PEOPLE AND PLACE AS NORMS
IN MULTISTATE TORT ADJUDICATION

by
DONALD SCOTT GRATAN
BA LLB (Hons), Macquarie University, 1988

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF
MASTER OF LAWS
in
THE FACULTY OF GRADUATE STUDIES
(LAW)

We accept this thesis as conforming
to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA
December 1996

© Donald Scott Grattan, 1996
In presenting this thesis in partial fulfilment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the head of my department or by his or her representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

Department of LAW

The University of British Columbia
Vancouver, Canada

Date 23 DECEMBER 1996
Abstract

An action in tort which is brought in one state ("forum"), but is based on events which occurred in another state ("locus state"), can be styled a "multistate tort". States have developed "choice of law" rules to deal with such disputes. These rules select a law or body of law from either the forum's own legal system, or the legal system of another state, which is used to adjudicate the dispute. A range of choice of law rules have been developed at various times by the courts in the United States, England, Canada and Australia in order to select the "dispositive" law in multistate tort disputes. Although there are profound differences in the content and operation of these rules, they universally make reference to either or both of two specific concepts. The first of these is the concept of "people", that is, the parties' membership of particular political communities constituted by states. The second is the concept of "place", that is, the location of the parties' acts within particular states.

The paper examines the function played by the concepts of people and place in shaping the significant common law developments in multistate tort choice of law which have taken place in England, Canada and Australia. In order to provide a theoretical context for this, the paper analyses the various choice of law methodologies which have been employed in the United States: multilateralism; unilateralism and the substantive law method. In order to "unpack" the significance of the concepts of people and place in these methodologies, the methodologies are subjected to classification in terms of various dichotomies; jurisdiction-selection/rule-selection; spatially-informed/substantively-informed function; and externally-generated/internally-generated norms. From this analysis it is concluded that the function performed by the concepts of people and place in the methodologies is either the role of effecting the interests of the states connected to multistate disputes, or ensuring the fair treatment of the parties to those disputes.
The paper then goes on to map the common law developments in the English, Canadian and Australian courts in respect of multistate tort choice of law from a common doctrinal starting point, dominated by the application of forum law, to disparate choice rules. It is noted that in the first period of reform, the concepts of people and place were each used in order to diminish the importance of the law of the forum qua forum. However, the most recent developments in Canada and Australia show a domination of the concept of place over that of people, evidenced by the inflexible application of the law of the locus state. This has been justified on the basis of giving effect to state interests.

It is concluded that the triumph of place over people cannot be persuasively explained in terms of state interests. If effecting state interests is the desired end of the choice of law process, then the concept of people must also be taken into account. It is argued that the inflexible application of locus law can more successfully be justified in terms of the fair treatment of the parties. However, in this respect too, the concept of people, as well as that of the "person" (an individual who deserves to be treated with substantive fairness), should not be forgotten.
# Table of Contents

Abstract .................................................................................................................. ii  
Acknowledgment ................................................................................................. vi  
Introduction ........................................................................................................ 1  
  Choice of Law in Tort in the United States ....................................................... 4  
  Choice of Law Methodologies and Dichotomies ........................................... 5  
    Jurisdiction-selection/Rule-selection ........................................................... 5  
    Spatially-informed/Substantively-informed function .................................... 7  
    Externally-generated/Internally-generated norms ......................................... 8  
Structure of the Paper ......................................................................................... 9  
Chapter 1 - Multilateralism ............................................................................. 10  
  Characteristics of Multilateralism ................................................................. 10  
  Multilateralist Philosophy ............................................................................ 15  
    Comity ......................................................................................................... 17  
    Brilmayer's Political Rights Model ............................................................. 26  
  People and Place in Multilateralism ............................................................... 31  
Chapter 2 - Unilateralism ............................................................................. 39  
  Characteristics of Unilateralism .................................................................. 39  
  Unilateralist Philosophy .............................................................................. 50  
    Advancement of forum interests .................................................................. 51  
    The nexus between community membership and state interests .............. 55  
    Do states have interests at all? ..................................................................... 62  
  People and Place in Unilateralism ................................................................ 65  
Chapter 3 - The Substantive Law Method .................................................. 67  
  Characteristics of the Substantive Law Method ........................................... 67  
  The Philosophy of the Substantive Law Method ............................................ 72  
  People and Place in the Substantive Law Method ........................................ 73  
Chapter 4 - People and Place in English Choice of Law in Tort ............. 75  
  Phillips v Eyre ................................................................................................. 76  
    Rationale for the Phillips v Eyre Rule ......................................................... 79  
      The First Limb of the Rule ....................................................................... 79  
      The Second Limb of the Rule ................................................................ 82  
    Characteristics of the Phillips v Eyre Rule ................................................. 85  
    Function of People and Place in the Phillips v Eyre Rule ......................... 89
<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chaplin v Boys</td>
<td>91</td>
</tr>
<tr>
<td>New Interpretation of the Second Limb</td>
<td>92</td>
</tr>
<tr>
<td>Exception to the Phillips v Eyre Rule</td>
<td>95</td>
</tr>
<tr>
<td>Red Sea Insurance Co Ltd v Bouygues SA</td>
<td>105</td>
</tr>
<tr>
<td>Red Sea: Methodology, People and Place</td>
<td>107</td>
</tr>
<tr>
<td>Red Sea and the Concept of Forum</td>
<td>110</td>
</tr>
<tr>
<td>Chapter 5 - People and Place in Canadian Choice of Law in Tort</td>
<td>114</td>
</tr>
<tr>
<td>The First Period - McLean v Pettigrew</td>
<td>114</td>
</tr>
<tr>
<td>The Second Period - Activism of The Ontario Court of Appeal</td>
<td>116</td>
</tr>
<tr>
<td>Grimes v Cloutier</td>
<td>117</td>
</tr>
<tr>
<td>Prefontaine v Frizzle</td>
<td>122</td>
</tr>
<tr>
<td>Aftermath</td>
<td>124</td>
</tr>
<tr>
<td>The Third Period - Tolofson v Jensen</td>
<td>128</td>
</tr>
<tr>
<td>The Decision</td>
<td>128</td>
</tr>
<tr>
<td>Choice of Law Methodology</td>
<td>131</td>
</tr>
<tr>
<td>People and Place</td>
<td>134</td>
</tr>
<tr>
<td>Chapter 6 - People and Place in Australian Choice of Law in Tort</td>
<td>137</td>
</tr>
<tr>
<td>The First Period - The Supremacy of Forum Law</td>
<td>137</td>
</tr>
<tr>
<td>The Second Period - The Appearance of People</td>
<td>142</td>
</tr>
<tr>
<td>The Third Period - Developments in the High Court</td>
<td>145</td>
</tr>
<tr>
<td>What the High Court Decided</td>
<td>145</td>
</tr>
<tr>
<td>People and Place in the High Court</td>
<td>147</td>
</tr>
<tr>
<td>The Majority View</td>
<td>148</td>
</tr>
<tr>
<td>Chief Justice Mason's View</td>
<td>156</td>
</tr>
<tr>
<td>The Views of Wilson, Deane and Gaudron JJ</td>
<td>164</td>
</tr>
<tr>
<td>Conclusion</td>
<td>176</td>
</tr>
<tr>
<td>Bibliography</td>
<td>183</td>
</tr>
</tbody>
</table>
Acknowledgment

To Louise,

in thanks for her support and her love.
A "multistate tort" can be said to arise when an action in tort is brought in one state\(^1\) (the "forum"), based on events which occurred in another state (the "locus state"\(^2\)). Multistate torts involve the problem of choice of law\(^3\), which has proven to be a difficult task for judges, and a difficult subject for academic commentators. *What* a court does when it engages in choice of law in tort, when expressed in broad, functional terms, is quite simple. The court selects a law or a body of law with which to adjudicate the action. *How* the court is to make the selection has been the source of much analysis, debate and, above all, disagreement. This disagreement has been profound. It has related to the content of the appropriate choice of law methodology for multistate torts rather than to the result yielded by the application of a commonly accepted methodology in a case with difficult facts. Outside of the United States, the question of *why* a court engages in the choice of law task at all is one which has not received much attention when compared to the question of how it is to do so. But these questions are inextricably linked. The methodology which should be employed in making the selection cannot be formulated without regard to the purpose which the selection is designed to achieve. Yet the purpose of the choice of law process for multistate torts has been largely ignored in the Australian, Canadian and English traditions.

---

\(^1\) The term "state" is used to denote a law area, whether a unitary country or the component of a federation. The term "State" is used to denote one of the components of a particular federation.

