar Rev. 116; also *Boys* v. *Chaplin*, [1968] 1 All E.R. 283, *per Diplock* L.J.

9 This appears to be, as will be discussed herein, the ultimate holding of the House of Lords in *Chaplin* v. *Boys*, [1969] 3 W.L.R. 322.

10 [1897] 2 Q.B. 231.

11 [1945] S.C.R. 62.

12 But see *Lieff* v. *Palmer* (1937), 63 Que. K.B. 278, which earlier had refused to adopt similar reasoning.

just as between the parties, and which are irrational inasmuch as they may be inconsistent with the policies behind the particular domestic rules sought to be applied. How can one apply a rule to solve a case without having some regard for the content of the rule one is seeking to apply? Interestingly enough, however, it has been suggested in an article by Moffatt Hancock in the Canadian Bar Review[13] that the *results* reached by courts in the leading Canadian cases have in fact been defensible from both standpoints of common sense and policy.[14] The reason would seem to be that courts have felt compelled to strain the rule to the limit in order to satisfy policy demands imposed by the particular problems before them. A good example is the pressure placed upon the ***Phillips*** v. *Eyre* rule by the Supreme Court in *McLean* v. *Pettigrew,*[15] to permit Quebec law to determine the question of liability between Quebec residents facing the obstacle that Ontario law, the *lex loci* of the accident, took away the right of a gratuitous passenger to recouver.[16] Herein lie the second basis for dissatisfaction; where courts have strained the rule, their reasoning has seemed artificial and has failed to address itself to the realities of the problems before them. It seems reasonable that if the suspicion is correct that courts do in fact take policy considerations into account, they ought to abandon their clandestine approach in favour of one which

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13 (1968), 46 Can. Bar Rev. 226.

14 *Ibid.,* at pp. 239-44.

15 [1945] S.C.R. 62.

16 *Ibid.*, at p. 77, where Taschereau J. said (translation): "If the act with which McLean is charged does not give rise to a civil action in Ontario, and if it is not 'punishable', in the Province, even if it is 'wrongful' in Quebec, then the respondent cannot succeed.

"I have already said that if the quasi-delict had been committed in the Province of Quebec, the respondent could have claimed by virtue of art. 1053 C.C. but it is certain that it has not been shown that civil recourse exists in Ontario against the gratuitous driver for the benefit of a passenger who suffers bodily injuries as the result of an accident. On the contrary the Ontario law denies such action and there is no ambiguity in the wording of the Act.

"Hence, no civil recourse exists in Ontario, but is the act 'punishable', and can it be said that the appellant violated some provision of the Criminal Code or of the Ontario Highway Traffic Act?

"The conduct of the appellant certainly cannot be characterized as criminal, and I am not convinced that his carelessness or his incompetence reveal the elements necessary to qualify his action as a crime. *American Automobile Ins. Co.* v. *Dickson,* [1943] 2 D.L.R. 15, at p. 21; S.C.R. 143, at p. 150. But, it is otherwise, I believe, in regard to the charge that he violated a provincial statute, which would make his act punishable in Ontario, and as a result 'not justifiable'."

openly discusses those considerations; only in this way can we assess and criticize what courts are doing and thereby develop the role policy analysis is to play in the solution of these problems.

A problem with the traditional rule is that it reflects a narrow territorial concept of law which has led courts to espouse two rather presumptuous notions: (1) that the state in which the injury occurred *necessarily* has a legal concern in the question of liability arising out of the injury, and (2) that a forum can never give recognition to a foreign "right" which is not recognized as a right by the forum. Yet surely it is difficult, if not impossible, to identify an "interested" or "concerned" jurisdiction solely by reference to such factors as where the conduct has taken place, where the litigation is taking place, or the legal category within which a particular claim may conveniently be classified. Surely conflict of laws is better looked at as a subject concerned with the determination of the proper scope of application of the *particular* laws of various legal systems, to examine whether particular laws can legitimately claim to be applied to specific legal problems, on the assumption that such a claim may be made by more than one state in a given situation. In short, we must be wary of general rules, for general rules may not satisfy the demands that are placed upon a system of conflicts in a free-flowing society. General rules that point to the application of the domestic laws of a legal system, without first examining those laws, can hardly serve to identify jurisdictions that are truly concerned with the outcome. It is becoming apparent, especially with respect to motor vehicle litigation, that the place of injury may have no legitimate interest in the outcome. Why, then, should we bind ourselves to a rule which inevitably gives blind recognition to the law of that jurisdiction?

For a number of years now there has been an increasing awareness by many persons interested in the study of conflict of laws of a need for a restructuring of the subject.[17] As has been the case in many areas of the law, the impetus has come from the United States. In 1963, what many people consider to be a breakthrough occurred in the New York Court of Appeals in the case of *Babcock* v. *Jackson*.[18] The Jacksons, residents of New York, went to Ontario on a weekend trip taking Miss Babcock, also a New York resident, as a guest. While driving on an Ontario highway, Jackson lost control of the car and ran into a stone

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[17] An interesting approach is taken, for example, in Von Mehren and Trautman, The Law of Multistate Problems (Boston, Toronto, 1965).