\(^2\) For the sake of simplicity, the Latin terms traditionally associated with choice of law - such as, *loci delicti, lexi loci delicti* and *lex fori* - will not be used in this paper.

\(^3\) The question of jurisdiction - whether the court should entertain the action at all - also arises.
This lacuna has taken on increased significance in recent years due to the attention that choice of law in tort has received by the highest courts in Australia\(^4\), Canada\(^5\) and England\(^6\). The uncertainty surrounding multistate tort choice of law methodology is shown in stark relief in these cases as a different methodology has been adopted in each of these countries, despite the fact that all three nations share a common starting point for the selection process\(^7\). Additionally the Law Reform Commissions of England and Scotland\(^8\) and the Australian Law Reform Commission\(^9\) have reviewed their respective country's then current position on choice of law in tort and recommended substantial changes to that position.

This paper will analyse the developments in the English, Canadian and Australian courts with respect of choice of law for multistate torts. In so doing, it will identify the underlying polices which have informed the judicially chosen methodologies. In order to reduce this task to a manageable compass, the paper will focus on the concepts of "people" and "place".

Two factors are prominent in the array of choice of law rules for multistate torts. The first is the "people" to which the participants in the dispute belong; that is, the states in which they were domiciled or resident. The second is the "place" or location of the events.


\(^6\) The Privy Council decision in Red Sea Insurance Co Ltd v Bouygues SA [1994] 3 All ER 749.

\(^7\) The English case of Phillips v Eyre (1870) LR 6 QB 1


relevant to the cause of action. Although these concepts are present in most of the methodologies, their significance varies profoundly as between methodologies. The significance of these concepts in any given methodology provides an insight into the values which inform that methodology. The concepts themselves are not normative, but their function in a particular methodology does provide a guide to the norms which underpin the methodology. For example, it will be seen that the way the concepts function in a methodology reveals certain assumptions made by the methodology regarding (i) the relationship between a state and its people; (ii) the relationship between a state and persons within its borders; (iii) the relationship between states (whether between foreign countries or between the constituent parts of a federation); and (iv) nature of the individual.

In order to identify the functional role of the concepts of people and place in the English, Canadian and Australian judicial developments in choice of law for multistate torts, it is necessary to provide some philosophical context. This will be done by drawing upon some of the vast and varied American writing on choice of law. The American analysis of the theoretical aspects of choice of law theory is without parallel in the English-speaking world. The writing of American scholars in the late 1950s and 1960s effected a "conflicts revolution"\(^\text{10}\) in the American choice of law doctrine, primarily in the areas of tort and contract\(^\text{11}\). In the area of choice of law in contract, the revolution has had little effect outside the United States\(^\text{12}\). In most countries, the ideal of party autonomy\(^\text{13}\) and the

---


\(^{11}\) A Hill, "The Judicial Function in Choice of Law" (1985) 85 *Col. L. Rev.* 1585 at 1586; RA Sedler, "Continuity, Precedent, and Choice of Law: A Reflective Response to Professor Hill" (1992) 38 *Wayne L Rev* 1419 at 1423; G Kegel, "Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers" (1979) 27 *Am J Comp L* 615 at 616. Cf Juenger (*supra* note 10, p 146) who claims that the revolution was "by and large, limited to tort choice of law".

\(^{12}\) Hill, *supra* note 11 at 1625-1626. Even within the United States, the effect of the revolution on choice of law in contract has been much more limited than in tort. See PJ Borchers, "Conflicts Pragmatism"(1993) 56 *Albany L Rev* 883 at 883. For an analysis of the effect of the revolution in America on contract choice of law doctrine, see E
adoption of the concept of the proper law\textsuperscript{14} have been regarded providing a workable solution for most contractual choice of law problems. There has not been any real need or opportunity to draw upon the new American learning in that area. However, in the area of multistate torts, there has been significant disagreement about the choice of law methodology which should be employed. Much can be gained by looking at the American experience in this area.

Choice of Law in Tort in the United States

The greatest obstacle confronting the observer of the American choice of law experience is the lack of a general appellate jurisdiction of the United States Supreme Court. This means that the highest court in each of the States has great freedom to adopt for that State whichever choice of law method it thinks the best\textsuperscript{15}. The only restriction upon this freedom is that the selected method must meet minimal constitutional standards of due process and full faith and credit\textsuperscript{16}. This has resulted in a significant divergence of approaches in the United States courts as to the appropriate choice of law methodology in

\textsuperscript{13} Hill, \textit{supra} note 11 at 1625-1626.
\textsuperscript{15} MT Hertz, "The Constitution and the Conflict of Laws: Approaches in Canadian and American Law" (1977) 27 \textit{U Tor L J} 1 at 3. Further, when a Federal court is seised of a matter involving State law, the Federal court is bound to apply the law of the state in which it is sitting. See PD Phillips, "Choice of Law in Federal Jurisdiction" (1961) 3 \textit{M U L Rev} 170 at 178 -180.
tort\textsuperscript{17}. So great is this divergence, that it has become necessary for academic commentators to keep a scorecard as to which State is employing a particular methodology at any particular time\textsuperscript{18}. Thus, in drawing on the American learning in relation to choice of law in tort, it is necessary to concentrate on some of the broad themes which have informed that learning, rather than on the minutiae which emerge from the hundreds of cases\textsuperscript{19}. The structure which will used to highlight these themes is set out below.

**Choice of Law Methodologies and Dichotomies**

The varied choice of law methodologies which have been employed in the United States can be subjected to three broad classifications: multilateralism; unilateralism and the substantive law method\textsuperscript{20}. The operation of these techniques can be defined in terms of three sets of dichotomies: (i) jurisdiction-selection and rule-selection; (ii) spatially-informed-function and substantively informed-function; and (iii) externally-generated norms and internally-generated norms. These dichotomies will now be briefly explained.

*Jurisdiction-selection/Rule-selection*

All choice of law methodologies share the same end - to identify a law (the "dispositive law") which the forum court will apply to resolve, or "dispose of" the dispute being litigated. However, the jurisdiction-selection/rule-selection dichotomy\textsuperscript{21} relates to the

\textsuperscript{17} For a recent survey of the various methodologies employed in the United States, see RM Juenger " A Proposed Choice of Law Methodology for Tort in Canada: Comparative Evaluation of British and American Approaches" (1994) 26 Ottawa L Rev 75.


\textsuperscript{20} Juenger, supra note 10, pp 42 - 43.

\textsuperscript{21} The recognition of this dichotomy owes much to David Cavers who, in his article "A Critique of the Choice-of-Law Problem" (1933) 47 Harv. L. Rev. 173, "invented" the
nature of the thing immediately selected by the methodology. A rule-selecting methodology directly selects the dispositive rule from one of the potentially applicable rules of the various states connected with the dispute (the "putative dispositive laws"). The criterion of selection is dependant upon the content of the putative dispositive laws, or expressed another way, a comparison of the results which would be yielded by the application of the various putative dispositive laws. In this respect, rule-selection is a consequentialist form of reasoning, in that "alternative courses of action are evaluated according to the desirability of their consequences". Under a rule-selecting methodology, the consequences produced by the application of the selected dispositive law are regarded as more desirable than the consequences that would be produced by the application of the other putative dispositive laws.

By contrast, a methodology which is jurisdiction-selecting does not make a direct selection of the dispositive law. Rather, it selects a state (jurisdiction) the legal system of which will provide the dispositive law. The central tenet of jurisdiction-selection is that the selection of the state which is to provide the dispositive law is independent of the content of the putative dispositive laws. The court is thus required to "blind" itself to the result which would be yielded by the application of such laws. Jurisdiction-selection is thus a non-consequentialist form of reasoning.

Term "jurisdiction-selecting rules" (See F. K. Juenger, "Conflict of Laws: A Critique of Interest Analysis", (1984) 32 Am. J. Comp. L 1 at 2 n 11). Cavers also established the second division of the dichotomy by being the first to argue for choice of law based on rule-selection (See Alfred Hill, supra note 11 at 1588). Although he does not use this expression or a similar shorthand equivalent, Cavers clearly advocates rule-selection through the direct choice of a dispositive law through an appraisal of the results which would be yielded by an application of the contending laws "from the standpoint of justice between the litigating individuals...[and] broader considerations of social policy." (Cavers, supra at 192).

23 Cavers, supra note 21 at 180. There are, however, limited circumstances in which the jurisdiction-selection methodology employed in the Canadian, English and Australian courts requires examination of the content of the putative dispositive laws. Such an examination is necessary to establish whether the putative dispositive law of the dispositive jurisdiction will be denied application on the basis that it:
Because a jurisdiction-selecting methodology is precluded from making the selection on the basis of the content of the putative dispositive laws, it must do so on the basis of some other criterion. This criterion is the "objective" relationship between the factual circumstances of the dispute and the state which is selected to provide the dispositive law. This relationship arises because certain events relevant to the dispute occurred within the jurisdiction or that one or more of the parties to the dispute lived or resided in the jurisdiction.

**Spatially-informed /Substantively-informed function**

Dispositive laws operate to realise certain substantive policies. For example, "[t]ort rules embody tort policies" and "contracts rules embody contracts policies." Most conflict of

(a) would be classified, by the dispositive jurisdiction, as procedural rather than substantive (*McKain v RW Miller & Co. (South Australia) Pty. Ltd*, supra note 4; *Re Cohn* [1945] Ch. 5); (b) would be classified, by the dispositive jurisdiction, as falling outside the legal category which the dispositive jurisdiction has been selected by the forum's choice of law rules to regulate (eg. if the forum has selected Spanish law to dispose of an issue of succession but Spanish law characterises the rule it would apply as one of *jus regale* rather than of succession: See *In the Estate of Maldonado* [1954] P. 233); or (c) is a penal (*Huntington v Attrill* [1893] A. C. 150) or revenue (*Government of India v Taylor* [1955] AC. 491) law or contravenes the public policy of the forum (*Kaufman v Gerson* [1904] 1 KB. 59).

Rather than being contrary to the process of jurisdiction-selection, the practices referred to in paragraphs (a) and (b) are perfectly consistent with it. Where the determination of the dispositive jurisdiction is based upon the classification of the legal issue involved, it is necessary to establish that the law which would otherwise be applied does in fact come within that classification. And for this purpose, procedural aspects of the dispute are to be governed by the law of the forum. In contrast, the examination of the content of the putative dispositive law referred to in paragraph (c) is not consistent with strict jurisdiction-selection as it excludes the operation of the types of laws there enumerated, not on the basis of falling outside the type of legal category assigned to the legal system of a particular jurisdiction, but on the basis of the inherent nature of the law.

24 See Brilmayer, , p 199.
25 I have derived these terms from G Kegel, "The Crisis of Conflict of Laws" (1964) 112 Recueil des Cours 91 at 184
26 L Brilmayer, *supra* note 22, p 75.
laws scholars\textsuperscript{27} think that the choice of law process does not reflect these substantive policies. For such scholars, the process performs a qualitatively different function. This function is to determine the appropriate spatial, or territorial, reach of dispositive laws. The substantive merits of the dispositive law selected by the process is not relevant to the selection process.

Another view is proposed by Juenger\textsuperscript{28}. He argues that choice of law techniques, like dispositive law, should operate "...in such a way so as further the policy underlying the substantive field involved"\textsuperscript{29}. Thus just as modern product liability law reveals a policy of protecting consumers, the choice of law in a product liability case should do the same.\textsuperscript{30} Similarly, domestic contract law reflects a policy of party autonomy but limits this policy by also expressing a countervailing policy of protecting the weaker party. Juenger argues that choice of law in contract should also reflect the substantive policy of protecting weaker parties\textsuperscript{31}.

\textit{Externally-generated/Internally-generated norms}

The final dichotomy relates to the source of the norms which shape a choice of law methodology. Should these norms be derived from values which are within (internal to) the putative dispositive laws of the states connected with the dispute? Or should the norms be derived from outside (external to) the putative dispositive laws?\textsuperscript{32} Expressed in this way, the dichotomy seems extremely abstract. However, in the discussion of the various choice of law approaches below, the meaning of this dichotomy will become clearer.

\textsuperscript{27} For example, Kegel, supra note 25 at 184; AJE Jaffey, "The Foundations of Rules For the Choice of Law" (1982) 2 Oxf J L S 368 at 377 - 378. Cf L Brilmayer, supra note 22 pp 74-75.
\textsuperscript{28} Juenger, supra note 10 Chapters 4 and 5.
\textsuperscript{29} Ibid p 153 quoting Reese, "Book Review" 33 Am J Comp L 332 (1985) at 335.
\textsuperscript{30} Ibid p 197.
\textsuperscript{31} Ibid p 219.
\textsuperscript{32} See Brilmayer, supra note 22, p 1.
Structure of the Paper

We have now outlined the various dichotomies by which the choice of law methodologies of multilateralism, unilateralism and the substantive law method can be described. In Chapters 1, 2 and 3 of the paper, the influence of each of these methodologies upon the American experience with choice of law for multistate torts will be analysed. In each Chapter, the characteristics of the applicable methodology will be outlined in terms of the relevant dichotomies. The philosophical underpinnings of the methodology will then be analysed. Finally, the function performed by the concepts of people and place in the methodology will be ascertained. When this has been done with respect to all three methodologies, we will then have a context in which to analyse the developments in the English, Canadian and Australian courts regarding choice of law for multistate torts. We will be able to appreciate the extent to which the various choice of law methodologies, and the accompanying concepts of people and place, have shaped the practices in these countries. This will be done in Chapters 4, 5 and 6.
Chapter 1
Multilateralism

Characteristics of Multilateralism

The method is appropriately styled “multilateralism” as it sets “the limits of the application in foro not only of forum rules but also of foreign ones”33. Multilateralism seeks to “localise a legal dispute connected with more than one state to the legal system of a single state.34. It does this by holding that the connection between the dispute and one of the states is more significant than the connection between the dispute and the other states. Metaphorically, this has been variously expressed35 as ascertaining the “seat” or “center (sic) of gravity” of legal relationships36.

From this brief outline it is possible to define multilateralism in terms of the dichotomies defined in the Introduction. Most importantly, multilateralism is distinguished from unilaterialism and the substantive law approach by the fact that it is jurisdiction-selecting. It identifies a state whose legal system is to provide the dispositive law by reference to the factual relationship of the dispute with the various states, rather than by reference to the content of the dispositive law. Because the "dispositive" state is selected in this way the method is spatially-informed, rather than substantively-informed. It is the geographical "setting" of the events constituting the dispute, rather than the substantive policies

36 FK Juenger, supra note 10, p128.
underpinning the relevant domestic law field, which is relevant to the selection process.\textsuperscript{37} The selection is based upon an analysis of the connections ("connecting factors") between the circumstances of the dispute and various states, rather than an analysis of the policies inherent in the putative dispositive laws themselves. This means that multilateralism is based on norms which are external, rather than internal to the putative dispositive laws of the connected states. The norms which inform the multilateralist methodology will be discussed in the section "Multilateralist Philosophy" below.

There are basically two forms of multilateralism which have been employed in the United States. These may be styled "hard" and "soft".\textsuperscript{38}

Hard multilateralism is distinguished by a number of (supposedly) immutable\textsuperscript{39} choice of law rules comprising two parts. The first is the juridical nature of the dispute, such as tort or contract. The second is a single, exclusive connecting factor which for each juridical category selects a state which is to provide the governing law. Hard multilateralism was established in the United States by Joseph Story\textsuperscript{40}, but is now most closely associated with Professor Joseph Beale. Beale was the Reporter for the American Law Institute's \textit{Restatement of Conflict of Laws} issued in 1934.\textsuperscript{41} Under this methodology, the basic

\textsuperscript{37} An exception to this is multilateral methods which allow the parties to choose the jurisdiction whose legal system is to govern their contract. As party autonomy underpins both the relevant domestic field of law involved, as well as the choice of law technique relevant to this field in the international setting, it can be said that the choice of law rule is substantively-informed. As the parties are free to choose as their governing law the legal system of a jurisdiction which is not connected to the contract, the choice of law rule is not spatially-informed.

\textsuperscript{38} This dichotomy is derived from Juenger, (\textit{supra} note 10) who refers to "hard and fast" choice of law rules (p 90), as opposed to "a soft, flexible type of multilateralism" (p 128).

\textsuperscript{39} Some courts have employed the "escape devices" of characterisation and the public policy exception in order to avoid applying the appropriate rule. See JA McLaughlin, "Conflict of Laws: The Choice of Law \textit{Lex Loci} Doctrine, The Beguiling Appeal of a Dead Tradition"(1991) 93 \textit{W Va L Rev} 957 at 981 - 995.

\textsuperscript{40} EG Lorenzen, \textit{Selected Articles on the Conflict of Laws}, Yale University Press, 1947, p 193

\textsuperscript{41} See Brilmayer, \textit{supra} note 22, pp 18-19.
rule for torts is that liability is determined by the law of the place of the wrong\textsuperscript{42}, (defined to be the place of injury)\textsuperscript{43}; with regard to contracts, the law of the place of contracting applied\textsuperscript{44} except for certain issues relating to performance, which are governed by the law of the place of performance.\textsuperscript{45} Hard multilateralism is subject to criticism on the basis of its inflexibility due to the unyielding operation of a single connecting factor.