[18] 240 N.Y.S. 2d 743 (1963). See also Symposium on case in 63 Colum. L. Rev. 1212 (1963).

wall seriously injuring Babcock. Babcock sued Jackson in a New York court. The issue turned on whether Babcock would be denied relief by virtue of the operation of the Ontario gratuitous passenger provision. This would have been the result if the Court had decided to apply the traditional American rule, leaving it to the law of the place where a tort is committed to determine the liability arising out of the injury. This rule differs from our rule in that the forum does not require proof of actionability under its law as a condition precedent to recovery. In addition, the *lex loci delicti* rule requires that the plaintiff establish civil actionability under the law of the place where the injury has taken place. It is relevant to note, however, that even if the *Phillips* v. *Eyre* rule had been applicable, the Court in *Babcock* would have faced the same dilemma; in either case, the defendant would have been entitled to raise, as a bar to his liability, the fact that the Ontario gratuitous passenger provision relieved him of legal liability. In the face of this, Fuld J. put the question in this way:

> Shall the law of the place of the tort *invariably* govern the availability of relief for the tort or shall the applicable choice of law rule also reflect a consideration of other factors which are relevant to the purposes served by the enforcement or denial of the remedy?[19]

In responding to this question he made extensive reference to the increasing criticism of the traditional rule and noted a judicial trend towards its modification. It is not insignificant that Fuld J., himself, had earlier espoused some of the same considerations in establishing choice of law patterns to be employed in the solution of contracts problems.[20] To use his own words:

> Justice, fairness and "the best practical result" may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation. The merit of such a rule is that "it gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of a particular factual context" and thereby allows the forum to apply "the policy of the jurisdiction most intimately concerned with the outcome of the particular litigation' ".[21]

The factors emphasized were the essential characteristics of the tort, and the relevant purposes of the rules vying for application. Looking at the problem from this standpoint, he felt that Ontario's interest in having its gratuitous passenger provision apply

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19 *Ibid.*, at p. 746.

20 *Auten* v. *Auten*, 124 N.E. 2d 99 (1954).

21 *Babcock* v. *Jackson*, *supra* fn. 18, at p. 749.

to this situation was at best minimal. He took into consideration the object of the Ontario provision which, he concluded, was to prevent collusion between passengers and drivers in the defrauding of insurance companies.[22] If this were the true purpose of the Ontario provision, one might reasonably conclude that the Ontario legislature, in enacting it, was interested in protecting Ontario insurers and not New York insurers, so that there would be no point in construing it to prevent either an Ontario or a New York resident from proceeding against a New York insurance company. Here he emphasized that the automobile was insured in New York. In addition, Ontario could hardly be concerned in imposing limitations on the right of one New York resident to seek compensation from another New York resident if it was interested in no other regard in the determination of legal liability arising out of this accident.

The decision illustrates that by analyzing foreign tort problems in this way, certain alleged conflicts cases can be dismissed as *false conflicts* cases. In *Babcock* the court felt there was never really any conflict between the Ontario law and the New York law. A conflicts issue only arises in a case where the court can detect an interest in the application of the laws of more than one

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[22] This, of course, focusses on one of the defects of interest analysis. Fuld J. based this assumption on a note in 1 U.Tor. L.J. 358 (1936), without attempting to analyse the legislative provision in the context of the overall statutory or general tort liability obtaining in Ontario. In commenting on this, Maurice Rosenberg facetiously remarked in 67 Colum. L. Rev. 459 (1967): "Why did our civilized neighbours in Ontario fashion this barbaric law? We are told it was done from a misguided purpose to protect insurance companies from the frauds of insured motorists — who otherwise presumably would have had great sport hurtling their cars off high cliffs so their passenger friends might collect easy money as personal injury damages. This intelligence is derived, not from reading what the statute says or its legislative history records, but from a piece in the University of Toronto Law Journal, entitled 'Survey of Canadian Legislation'." There are, however, certain limitations on the extent of the judicial inquiry. One important one is the rule in Canadian jurisdictions that the legislative history of an Act cannot be used as a judicial aid to its interpretation. This has not precluded judges from interpreting statutes in other contexts, however, and one would be unduly pessimistic if he considered that this limitation was fatal to interest analysis in conflict of laws. Another interesting story is related by Allen Linden in a note in (1962), 40 Can. Bar Rev. 284, at p. 286, fn. 11: "A prominent Toronto negligence lawyer tells a story about Mitchell Hepburn who had just been elected Premier of Ontario when the subsection was passed. It is said that he had vowed to pass such a statute if he ever became Premier because he had once been sued by two hitchhikers who were injured while gratuitous passengers in his automobile."