A frequently cited\textsuperscript{46} example of the seemingly unsatisfactory result which can arise under hard multilateralism is *Alabama Great Southern Railroad v Carroll*\textsuperscript{47}. The plaintiff was employed by the defendant railway company. The plaintiff was injured while riding on one of the defendant's trains in the course of his employment. The journey was to commence and end in Alabama, but was to cross a number of state borders. The plaintiff was injured in Mississippi when a coupling broke as a result of the negligent maintenance performed in Alabama by another employee of the defendant. Under the law of Mississippi, the plaintiff was not entitled to recover under the then extant fellow-servant rule in force in that State. Under the law of Alabama, the plaintiff was entitled to recover as the fellow-servant rule had been abolished.

The overwhelming connection of the dispute with Alabama was clear. The parties were resident there, the employment relationship was centred there, and that is where the negligent conduct which led to the injury occurred. By contrast, the fact that the place of injury was Mississippi was fortuitous. The coupling could have broken and the injury occurred in any of the States which the train was to cross in its journey. However, under

\begin{itemize}
  \item \textsuperscript{42} Section 379.
  \item \textsuperscript{43} Section 377 refers to "the state where the last event necessary to make an actor liable for an alleged tort takes place...". With regard to the tort of negligence, that "last event" is injury to the plaintiff. See Brilmayer, *supra* note 22, p 21.
  \item \textsuperscript{44} Section 332
  \item \textsuperscript{45} Section 358.
  \item \textsuperscript{47} (1892) 97 Ala 126
\end{itemize}
the form of hard multilateralism employed in the United States at that time, the only relevant connecting factor was the place of injury. Thus the legal system of Mississippi was selected, and its dispositive law applied to deny the plaintiff recovery.

Soft multilateralism, like hard multilateralism, also seeks to localise a multistate legal dispute to a single state the legal system of which is to provide the dispositive law.\(^{48}\) Thus, soft multilateralism is also jurisdiction-selecting as it selects the state which is to supply the dispositive law without regard to the content of the putative dispositive laws of the connected states.\(^{49}\) Unlike hard multilateralism, however, soft multilateralism does not employ a single, exclusive connecting factor, but rather an "open-ended formula" whose function is to ascertain the state to which the facts of the dispute "belong".\(^{50}\) These formulae are alternatively expressed in terms of "the seat of a legal relationship", 'the nature of the thing', 'the centre of gravity', 'the most real (or closest) connection".\(^{51}\) These forms of inquiry require all the connections between the dispute and the connected states to be examined in order to ascertain which of those states bears the relevant relationship, however metaphorically termed, with the dispute. With regard to multistate torts, this inquiry will typically consider the place of injury, the place of the allegedly tortious conduct, the residence of each of the parties and the place in which any relationship between the parties is based.\(^{52}\) Using soft multilateralism, in *Alabama Great Southern Railroad v Carroll*, the law of Alabama would have been applied. The connection the dispute had with Alabama, as the place of the tortious conduct, the residence of the parties and the place where the employment relationship was centred, was much closer than its connection with Mississippi, the fortuitous locus of the injury.

\(^{48}\) FA Mann, , p36.
\(^{49}\) WC Powers, *supra*, note 46 at 35.
\(^{50}\) FA Mann, *supra* note 35, p 35.
\(^{51}\) *Ibid*, p 36.
\(^{52}\) Juenger, *supra* note 10 p 97.
In the United States, the first departure from the hard jurisdiction-selection of the *First Restatement* came with the adoption of a soft jurisdiction-selecting method in relation to contracts. A series of cases commencing with *W. H. Barber Co. v Hughes*, and culminating in the New York Court of Appeals decision in *Auten v Auten*, rejected the use of the single connecting factors of the place of contracting and place of performance in order to select the state which is to supply the dispositive law. Employed instead, was an inquiry, based upon all the circumstances of the case, for the state which is the "center of gravity" or which has "the most significant contacts" with, the contract.

The use of soft-multilateralism as a choice of law methodology for tort began in the United States with the famous case of *Babcock v Jackson*. The case involved a single motor vehicle accident in Ontario. A passenger in the car who was injured in the accident sued the estate of the driver of the car in New York. The plaintiff and the driver of the car, who were sister and brother-in-law, both lived in New York at the time of the accident. A host-guest statute was in force in Ontario which, if applied to the action, would have denied the plaintiff recovery because she was a gratuitous passenger. Under the hard multilateralism of the *First Restatement*, the law of the place of injury (Ontario) would apply and the plaintiff would be denied recovery.

In a majority decision, the New York Court of Appeals decided not to use hard multilateralism, and instead held that the law of New York applied to the plaintiff's claim. One of the choice of law methodologies with the court employed to select the law of New

---

53 63 NE 2d 417 (1945).
54 124 NE 2d 99 (1954).
55 *W. H. Barber Co. v Hughes*, supra note 53 at 417.
56 *Auten v Auten*, supra note 54 at 102.
York was soft multilateralism\(^59\). In delivering the majority judgment, Judge Fuld referred to the "center of gravity" or "grouping of contacts" doctrine, as adopted in contract conflicts cases, as "affording the appropriate approach for accommodating the competing interests in tort cases with multi-State contacts".\(^60\) The emphasised terms are firmly grounded in the discourse of soft jurisdiction-selection. Indeed, in applying the law of New York, rather than that of Ontario, the majority relied on the fact that the aggregation of contacts between the circumstances of the dispute and the contending states\(^61\) revealed that "the concern of New York is unquestionably the greater and more direct and that the interest of Ontario is at best minimal".\(^62\) Despite the reference to "concern" and "interest" of the involved states, such terms being closely associated with the governmental interest analysis form of rule-selection\(^63\), the "contacts" portion of the judgment is based upon jurisdiction-selection. The content of the relevant laws of New York and Ontario had been not taken into account, as would be required under governmental interest analysis, in assessing the relevant concerns or interests of the states.

### Multilateralist Philosophy

Having noted the characteristics of multilateralism, we now turn to the values which have been used to justify the use of multilateralism as a choice of law technique. In the following section, these values will be analysed in terms of the concept of "people" and "place".

\(^{59}\) The majority judgment also used language consistent with unilateralism and the substantive law approach. These aspects of the decision will be discussed in Chapters 2 and 3.

\(^{60}\) Supra, note 58 at 283 (Emphasis added.)

\(^{61}\) The contacts assessed were the residence of the parties, the place where the involved motor vehicle was garaged and insured, the place the journey commenced and where it was intended to end (all New York) and the place of the accident (Ontario).

\(^{62}\) Supra, note 58 at 284.

\(^{63}\) Governmental interest analysis will be discussed in regard to unilateralism in Chapter 2.
Consistent with its jurisdiction-selecting nature, multilateralism is noted for its “urbane evenhandedness with which it purports to assure foreign laws the same consideration as local ones”. Forum and foreign law are treated equally as the state which is to supply the dispositive law is selected on the basis of a particular objective connection with the dispute, with forum law being no more likely to be selected in any matter than foreign law. We will examine two theories which have been put forward to justify the cosmopolitan nature of multilateralism. These theories reflect a theme in choice of law scholarship as to whether the choice of law task is concerned with giving effect to the interests or policies of states, or with doing justice to the parties to the dispute. The first justification for multilateralism to be discussed focuses on the interests of states in the choice of law process. This is the rationale of comity. The second justification to be discussed focuses on the rights of the parties involved in the litigation. This is Brilmayer’s political rights model. Both of these justifications rely on norms which are external to the domestic policies of the forum. The comity justification looks to the interests of other states and not simply the interests of the forum. The political rights model seeks to ensure that parties in multistate disputes are treated fairly in the choice of law process. Neither justification focuses directly upon the domestic policies of the forum.

In the following discussion, it will be seen that Brilmayer’s political rights model provides a much more satisfactory rationale for multilateralism than the comity justification.

64 FK Juenger, *supra* note 10, p 47.
65 The exception to this is that foreign procedural, revenue or penal laws, nor those foreign laws which contravene forum public policy are not applied.
66 JJ Fawcett, "Policy Considerations in Tort Choice of Law" (1984) 47 *Mod L Rev* 650 at 650 and Mclaughlin, *supra* note 57 at 92 - 97 suggest that a choice of law technique must serve both of these objectives. These writers also state that the methodology must be one that serves the needs of a legal system for certainty and stability.
67 Brilmayer, *supra* note 22, p 207.
Comity

This rationale can be traced to the work of the seventeenth century Dutch jurist Ulrich Huber. The starting point for Huber's choice of law thesis was the postulate of territorial sovereignty. Within the territory of state, the only law of that state takes effect by virtue of its own force. Accordingly, a state cannot be compelled to give effect within its own courts to the laws of a foreign state. However, Huber observed that states do, at times, give effect within their own courts to “rights acquired within the [territorial] limits of a [foreign] government.” In so doing, a state acted “by way of comity,” that is, by way of “mere concession ... made on grounds of convenience and utility.” Huber does little to underscore the policies behind this concept of conceded recognition other than to draw attention to fact that if appropriate recognition was not afforded then beneficial international trade and commerce would be stagnate. Huber claimed:

[N]othing could be more inconvenient to commerce and to international usage that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law.

This justification for the affording of comity by applying foreign law seems persuasive in regard to planned multistate transactions such as contracts, inter vivos property transfers, testate succession, marriages, adoptions and so on. To apply forum law in these cases might be to apply a law which would defeat the expectations of the parties. The

---

68 Morris, supra note 14, p 505. For a discussion of the influence of Huber on choice of law in England (through Lord Mansfield, TE Holland and AV Dicey) and in America (through Story and Beale), see Juenger, supra note 10, pp 19 - 31 and KH Nadelman, *Conflict of Laws; International and Interstate*, Martinus Nijhoff (1972), pp 2-17.


70 *Ibid*, p164. It should be noted that Huber spoke of the recognising sovereign giving effect to rights created by foreign law rather than giving effect to the foreign law itself, as “the laws of one nation can have no force directly with another...”. (*Ibid*, pp 164-165.). This distinction laid the foundation for the “vested rights” theory expounded at length by Joseph Beale.


transaction might be invalidated within the forum by the application of forum law, which
the parties did not anticipate would apply to their transaction at the time it was planned.
The possibility of this unhappy state of affairs may dissuade people from engaging in
multistate activity altogether if they could not be assured that their plans would be given
effect. The choice of law process, like other aspects of the conflict of laws, is "grounded
in the need to facilitate the flow of wealth, skills and people across state lines in a fair and
orderly manner."74

There are at least two difficulties with this version of the comity justification. Firstly, the
inconvenience to commerce argument cannot explain what law should be applied to
"transactions" which are not planned, such as tort or intestate succession. It cannot
convincingly be suggested that multistate activity would grind to a halt simply because in
the litigation an alleged tort, the forum applied its own law. People will still move across
international boundaries. This is demonstrated by the fact that for most of the twentieth
century the Australian, Canadian and English courts applied forum law in the disposition
of multistate torts75.

Secondly, the justification assumes that forum law will invalidate the transaction which
would be validated by the law of the state with regard to which the parties planned.
However, because multilateralism is jurisdiction-selecting, the dispositive law which the
forum applies out of comity may in fact invalidate the transaction. This is possible
because it is the application of objective connecting factors which defines multilateralism.
It is only in contract where the parties are free to expressly choose which legal system is to

74 Morguard Investments Ltd v Savoye (1990) 76 DLR (4th) 256 at 269. The case
cconcerned the recognition of the judgment of a sister province.
75 Under the rule in Phillips v Eyre. This will be discussed in Chapter 4.
govern their transaction. And even then the parties are not given unlimited freedom to choose.\textsuperscript{76}

Huber's writings significantly influenced the choice of law theory of the American scholar, teacher and judge Joseph Story\textsuperscript{77}. Story, like Huber, adopted the twin concepts of territorial sovereignty and comity. However, whereas for Huber the rationale for comity was the facilitation of multistate activity, Story put forward another basis for comity. According to Story, a state afforded comity to the laws of other states because of "a sort of moral necessity to do justice, in order that justice may be done to us in return."\textsuperscript{78} Story thus identified a principle of reciprocity in the comity concept. A state concedes recognition in its own courts to foreign law in the hope that foreign states will concede recognition in their own courts to its laws (or, in the language of Huber, rights created under such laws).

The ideal of reciprocity in Story is an example of what Lea Brilmayer calls the "maximization of long-range interests" of a state\textsuperscript{79}. These are advantages which accrue to a state through cooperation with other states in the resolution of multistate disputes. Rather than blindly applying forum law, the adjudicating state will defer to the dispositive law of another state when that other state has a stronger interest in having its dispositive law applied to the dispute. The deferring state does this in anticipation that the other state will reciprocate by applying the law of the first state when the first state has a greater interest in having its law applied than the second (and in this case, the forum) state. By states co-ordinating their choice of law processes, each will have its law applied in circumstances which will benefit it most, whether the action is brought in its courts or

\textsuperscript{76} At common law, the choice must have been "bona fide and legal, and ...[not contrary to] public policy." (\textit{Vita Food Products Inc v Unus shipping Co} [1939] AC 277 at 290)
\textsuperscript{77} Lorenzen, \textit{supra} note 40, p 199.
\textsuperscript{78} J Story, \textit{Commentaries on the Conflict of Laws}, 2nd ed, 1841, para 35.
\textsuperscript{79} L Brilmayer, \textit{supra} note 22. p 75.
elsewhere. It is true that a state might lose out if, as the forum, it applies the dispositive law of another state when it has an interest which is less than that of the other state in the resolution of the dispute. However, that state wins when its own dispositive law is applied by another state when the first state has a greater interest in the resolution of the dispute than the forum state. By participating in this process, a state gives up a little (not applying its own law when its interest in the resolution of a dispute litigated in its courts is not as great as another state's), in the hope of gaining a lot (having its law applied by another forum when it has a greater interest than the forum). Thus, under the reciprocity version of the comity justification for multilateralism, at the heart of the equal treatment of forum and foreign law is the self interest, albeit enlightened, of the conceding state.

The comity justification based upon mutual advantage arising from reciprocity assumes that states derive some kind of benefit from the application of that state's dispositive law in the resolution of a dispute. It also assumes that this benefit can be quantified, because the justification is centred on one state deriving greater benefit - that is, having a greater interest - than other states in the disposition of the dispute. This is a controversial proposition which will be discussed in Chapter 2 in relation to our analysis of the unilateralist methodology of governmental interest analysis. However, even accepting that states do have interests in the application of their own dispositive law in the resolution of a multistate dispute, there are major difficulties with this reciprocity version of the comity justification.

Specifically, hard multilateralism, with its single, exclusive connecting factors, is ill-equipped to promote the values which underpin this justification. Where the place of the occurrence of one event only controls in the selection of the state which is to provide the dispositive law, there is no guarantee that the state which is selected will indeed have the greatest interest in the application of its dispositive law. For example, in *Alabama Great Southern Railroad v Carroll* the Alabama court deferred to the law of Mississippi as the
place of injury, despite the fact that the place of injury was fortuitous and that all of the other connections of the dispute were with Alabama. In deferring to Mississippi law, the Alabama court sacrificed its own state's substantial interest in the case and applied the law of a state which really did not have an interest in having its law applied. This case is an example of how the inflexible rules of hard multilateralism are incapable of ensuring that the state which will yield the maximum advantage from the application of its law to the resolution of the dispute will in fact be selected as providing the dispositive law.

It might be thought that if hard multilateralism is too blunt an instrument to realise the values underpinning the reciprocity version of the comity justification, then soft multilateralism might be apt to do so, as it considers all the connections between the dispute and the contending states. Indeed, the test of "the most significant relationship" or "greatest and most real connection" seems to encapsulate the concept of the state which has the greatest interest, in terms of having the most to gain from having its dispositive law applied in the resolution of the multistate dispute.

However, it is one thing for a state to have a preponderance of contacts with a dispute; it is quite another for that state to have an interest in the dispute in the sense of gaining some kind of benefit from the application of its dispositive law. Those who have argued that states do have an interest in the outcome of private litigation are unilateralists of the governmental interest analysis school. These choice of law theorists argue that a state can be said to have an interest in a multistate dispute if the policy underlying its putative dispositive law would be advanced by its application in the resolution of the dispute. And whether or not the underlying policy would be advanced requires a consideration of what the law is meant to achieve. This, of course, requires an examination of the content of the putative dispositive law itself, which is antithetical to jurisdiction-selection.