concerned jurisdiction, in which case the court must choose which of these two laws has the better claim for application to the particular problem. Consider, for example, this variation on the actual facts of *Babcock*:[23] Suppose the gratuitous passenger provision were found in New York legislation rather than in Ontario legislation. One might conclude from the failure of the Ontario legislature to enact such a provision that it felt there was some point in permitting gratuitous passengers the benefit of normal tort remedies. One might argue at least two reasons for this: (1) the imposition of liability would have the effect of inducing more careful driving habits on the part of drivers carrying passengers in their automobiles and hence improve safety on Ontario highways; (2) it would permit injured parties to recover damages for their injuries and thereby to indemnify persons within the province of Ontario to whom the injured party may be indebted, for example, doctors, hospitals, and the Government itself in the presence of a compulsory health plan.[24] This leads to the difficult and important question which *Babcock* v. *Jackson* leaves open: How does one evaluate competing interests in a true conflicts case? Should the forum invariably apply its own law in any situation where it can detect an interest in its application, notwithstanding that that interest may be significantly out-weighed by a competing interest of a foreign jurisdiction?[25] There is much to be said for this from the stand-

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[23] This variation was put forth by Willis Reese in a symposium on *Babcock* appearing in (1963), 63 Colum. L.Rev. 1212, at p. 1256.

[24] Another interesting variation on *Babcock* v. *Jackson* arose in *Kell* v. *Henderson*, 270 N.Y.S. 2d 552 (1966), where an Ontario motorist was injured in New York while a gratuitous passenger in an Ontario automobile. The Court applied New York law, refusing permission to the defendants to plead the Ontario statute. Because its facts were directly reverse from Babcock, one might have expected the Court to apply Ontario law as the most interested jurisdiction. Donald Trautman suggests that this might be a valid point had the Ontario legislation evinced a clear policy in favour of protecting Ontario insurers. However he felt this was not the case and that the original policies underlying the provisions had lost their vitality in Ontario, basing his conclusions on certain pieces of evidence discussed in his note. Accordingly, New York had validly asserted its interest in awarding compensation to persons injured on its highways: 67 Colum. L.Rev. 465 (1967).

[25] This view has its most popular expression in an article by B. Currie in (1959), 8 Duke L. J. 171, at pp. 177-8 where he states: "If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and *a fortiori*, it should apply the law of the forum if the foreign state has no such interest."

points of convenience and familiarity; yet it seriously distorts the role suggested for conflict of laws earlier, to analytically delimit the application of legal rules, be they laws of the forum, or laws of a foreign jurisdiction. The indiscriminate application of the law of the forum not only distorts the process, but may, in the long run, prove detrimental to the interests of the forum by dissuading courts in other jurisdictions from giving proper deference to its laws in circumstances where its laws should on analysis apply. In other words, a forum-biased approach retards the operation of one of the fundamental forces in the conflict of laws, comity. On the other hand, if one concedes that the forum ought not automatically to apply its own law wherever it has an interest, what criteria are available to weigh competing interests? Does the process become so complicated as to defy application in a judicial process? These are questions upon which much has been written; however, no attempt will be made here to summarize the development of American case law and its attendant academic criticism. Nor is it suggested that *Babcock* v. *Jackson* is in any sense of the word "the law" in the United States. It has been discussed primarily because it marks the fruition of the interest analysis in judicial terms, and because it continues to attract much attention as a rallying point for the proponents of the new analysis.[26]

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[26] Mention should also be made of the recent case of *Tooker* v. *Lopez*, 249 N.E. 2d 394 (1969), where the Court of Appeals of New York reviewed its original role in *Babcock* and summarized the development of the case law in that court over the years following *Babcock*. A New York domiciliary attending university in Michigan was killed in an automobile accident in that state. The automobile belonged to her father and was registered and insured in New York. The Michigan law permitted recovery in respect of the wrongful death of guest passengers only where the wilful misconduct or gross negligence of the driver could be shown. In one of the judgments upholding the application of New York law Keating J. said at pp. 398-9: "New York's 'grave concern' in affording recovery for the injuries suffered by Catharina Tooker, a New York domiciliary, and the loss suffered by her family as a result of her wrongful death, is evident merely in stating the policy which our law reflects. On the other hand, Michigan has no interest in whether a New York plaintiff is denied recovery against a New York defendant where the car is insured here. The fact that the deceased guest and driver were in Michigan for an extended period of time is plainly irrelevant." And Fuld J., who had decided *Babcock*, reviewed the development of the law thus at p. 403: "*Babcock* and the decisions it heralded place in our hands an instrument not confined to the rare and unusual situation. Rather, they comprise a sound foundation for a set of basic principles which the practicing lawyer, as well as the conflicts scholar, may be able to wield with good results. They have helped us

It remains to consider the significance of all this to a lawyer in New Brunswick at the advent of the 1970s. Does one summarily dismiss these ideas as being more of that American innovation unsuited to Canadian needs? This might very well have been the attitude even a year ago, and a law teacher might never have been so presumptuous as to address a group of practicing lawyers on interest analysis in conflict of laws were it not for two factors:

(1) The continuing activity of the Special Committee of the Conference of Commissioners on Uniformity of Legislation in Canada, who have adopted a model Foreign Torts Act[27] to replace the rule in *Phillips* v. *Eyre*. This would allow for the application of the law of the state having the most substan-

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uncover the underlying values and policies which are operative in this area of the law. Now that these values and policies have been revealed, we may proceed to the next stage in the evolution of the law — the formulation of a few rules of general applicability, promising a fair level of predictability. Although no rule may be found or framed to guarantee a satisfying result in every case, we cannot hope to deal justly with the legion of multi-state highway accident cases by regarding each case as one of a kind and unique." He then offered three guidelines "proffered as a beginning, not as an end, to the problems of sound and fair adjudication in the troubled world of the automobile guest statute".

[27] 1966 Proceedings of Conference of Commissioners on Uniformity of Legislation in Canada, p. 62. The text of the model statute is as follows:

1. When deciding the rights and liabilities of the parties to an action in tort the court shall apply the local law of the state which has the most substantial connection with the occurrence and with the parties regardless of whether or not the wrong is of such a character that it would have been actionable if committed in this Province.

2. When determining whether a particular state has a substantial connection with the occurrence and the parties the court shall consider the following important contacts:

(a) the place where the injury occurred;
(b) the place where the conduct occurred;
(c) the domicile and place of business of the parties; and
(d) the place where the relationship, if any, between the parties is centered.

3. When deciding which state, among the states having any contacts within section 2, has the most substantial connection with the occurrence and the parties, the court shall consider chiefly the purpose and policy of each of the rules of local law that is proposed to be applied.

tial connection with the occurrence and with the parties, taking into account various contacts, including the place of injury, the place of conduct, the domicile and place of business of the parties. In determining the state with the most substantial connection the court is to consider the purpose and policy of each of the rules proposed for application.[28]

(2) The fact that in a recent case before the House of Lords, *Chaplin* v. *Boys,*[29] two Lords[30], gave, at least in theory, a limited role to the technique of policy analysis.

It is proposed to discuss only this second factor. *Chaplin* v. *Boys* is important inasmuch as it represents, in many respects, an English counterpart to *Babcock* v. *Jackson,* which, as might be expected, was cited to the House in argument. It raised the question of the true effect of and scope of application of the traditional rule and afforded an opportunity for the adoption of a new approach to contemporary tort problems. In many ways the decision is a disappointment; the fact that the state of the law after the decision is hardly more satisfactory than before would seem a major disappointment. Nevertheless, it is optimistically suggested that a limited avenue may have opened for lawyers seeking to attach significant judicial authority to innovative arguments in favour of the application of a law not patently applicable under a strict *Phillips* v. *Eyre* formula. The House of Lords is of considerable persuasive authority still in the courts of this province, and one might reasonably anticipate that arguments endorsed by individual members of the House will be carefully scrutinized before being rejected by our Court of Appeal.

Having posed this justification, it remains to say something about the case itself. The plaintiff and defendant were both British subjects, domiciled and resident in England, but serving with the British forces in Malta. The plaintiff was injured in a highway accident due to the established negligence of the defendant.

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28 The model statute is commented upon favourably in Hancock, *Canadian - American Torts in the Conflict of Laws: The Revival of Policy-Determined Construction Analysis* (1968), 46 Can. Bar Rev. 226, at pp. 244-51; see also article by Horace E. Read, chairman of the Special Committee of the Conference, in 1 Can. Leg. Studies 277 (1968); note also, reaction to the draft in 1967 Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada at pp. 153 ff. For an opposed reaction see J. A. Clarence Smith, *The Foreign Torts Act: Look Before You Leap* (1970), 20 U. Tor. L.J. 81.

29 [1969] 2 All E.R. 1085.

30 Lords Wilberforce and Hodson.

In bringing his action in England, the plaintiff alleged pain and suffering as one of his heads of damage, which, in fact, constituted the substantial portion of his claim. The trial judge awarded general damages for pain and suffering notwithstanding the important consideration that under Maltese law there could be no recovery for this aspect of the injury. It is understandable, therefore, that the defendant, seeking to limit his liability, argued that Maltese law rendered this aspect of the tort "justifiable". This raised squarely the question as to the meaning of the rule in *Phillips* v. *Eyre.* It also raised the interesting question whether, given the proper interpretation of *Phillips* v. *Eyre,* the rule must invariably be applied to determine liability for a foreign tort.