The reciprocity version of the comity justification thus supplies a very unsuitable basis for multilateralist jurisdiction-selection. A choice of law methodology based upon the
relevance of contacts between a state and the facts of a multistate dispute is not subtle enough to select the state which has the greatest interest in the resolution of the dispute as the one to supply the dispositive law. To invoke an argument founded on state interests, the connection between a state and the facts of the dispute is only relevant if that contact "implicates" or brings into play the policy which underpins that state's putative dispositive law. Thus, to take a matter in tort, the state in which the injury-causing conduct or the injury itself occurred will only have an interest in the dispute if the policy underlying its contending dispositive law is to deter (by imposing liability on the actor) or encouraging (by immunising the actor from liability) the conduct. Similarly, the state in which one or more of the parties are resident will have an interest in the resolution of the dispute if the policy underpinning its putative dispositive law is to protect its resident by allowing compensation to its resident plaintiff or insulating its resident defendant from liability. In the language of state interest, a contact is not relevant unless it is such that the underlying policy of the respective contending laws would be advanced by the law's application. These points will be dealt with in the discussion of unilateralism in Chapter 2.

In addition to the unsuitability of jurisdiction-selecting methodology in identifying and promoting state interests, the reciprocity version of the comity justification faces a further difficulty in providing a theoretical basis for multilateralism. And this difficulty concerns the concept of reciprocity itself. In practice it is clear that states do not require reciprocity when applying foreign law under the choice of law process. Multilateralism does not inquire as to whether the state which is selected to apply the dispositive law would apply forum law if the facts of the dispute was reversed. An inquiry into reciprocity is not built in to the objective connecting factors upon which the methodology is based. Specifically with regard to hard multilateralism, the choice of law rules differ as between states with regard to the single, exclusive connecting factors employed. Thus, for civil

law states usually use nationality as the personal connecting factor, while most common law states use domicile. Differences also arise in characterisation of the dispute. The property rights of surviving spouses might be classified as a matter of either domestic relations law or succession. The consequence of this divergence within the multilateralist methodology is that there is no actual reciprocity in the resolution of multistate disputes. Reciprocity is based on the concept that a state defers to the law of another state identified by the applicable rule on the basis that the other state will apply the law of the first state in converse circumstances. In each case, the state with the greatest interest in the resolution of the dispute is applied. But because the same choice of law rule may not be applied by the two states in the mirrored circumstances, there is no guarantee of reciprocity of treatment. So, if the choice of law rule of State A selects the dispositive law of State B to resolve a dispute arising from particular factual circumstances, there is no guarantee that State B will select the dispositive law of State A to resolve a dispute arising from converse factual circumstances. This is because State B might apply a different choice of law rule to that applied by State A. Thus the hope of the advancement of the state interest through reciprocal cooperation does not provide a convincing explanation for multilateralism.

The inability of the reciprocal version of comity to provide a convincing justification for multilateralism may be contrasted with its greater explanatory force in relation to multistate jurisdiction. In *Amchem Products Inc v British Columbia (Workers' Compensation Board)* the Canadian Supreme Court was concerned with the appropriate principles governing the granting of injunctions prohibiting a plaintiff from continuing proceedings in a foreign court. These injunctions are known as "anti-suit" injunctions. The principles

---

82 See *Pfau v Trent Aluminium Co* (1970) 263 A 2d 129 where the forum applied a choice of law rule which selected the law of another state, even though the selected state would not have applied its own law to the dispute.
83 [1993] 3 *WWR* 441
were to be developed in light of the need to reduce the availability of "forum shopping". This practice occurs when a plaintiff selects a particular state as a forum for the litigation of a multistate dispute "simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction".84

In an ideal world the practice of forum shopping would be eliminated through the cooperation of states, in adopting consistent principles regarding stays of action. A court in a state where the litigation of a multistate dispute was commenced would stay the proceedings if another forum was more appropriate for the litigation of the dispute. This is the situation which would result in "a world where comity was universally respected".85

However, the Supreme Court recognised that comity is not so respected. Because of this, a court which is not the appropriate forum for the litigation of a multistate dispute may not order a stay of proceedings when comity dictates that it do so. Where such a failure to stay the proceedings would result in a serious injustice, the court of the natural forum for the litigation must have the power to injunct the plaintiff in the foreign proceedings from continuing those proceedings. These are the principles governing the issue of anti-suit injunctions.86

How does the Supreme Court's derivation of principle in the Amchem case inform our understanding of the suitability of the reciprocity version of the comity justification for multilateralism? Before answering this question it must be noted that the concept of comity in Amchem differs from that discussed above which concerned the advancement of a state's interests through cooperation. In Amchem, the court saw the function of comity as doing justice to the parties involved in the litigation of multistate disputes. This is made

84 Ibid at 457. Also see p 451.
85 Ibid at 452.
86 Ibid.
clear by the Supreme Court's endorsement\textsuperscript{87} of the definition of comity it had previously given in \textit{Morguard Investments Ltd v De Savoye}\textsuperscript{88}.

Comity... is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of its laws...

This important difference in the focus of comity aside, \textit{Amchem} is instructive. It considers how states, through cooperation, might achieve a particular goal such as ensuring that a multistate dispute is litigated in the appropriate forum. This goal can only effectively be achieved by states adopting a uniform approach to exercising jurisdiction. The approach would work as follows. A state in which an action is initiated but which is not the appropriate forum will dismiss the action. The contribution towards cooperation of the state which would be the appropriate forum is to not pre-empt the decision of the foreign court in which the multistate dispute has been inappropriately commenced. The appropriate court should not grant an anti-suit injunction until the inappropriate foreign court has considered and rejected an application to stay the action.\textsuperscript{89} However, a problem arises where a foreign state does not co-operate in this fashion and refuses to dismiss the action inappropriately commenced in its court. The court of the state which would be the appropriate forum is then free to consider whether to grant an anti-suit injunction. Because the inappropriate foreign court has departed from the cooperative scheme, the appropriate court must take the action which is necessary to achieve the desired end (litigation in the appropriate forum).

What \textit{Amchem} shows is that in order for a state to effectively reach its goals it cannot blindly rely on other states to cooperate. A state must tailor its response to the challenges

\textsuperscript{87} \textit{Ibid} at 452.
\textsuperscript{88} \textit{Supra} note 74. Blom argues that the use of comity in such a manner is not ideal as the concept traditionally suggests "the reconciling claims of sovereigns to have their laws applied". See J Blom, \textit{Case Comment} (1991)70 \textit{Can Bar Rev} 733 at 735 n13.
\textsuperscript{89} \textit{Supra} note 83 at 464.
presented by multistate disputes in light of the response of other states to the same challenge. Deferring to other states in a spirit of cooperation in order to reach mutually beneficial results only works if the other states do the same. The law with regard to jurisdiction and anti-suit injunctions allows a state to reach its desired ends because that state is aware of what other states are doing and can formulate its action accordingly. A multilateralist methodology in choice of law does not allow a state to do this, as multilateralism does not permit a state to formulate its response in light of what other states are doing. Multilateralism requires a state to apply the dispositive law of the state without regard to what law that state would apply in converse circumstances. Multilateralism does not allow a state to achieve its ends by non-cooperative means when it is clear that other states are not cooperating. Comity does not provide a satisfactory justification for multilateralism because multilateralism does not allow a state to achieve its ends by abandoning comity when it is clear that other states are not acting in accordance with comity.

One can conclude from this discussion that fulfilling the interests of states does not provide a convincing justification for multilateralism. Accordingly, our attention now turns to the justification based upon the need to act fairly in regard to the parties involved in the multistate dispute.

*Brilmayer's Political Rights Model*

This justification for multilateralism, like the comity doctrine, accepts that states may have substantive policies which can be advanced through the application of that state's law in the adjudication of a dispute. However, whereas the comity doctrine saw multilateralism as a means by which the promotion of the state policies could be advanced, Brilmayer's political rights model advocates multilateralism as a means by which the promotion of state
policies can be constrained. The reason why the promotion of state policies may need to be constrained is as follows. The application of the law of a state to the detriment of an individual constitutes the coercion of the individual by that state. Individuals have the right to be free from coercion by a state unless the relationship between the individual and the state makes that coercion legitimate. Thus, whereas comity sees multilateralism as a means of promoting state policies, the political rights model sees multilateralism as protecting the rights of individuals to be free from the illegitimate exercise of state power.

Under the political rights model, the choice of law process performs its rights-protecting function by ensuring that a state's law is only applied through the choice of law process to the disadvantage of an individual when it is fair to do so. A choice of law method should perform this function through the use of objective connecting factors which link the parties to the dispute to the various states among which the governing law is to be selected. Multilateralism can thus ensure that the party who will be disadvantaged by the selection has sufficient connection with the relevant legal system so that the application of it to that party is fair.