A brief review of the speeches in the House would seem to be warranted. Lord Guest[31] indicated clearly that he did not wish to be drawn into a broad discussion of the American trends and stated that he was deciding the issue on a "very narrow ground". He defined the *Phillips* v. *Eyre* rule in terms of double actionability: in order for an action to be brought in England upon a tort committed abroad the conduct must be actionable (1) by English law and (2) by the law of the country in which the conduct occurred.[32] Implicit in this is a rejection of *Machado* v. *Fontes* to the extent that it suggests that one need only establish a lack of "innocence" in terms of a contravention of some statutory provision. Applying this test to the situation before him, Lord Guest was saying that in order for the plaintiff to recover he had to establish a right of action in terms of English law, which was no problem, but also in terms of Maltese law, which was a problem in view of the Maltese provision that pain and suffering is not permitted as a head of damage. He solved this problem by resorting to traditional analysis in terms of "substantive-procedural" classification.[33] His feeling was that the Maltese provision could not be characterized as a *substantive* rule, relating to the nature of the tort claim itself, but rather as a *procedural* rule, an element in the quantification of compensation. Given the fact of the actual tortious invasion, the "dollars and cents" aspect of the injury was simply a procedural matter to be determined by the forum. Therefore, the English court was perfectly capable of evaluating the damages to be awarded in respect of the foreign injury, even where those damages would be far in excess of what a court of the place where the injury occurred would award.

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31 [1969] 2 All E.R. 1085, at pp. 1094 *ff.*

32 *Ibid.*, at p. 1095.

33 *Ibid.*

Lord Hodson,[34] after looking at some of the early cases preceding and following the actual decision in *Phillips* v. *Eyre,* also expressed the opinion that the rule in *Phillips* v. *Eyre,* properly interpreted, sets out a test for double actionability. He concluded that the decision in *Machado* v. *Fontes* was wrong and should be overruled.[35] But he differed from Lord Guest in his analysis of the Maltese law. He was persuaded that the question whether loss of earning capacity and pain and suffering are admissible heads of damage, is a question of substantive law.[36] In so far as this is a substantive question and affects actionability, the law of Malta must be applied in favour of the defendant. This reasoning left him in a position where, upon analyzing the issues in the light of what he felt was the proper interpretation of the rule in *Phillips* v. *Eyre,* he would be forced to deny relief to the plaintiff. Obviously his preference was against this, so he was compelled to consider whether the general rule must *invariably* govern the extent of legal liability arising out of a foreign tort. In doing so, he placed considerable emphasis on the precise words used by Willes J. in *Phillips* v. *Eyre,* that the rule was "a general rule", and concluded that these words should be interpreted to give a court leeway where it would be against public policy to admit or to exclude a particular claim.[37] He emphasized that the parties were British nationals, resident in England, and only temporarily in Malta on service at the time of the injury, and felt that these factors were more significant than the mere fact that the accident had taken place in Malta. Resting his disposition of the case on the American Law Institute Restatement (Second) of Conflict of Laws,[38] he went on to make the following statements:

> If controlling effect is given to the law of the jurisdiction which because of its relationship with the occurrence and the parties has the greater concern with the specific issue raised in the litigation, the ends of justice are likely to be achieved although, as the American authorities show, there is a difficult task presented for decision of the courts, and uncertainty has lead to dissenting judgments in the appellate courts.
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> It is to be expected that a court will favour its own policies over those of other States and be inclined to give its own rules a wider application than it will give to those of other states . . . . This tendency is convenient. To insist on the choice of the law of the place where the wrong was committed has an attraction and leads

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34 *Ibid.,* at pp. 1088 *ff.*

35 *Ibid.,* at p. 1091.

36 *Ibid.,* at p. 1093.

37 *Ibid.,* at p. 1092.

38 Proposed official draft, May 1, 1968, s. 145.

to certainty but in modern conditions of speedy and frequent travel between countries a place of the wrong may be and often is determined by accidental circumstances, as in this case where the parties were but temporarily carrying out their service in Malta.[39]

Lord Wilberforce, delivering what would seem to be the strongest speech of the House,[40] phrased his interpretation of the rule in *Phillips* v. *Eyre* a little differently. He accepted the orthodox view that the first branch of the rule lays down not a jurisdictional test but a choice of law rule, and concluded that the substantive law to be applied was the *lex fori.* However, as a condition to obtaining relief the plaintiff must also establish non-justifiability under the law of the place where the tort occurred. He suggested that, in applying its own substantive law, the forum must be prepared to give a greater role to the *lex loci delicti* than most courts have heretofore given. Courts must take into account the fact that under the *lex loci delicti,* a certain injury may not give rise to legal relief. He said:

> I would, therefore, restate the basic rule of English law with regard to foreign torts as requiring actionability as a tort according to English law, subject to the condition that civil liability in respect of the relevant claim exists as between the actual parties under the law of the foreign country where the act was done.[41]

In deciding this, it was necessary to reject *Machado* v. *Fontes,* and he, like Lord Hodson, specifically agreed with the Court of Appeal that *Machado* v. *Fontes* ought to be overruled.[42] In doing so, Lord Wilberforce found himself in the same position as Lord Hodson. Taking the view that the Maltese law provided a substantive barrier to relief under the general rule, he was forced to conclude that the rule in *Phillips* v. *Eyre* provided sufficient flexibility to permit a court to deviate from the rule to take into account the varying interests and considerations of policy which may arise when one or more foreign elements are present. He said:

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

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[39] *Chaplin* v. *Boys, supra* fn. 29, at p. 1094.