At this stage two important points must be made. Firstly, for a particular choice of law methodology to be supported by the political rights model, the connecting factors employed by the methodology must be those which would make the exercise of the selected state's legal system against the disadvantaged individual legitimate. Secondly, the political rights model does not prescribe a single permissible methodology. The model

---

90 "[The model] follows directly from the notion that states are limited in their pursuit of the common good at the expense of the individual. These rights are political rights because they concern the political relationship between the state and the individual."

Brilmayer, supra note 22, p 204.

91 Ibid, pp 204 - 207.

supports any given methodology which utilises as its connecting factor one of the range of connecting factors which the model regards as legitimate.\textsuperscript{93}

Brilmayer identifies two such connecting factors: domicile and territory, both of which "contain overtones of consent because both include inferences that the aggrieved party has submitted voluntarily to the law that is chosen."\textsuperscript{94}

A person who is domiciled in a state can be seen to have subjected themselves to the laws of that state because they have an opportunity to influence the content of those laws. A domiciliary can participate in shaping those laws through the political and electoral processes, or can ultimately leave that state and become domiciled elsewhere if dissatisfied with the laws of the first state\textsuperscript{95}.

With regard to territory, a person who engages in "some sort of purposeful action towards the territory" of a state\textsuperscript{96} constitutes that party's "voluntary submission" to that state's law\textsuperscript{97}. An act done within the territory of a state is clearly an act which is done "towards" the territory of that state. Brilmayer does not make it clear whether an act done outside the territory of a state, but which has consequences which operate within the territory of the state, is an act which was done "towards" the territory of the state. As Brilmayer uses the term "towards", rather than the term "within", it seems that such an act would come within Brilmayer's concept of territory. However, as the act must be "purposeful" in order to make coercion of the state legitimate, it might be argued that the consequence of the act within the territory must have been reasonably foreseeable to the actor in order to be embraced by the concept\textsuperscript{98}.

\textsuperscript{93} Ibid, p 208.
\textsuperscript{94} HG Maier, "Baseball and Chicken Salad: A Realistic Look at Choice of Law" (1991) 44 Vand L Rev 827 at 836.
\textsuperscript{95} Brilmayer, supra note 22, pp 211, 220
\textsuperscript{96} Ibid, pp 220.
\textsuperscript{97} Ibid, p 221.
\textsuperscript{98} Such an approach was taken by the Supreme Court of Canada in Moran v Pyle National (Canada) Ltd (1974) 43 DLR (3rd) 239 in the context of \textit{ex juris} service of
Although Brilmayer couches her arguments in terms of consent, it is clear that she is not concerned with the subjective state of mind of the disadvantaged party. Rather, her point is that given that states are sovereign entities which have the power to coerce individuals in certain circumstances, when an individual brings himself or herself into a certain relationship with that state, it is reasonable for that state to apply its law to the disadvantage of that person.

Given the importance of the function of domicile and territory to her thesis, Brilmayer's explanation of why these connections invoke the legitimate exercise of state coercion is surprisingly brief. Other than the arguments outlined above regarding "a party's volitional affiliation with the state"99, Brilmayer's reliance on these connecting factors are supported by assertions of the self-evident correctness of her position.100 However, Brilmayer's arguments can be supplemented by reference to her other writing dealing with jurisdiction101, which will be referred to in the next section of the Chapter dealing with the concepts of people and place.

At this stage of Brilmayer's thesis, it appears that a wide range of choice of law methods would satisfy her political rights model. All the method must do is to ensure that the person who is aggrieved by the selection is domiciled in or has acted "towards" the territory of the state which has supplied the governing law. It further seems that the political rights model endorses rule-selecting methods rather than multilateralism (which is jurisdiction-selecting). This is because the model, as thus far described, looks at who

---
99 Brilmayer, supra note 22 p 220.
100 PJ Borchers, supra note 80 at 485 - 486, 487.
would win and who would lose from the application of the putative dispositive laws. The relevance of the result, seems to favour rule-selection over jurisdiction-selection.

However, Brilmayer adds another limitation upon the ability of states to coerce people which firmly entrenches her political rights model in jurisdiction-selection. This is the requirement of "mutuality"\(^{102}\). Mutuality demands that a state can only apply its law to the detriment of a party, if that law would have worked to the advantage of that party if the position of that party and his or her adversary were reversed. The following example should make this clear. Party A sues Party B for injuries inflicted on A by B. Law X is applied which gives B a defence to the action (that is, it disadvantages A). The application of Law X to A’s action will only satisfy the mutuality principle if Law X would also have been applied to give A the same defence if B had sued A for injuries inflicted on B by A in equivalent circumstances.

The justification for the mutuality requirement is that it reflects "a certain conception of impartiality, namely that the outcome of a particular case not be biased in favour of one party over the other."\(^{103}\) The principle calls for "treatment which is intrinsically fair because it offers the aggrieved party as much opportunity for benefit as burden."\(^{104}\).

The principle of mutuality has significant consequences for the political rights model for choice of law. Without the operation of the principle, all that would be required for a method to comply with the model was the requisite connection between the state supplying the dispositive law and the disadvantaged party. When the principle is added to the model, a methodology must have the requisite connection with the benefited and burdened parties. This is because a party can only be burdened by the selection if that party could also be benefited by it if "the tables were turned"\(^{105}\). With the mutuality requirement

---

102 \textit{Ibid} p 221.
103 \textit{Ibid} p 223 n 93
104 \textit{Ibid} pp 223 n 96 - 224 n 96 contd.
105 \textit{Ibid} p 225.
added, the selection does not depend upon which party is benefited or disadvantaged by the selection. Here multilateralist jurisdiction-selecting rules come into their own, as they select a governing system of law independently of the result reached by the dispositive law.  

However, the jurisdiction-selecting rule must still use the connections relevant to the legitimate exercise of state coercion. Thus a jurisdiction-selecting rule will comply with the model if it selects the state: (i) in which both parties were domiciled; or (ii) in which both parties were present (or towards which both parties acted). Either of these connecting factors satisfy the requirements of legitimating connection and mutuality.

**People and Place in Multilateralism**

We have noted that multilateralism comprises two techniques (hard and soft) and at least two justificatory theories (comity and the political rights model). It is thus not surprising that there is no single conception of either people or place which is inherent in multilateralism. In fact, a variety of conceptions can be detected.

In the hard version of multilateralism, the concept of place is paramount. Selection of the state to provide the dispositive law is determined by the place (state) in which a particular event occurred. For tort, the relevant event is the suffering of injury. The concept of "people" - being a member of a particular community - is not relevant. This position derives from the conception of states in hard multilateralism. States are seen as essentially territorial entities. The state is supreme within its own borders, able to command domiciliaries and non-domiciliaries alike. Individuals are defined by where they physically are, and not by the communities to which they belong. Concomitant with this,

is that states are only concerned with activities within their own borders and not, at least in so far as the law of tort is concerned, with the welfare of its subjects outside its borders.

In regard to soft multilateralism, the concept of belonging to the community constituted by a state is one of the factors relevant to the question of which state has the closest and most real connection or the most significant relationship with the parties and the dispute. The concept of place is similarly relevant, both in terms of where an action took place and where relationships between people were formed. Why these connecting factors are relevant under soft multilateralism is not an easy question to answer. Territorial sovereignty, which is the controlling value in hard multilateralism, does not provide the answer, as soft multilateralism allows a state to be selected to supply the dispositive law where the relevant actions took place outside the borders of that state.\textsuperscript{107} The answer seems to be that soft multilateralism does not really focus upon the relationship between the state and the parties, but rather on the relationship between the parties themselves.

This is borne out by the case of Dym v Gordon.\textsuperscript{108} The plaintiff and the defendant were both domiciled in New York, but met in Colorado while attending summer school there. The plaintiff was a passenger in a car driven by the defendant when it was involved in an accident in Colorado, causing injuries to the plaintiff. The plaintiff sued the defendant in New York. The court applied the law of Colorado, which had a host-guest statute. One of the reasons the court gave for applying the law of Colorado was that the host-guest relationship between the parties was formed in Colorado. This was seen as more important than the fact that both parties were domiciled in New York. This case shows that soft multilateralism focuses on the relationships which individuals create with each other. These relationships may be created voluntarily, such as people agreeing to share a motor vehicle. Or they be involuntary, such as when the driver of one motor vehicle

\textsuperscript{107} For example, Babcock v Jackson...
\textsuperscript{108} 209 NE 2d 792 (1965).
unintentionally causes injury to the driver of another motor vehicle when their vehicles collide in an accident.