[40] *Ibid.,* at pp. 1097 *ff.*

[41] *Ibid.,* at p. 1102.

[42] *Ibid.,* at p. 1101.

> the rule was devised to meet. This technique appears well adapted to meet cases where the lex delicti either limits or excludes damages for personal injury; it appears even necessary and inevitable. No purely mechanical rule can properly do justice to the great variety of cases where persons come together in a foreign jurisdiction for different purposes with different pre-existing relationships, from the background of different legal systems. It will not be invoked in every case or even, probably, in many cases. The general rule must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from what other rule, should be preferred.[43]

What is regrettable is that, following such a clear exposition of analytical technique, Lord Wilberforce failed to analyse the Maltese and English laws from a policy standpoint, and, accordingly, failed to indicate which factors were dominant in rejecting the application of the Maltese rule. He merely emphasized the same general factors previously emphasized by Lord Hodson, that neither party was a Maltese resident or citizen, and that Malta really had no interest in applying its restrictive rule to outsiders. What would have been preferable would be his informing us why these factors should be important in the light of the policy underlying the two different legal positions.

Of the two remaining speeches, only that of Lord Pearson[44] merits comment. He emphatically and articulately rejected the double actionability requirement, supported the interpretation placed on the rule in *Phillips* v. *Eyre* by the Court of Appeal in *Machado* v. *Fontes,* and gave a plausible explanation of why the thrust of that decision ought to be preserved. He suggested that by imposing a requirement of double actionability, an unfair burden is placed upon the plaintiff, in that he has the "worst of both laws". He also suggested that in some cases it would prevent the English court from giving judgment in accordance with its own ideas of justice. This difficulty, of course, would be alleviated by the flexible interpretation of the general rule illustrated by Lords Hodson and Wilberforce. Lord Pearson indicated, however, that the policy approach was the less desirable of the alternatives; he preferred the more forum-oriented approach exhibited in *Machado* v. *Fontes.*

The question remains, what conclusions can be drawn from the decision? All five of the Lords were prepared to uphold the award of relief to the plaintiff for pain and suffering, yet clearly there were differing reasons for doing so. What are the implications for Canadian lawyers? Consideration ought to be given to the following observations:

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43 *Ibid.*, at p. 1104.

44 *Ibid.*, at pp. 1105 *ff.*

(1) Three of the five Lords adopted an interpretation of the rule in *Phillips* v. *Eyre* which was incompatible with the interpretation previously placed upon the rule by the Court of Appeal in *Machado* v. *Fontes.* It would, therefore, appear that this latter decision has been effectively overruled insofar as the law of England is concerned even though the three Lords could have achieved the same disposition of the case without varying the earlier interpretation of the rule.

(2) If *Machado* v. *Fontes* is no longer a viable authority in England, Canadian courts presumably will have to look long and hard at the reasoning of the Supreme Court of Canada in *McLean* v. *Pettigrew.* Lawyers might anticipate a change in the Canadian position as to the meaning of the second branch of the rule.

(3) It is doubtful that a court will adopt a change in the interpretation of the rule in *Phillips* v. *Eyre* without providing itself with an escape valve in support of the *lex fori,* enabling the forum to apply its own law, reflecting its own notions of fairness, justice and policy. It would seem that if Canadian courts are to interpret the *Phillips* v. *Eyre* rule as requiring double actionability, they may well adopt it only as a "general rule", in which case they may be receptive to arguments based on policy analysis, in proper cases. Notwithstanding the fact that only two of the five Lords in *Chaplin* v. *Boys* were prepared to talk about interest analysis, this may well be the direction in which the law is moving. It is suggested that far more significance should be placed on the fact that two of the Law Lords spoke in terms of interest analysis, than on the fact that three of the Lords rather perfunctorily rejected the application of something which they referred to as "the proper law of the tort", without giving any indication that they were even interested in considering the objectives and techniques of interest analysis.[45]

(4) As a word of caution, it is important to emphasize that Lords Hodson and Wilberforce, in delimiting the application of *Phillips* v. *Eyre,* were motivated by a desire to exclude the operation of the rule so as to be in a position to apply the law of the forum. Strictly speaking, their speeches only go so far as to permit

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[45] It is noteworthy that both Lords Guest and Donovan rejected the application of the "proper law of the tort" in the U.K. for the same reason that Upjohn and Diplock L.JJ. had rejected the concept in the Court of Appeal, the reason being primarily the constitutional differences between the U.K. and the U.S. The implication is that while the concept may not be good for the U.K., it may be good for the U.S. What views might their Lordships have entertained about Canada?

a court to use its own law to determine foreign tort liability where policy and justice demand that the court ignore a foreign rule in favour of its own "better" rule. The question remains whether a court could be persuaded, by the reasoning of the two Lords, to ignore its own law where it feels the *foreign* law has a better claim to application. Could a court be persuaded to grant relief under foreign law notwithstanding that the injury is not actionable under its own law?[46] It seems clear that the speeches referred to, even under their most generous interpretation, do not go that far.

(5) As a further word of caution, it is important to emphasize that these speeches in *Chaplin* v. *Boys,* like the rule in *Phillips* v. *Eyre* itself, imply the prerequisite that the injury complained of be a foreign tort, in the sense that the injury occurs in a jurisdiction other than the jurisdiction in which the action is brought. These questions then arise: Is policy analysis at all relevant in litigation arising out of an accident occurring within the jurisdiction in which the action is brought? Would Lords Hodson and Wilberforce in *Chaplin* v. *Boys* have uttered the same language had the litigation involved two Maltese residents injured in a car accident in London? Would they, in such a case, have given any consideration to the multi-jurisdictional aspects of the case? One can only conclude that they would not: Under traditional analysis, such a situation would not have been regarded as raising a conflicts issue at all. It seems that the development of the law has blinded us to the possible relevance of extra-jurisdictional factors other than the conduct or injury itself.

One is forced to the conclusion that even in the face of the encouraging language of Lords Hodson and Wilberforce, the retention of *Phillips* v. *Eyre* as a "general rule" imposes serious limitations on the extent to which lawyers may base arguments on policy considerations. Clearly the way is not yet open for lawyers to argue in the terms advanced by some of the American writers. Nor does the way seem open to argue in terms of the model statute of the Uniformity Commissioners. Nevertheless, there would seem to be some scope for the lawyer to embark upon policy analysis in terms of the traditional rule in *Phillips* v. *Eyre*. Even if, to use Lord Wilberforce's words, the general rule should only be departed from where there are "clear and satisfying grounds"

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[46] This would seem to offend the leading case of *The Halley* (1868), L.R. 2 P.C. 193; but see Hancock, *Tort Problems in Conflict of Laws Resolved by Statutory Construction*: *The Halley and Other Older Cases Revisited* (1968), 18 U. Tor. L.J. 331, where the inconsistency of *The Halley dictum* with earlier cases is stressed.

for doing so, it is important to emphasize that these grounds normally exist wherever there are strong policy reasons for deviating from the rule.

What considerations might be borne in mind then in arguing for a deviation from the general rule? It would seem possible to argue as a general proposition that a court ought not to bar a claim in respect of a foreign tort under either branch of the *Phillips* v. *Eyre* rule unless the law which the rule requires the court to apply can support some substantial interest in being applied to the case at hand. This would establish a minimum requirement for the application of the general rule. In determining whether a substantial interest exists, a test would be to question what the impact, in socio-economic terms, would be of a failure to apply a particular rule. Would a failure to apply a rule constitute a setback to the state in terms of the policy it wishes to effectuate through the medium of its legal institutions? Testing this in relation to the first of the hypothetical cases given at the outset, involving the New Brunswick gratuitous passenger rule, or indeed with reference to the facts of *Martin* v. *Marmen*,[47] one must ask what the impact would be, in relation to the socio-economic forces lying behind the rule, of a failure to apply the New Brunswick rule in these cases? Should the court automatically reject the claim pursuant to the first branch of the rule in *Phillips* v. *Eyre*? Or should it only reject the claim under the rule where the right of action is taken away in New Brunswick by a statute or common law rule which has, in terms of its policy base, a substantial interest in being applied to the situation at hand? Is it appropriate to apply the New Brunswick gratuitous passenger rule in an action between Quebec residents? In *Martin* v. *Marmen,* where the automobile was insured outside New Brunswick, should a New Brunswick rule aimed at the protection of insurers be applied to deny a claim if the insurer is not a New Brunswick Company? Suppose it is an Ontario Company licensed to do business in New Brunswick; is our law aimed at the protection of such entities? Possibly one would say yes, in that the legislature may be presumed to have enacted the section for the protection of insurers doing business in New Brunswick regardless of the *locus* of the policy; and therefore there may exist a substantial interest in the application of the New Brunswick rule. But suppose the defendant was not insured in *Martin* v. *Marmen*? Or suppose in an analogous situation it is an American Company not licensed in New Brunswick which is affected. Should this not change the complexion of the issue? And

47 (1969), 6 D.L.R. (3d) 77 (N.B.C.A.).

in measuring the impact of a failure to apply the *lex fori*, is it not relevant to examine the current status of the rule, to determine whether it is supported by a contemporary policy base. It may very well be that the court ought not to bar a claim under either branch of the rule on the basis of an out-dated law, especially where good reasons exist to support the claim either under the *lex loci delicti* or the *lex fori* as the case may be. To take a representative case, the gratuitous passenger rule has come under criticism in this jurisdiction[48] as in others; it may very well be that in a proper case, lack of contemporary policy behind the rule may provide a good reason for a court's refusing to apply it.

Without pursuing the policy behind the rule (and it may very well be more complicated than I am suggesting)[49], let me simply make the point that a court might well consider these matters carefully before rejecting a claim on the basis of the first branch of the rule. If the court had determined in *Martin* v. *Marmen*, for example, that there was no reason to apply the first branch of the rule, it might very well have gone on to hold that the plaintiff had an action under the *lex loci delicti*, Quebec. One can easily rationalize the Quebec interest in terms of conduct on its highways; by imposing liability on host drivers to gratuitous passengers, the level of safety on its highways is theoretically raised.

A similar analysis ought to be made before denying relief under the second branch of the rule, the requirement of actionability under the *lex loci delicti*. Before conceding to a defendant the effectiveness of a defence of contributory negligence or of a defence under foreign fatal accidents legislation, one ought to consider very carefully, as did the New York court in *Babcock*, whether the thrust of these foreign statutory defences can possibly carry to the facts of the case at hand. For what object does the foreign defence exist? Would its rejection in the case at hand, in New Brunswick, have any social or economic impact in relation to the objectives of the foreign law? Is it a viable rule in the sense that it is supported by a contemporary policy? What legislative or judicial evidence is there of the intended extension of the foreign rule to the precise facts of the case before the court? It is, presumably, in this situation that the greatest possibility exists for persuading a court to depart from the general rule. For here

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48 The abolition of the rule was advocated in a general brief on law reform presented to the New Brunswick Cabinet by the Canadian Bar Association (N.B. Branch) in February 1970.

49 See fn. 22, *supra*.

the argument is in support of the forum adopting its own rule for the solution of an inter-jurisdictional problem. Here a court may appeal, not merely to familiarity with its own law, which, objectively, is not really a very strong reason for applying the *lex fori*, but may appeal to the comparative justice as between the parties. A court may be persuaded, as was Lord Denning in the Court of Appeal in *Boys* v. *Chaplin*,[50] that it is patently unfair that a foreign rule ought to stand as a bar to a claim for compensation by one New Brunswicker against another New Brunswicker unless an extremely cogent policy reason for applying the foreign defence can be established. And even where the court may be precluded from adopting such a chauvinistic approach in cases where the suit is by or against a foreign defendant, a court may very well be receptive to a well-structured argument that the *lex loci delicti* has no substantial interest in being applied to the problem at hand.

While it is suggested the approach just outlined may be arguable as a minimum prerequisite to the application of the general rule in *Phillips* v. *Eyre*, the question inevitably remains: In how many cases would it be applicable? Herein, of course, lies its limitation. While it may be an appropriate line of argument in classic cases such as those structured at the outset for purposes of illustration, many cases are more complicated. The slightest change of circumstances alters the complexity of the problem. Suppose one of the parties is from a foreign jurisdiction, one from the forum. This may impede the argument that either the forum or the place of injury is a completely disinterested jurisdiction. In short, the approach advanced would be applicable mainly to what have been termed "false conflicts" cases. But what of true conflicts cases, where both the *lex fori* and *lex loci* are interested jurisdictions? Can a court, within the confines of the general rule in *Phillips* v. *Eyre*, assess the relative strength or weight of the competing interests? Presumably one would have great difficulty in convincing a Canadian court of this on the basis of the existing authorities. It may well be that few would agree that any of the speeches in *Chaplin* v. *Boys* can be taken to support even the limited proposition outlined above, let alone a full-fledged undertaking in terms of interest analysis. It may well take legislation, at a minimum along the lines of the draft provisions of the Special Committee, to persuade a court to embark on such an undertaking; and it will undoubtedly take legislation to persuade a court of its authority to apply foreign law in relation to tortious conduct

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50 [1968] 1 All E.R. 283 (C.A.).

occurring within the territorial jurisdiction of the forum.[51] Nevertheless, the remoteness of prospects for a wholesale change in approach to these problems ought not to discourage lawyers from exploring even the limited potential within the structure of the existing rules for rational solutions to problems inappropriately handled by those rules.

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51 Except, of course, where the tort involves an issue which, by other conflicts rules, is to be solved by the application of a foreign rule. See the emphasis on this so-called third rule by J.A. Clarence Smith in (1970), 20 U. Tor. L.J. 81, at p. 82, where he states: "It is equally certain . . . that there is a third rule to the effect that some defences, which we may describe as being of a 'non-tort' nature, do not depend on the law either of the trying court or of the place of commission. In an action for conversion, for example, a defence founded on the defendant's own title to the property would not be decided either by the court's own law or by that of the place of alleged conversion."