This focus upon the relationships between individuals seems to be a flaw in the soft multilateralist method. Legal rights do not arise out of relationships between individuals but from the laws of a state. Whether or not a state gives an individual an enforceable right in relation to a dispute depends upon the relationship between that state and the circumstances of the dispute. This brings us back to the political rights model, which argues that states are constrained in their ability to coerce individuals. Whereas being present, domiciled, or perhaps even resident\(^\text{109}\) in a state might legitimate the exercise of that state's coercive power, the fact that some kind of relationship between the parties was formed in a state does not seem to do so. We can alter the facts of *Dym v Gordon* to demonstrate this.

The defendant, a New York domiciliary, meets the plaintiff, another domiciliary of New York, in Colorado. The defendant is in Colorado attending summer school. The plaintiff is passing through Colorado while hitchhiking across the country. The defendant agrees to drive the plaintiff to a neighbouring State on a day trip. While in the other state the defendant's vehicle is involved in an accident due to the defendant's negligence and the plaintiff is injured.

In these circumstances, the relationship between the parties would still be located in Colorado, yet the transitory connection of the plaintiff with Colorado would make the selection of Colorado law to the disadvantage of the plaintiff inappropriate. The

\(^{109}\) As domicile requires an intention to remain in a state for an indefinite period (PE Nygh, *Conflict of Laws in Australia*, Butterworths, 6th ed, 1995, p 207), a person may not be domiciled in a state in which he/she has lived for some time and in which he/she has forged significant social attachments. In such cases "ordinary residence" may be a more appropriate connection in determining whether a state can legitimately coerce an individual. A person is ordinarily resident in a state if the person resides there "for settled purposes as part of the regular order of his life for the time being, whether of short or long duration." (*Akbarali v Brent London Borough Council* [1983] 2 AC 343 per Lord Scarman at 343)
legitimizing connecting factors of territory and domicile/residence would allow the selection of the accident state or New York, respectively. In *Dym v Gordon* the selection of Colorado law was legitimate. The accident occurred in Colorado, which meant that both parties were present within its territory. It might also be argued that although the parties were domiciled in New York, the fact that they were resident in Colorado \(^{110}\) meant that Colorado could legitimately apply its law to the dispute\(^{111}\). The law of New York, where the parties were domiciled, could also have been selected.

The analysis of *Dym* and its variant reminds us that Brilmayer's political rights model may not point to a single state which may be legitimately selected to supply the dispositive law. This is because the model employs two alternate connecting factors - territory and domicile - which may point to different states. An inquiry into why Brilmayer uses these two connecting factors reveals that her model is built upon two inconsistent views of the nature of the individual. These views are liberalism and communitarianism.

In the political rights model of choice of law, the connecting factor of territory corresponds to a liberal conception of the individual, and the connecting factor of domicile corresponds to a communitarian conception of the individual. Brilmayer does not make the correspondence explicit in her delineation of the political rights model. However, she has considered the effect of these contradictory philosophies in shaping the law of state\(^{112}\), and what she has said about them in that context can easily be extrapolated to her political rights model of choice of law. This will now be seen.

\(^{110}\) See *supra* note 109. A person who is in a state for the purposes of attending university has been held to be ordinarily resident in that state (*Akbarali v Brent London Borough Council* [1983] 2 AC 343).

\(^{111}\) The fact that the parties were domiciled in New York, would mean the political rights model would also have permitted the selection of New York law.

\(^{112}\) L Brilmayer, *supra* note 101.
The liberal view of the individual is one of a personally autonomous being\textsuperscript{113}. The protection of the autonomy of the individual demands that "obligations should come to rest on an individual by virtue of voluntary assumption"\textsuperscript{114}. A person should be free from state coercion except where his or her voluntary actions legitimate the exercise of state power. The liberal conception of the role of the state is the prevention of harm within the territory of the state\textsuperscript{115}. When a person acts so as to cause harm within the territory of a state, that state is entitled to exercise its coercive power against the individual in response to that harm. For Brilmayer, the normative force of liberalism in the law of jurisdiction can been seen with regard to the doctrine of specific jurisdiction. Under the doctrine, a state can exercise personal jurisdiction over an individual if the activities of the individual impact upon the territory of the state\textsuperscript{116}. Because it is the actions of the individual - things which the individuals can control - which are relevant, specific jurisdiction is compatible with liberalism. The individual, is primarily responsible for his/her own destiny.

Liberalism can also be seen to have informed the use of territory as a connecting factor which justifies the application of the impact state's law under the political rights model of choice of law. A person is guaranteed to be free from coercion by a state, through the application of that state's law, if he/she stays out of the territorial sphere of the state. The choice belongs to the individual. Further, the individual can foresee when he or she is submitting to the law-making authority of a state, because he or she can control that which invokes that authority:- their own actions. The power to foresee the legal consequences of one's actions is vital to the personal autonomy ideal which underpins liberalism.

In contrast to liberalism, communitarianism sees the individual not as a self-contained agent, but rather as a member of a community. It is the community which is the source of

\textsuperscript{113} Ibid p 9.
\textsuperscript{114} Ibid p 19.
\textsuperscript{115} Ibid p 14.
the values which define the individual's identity\textsuperscript{117}. Communitarianism informs the law of jurisdiction through the doctrine of general jurisdiction. This doctrine provides that the state in which a person is domiciled is entitled to exercise jurisdiction over that individual, whether or not the individual has acted in relation to the territory of the state\textsuperscript{118}.

Again, the parallel between this aspect of jurisdiction and the domicile connecting factor under the political rights model is clear. Being domiciled in a state allows the law of that state to be applied to the individual. It is membership of a community, rather than the actions of the individual, which makes the exercise of the coercive power of the state legitimate.

The connecting factor of domicile under the model is antithetical to the liberal principle of personal autonomy. It must be remembered that the requirement of mutuality under the model means that the connecting factor of domicile will only be employed when both parties to the dispute are from the same state. However, this may still have results which are inconsistent with the personal autonomy of the parties. Assume that an accident occurs in state X involving parties both of whom are domiciled in state Y. They have not met each other before the accident. In such a case, the political rights model would permit the selection of the law of the common domicile to the disadvantage of a party who could not have reasonably foreseen that the law of that state would be applied to his or her actions. Where this occurs the individual is coerced not as a result of the exercise of his or her personal autonomy in entering a state, but because of his or her membership of a particular community.

In Brilmayer's political rights model of choice of law, the liberal and communitarian conception of the nature of the individual sit side by side. This is also the case with the choice of law methodology for torts proffered by Jaffey. Although he does not relate his

\textsuperscript{117} Ibid at 9.
\textsuperscript{118} Ibid, at 5, 25 - 26.
thesis back to liberalism and communitarianism, these conceptions of the individual are consistent with his choice of laws rules for torts. These rules mirror the connecting factors endorsed by Brilmayer's political rights model. Jaffey first proposes\textsuperscript{119} that when the parties are from the same state, the law of that state should be applied, as:

> it will nearly always be sensible and reasonable to attribute to a party as his own the standards of justice of the country to which he belongs. With only a few possible exceptions, a party in an international dispute cannot complain of injustice if the justice given to him is that of his own country.

This is consistent with the communitarian conception of the individual as a part of a normative community which has the function of establishing the value system in which the individual operates. What the community holds as just for it members is just for its members wherever they may physically be present.

Where the parties are not from the same state they are located in different value systems. To apply the law of one state to the detriment of the party who is not from that state would not be fair to that party. In these circumstances, Jaffey proposes that the law of the place of the tort be applied\textsuperscript{120}. This protects the expectations of the parties. In particular it protects the expectations of the defendant, who should be entitled to feel safe from adverse consequences in observing the law of the place where he or she acts, and to have his or her liability limited to the level imposed by that law\textsuperscript{121}. This justification is consistent with liberalism as it focuses on the individual, and how the individual acts, in determining the legitimacy of the application of state power to the detriment of the individual.

Given the varied methods and philosophies which fall under the multilateralist rubric, it is not surprising that no definitive concepts of people and place emerge from an analysis of

\textsuperscript{119} Jaffey, \textit{supra} note 27 at 382.
\textsuperscript{121} Jaffey, \textit{supra} note 27 at 385 - 386. Cf Jaffey, \textit{supra} note 120 at 107 where he relies not on the expectations of the parties but uniformity, simplicity and the avoidance of forum-shopping as justifications of the rule.
the American experience. We have noted that there is a division of opinion as to whether choice of law serves to promote the interests of states or to ensure that the parties are treated fairly. With regard to the first of these views, the concepts of people and place serve the function of indicating whether the interest of a state are implicated in a dispute. With regard to the second view, the concepts indicate when the law of a state may be fairly applied in the resolution of a dispute. We have also noted two conceptions of the relationships between states and individuals. The first is the liberal, which stresses the personal autonomy of the individual, and is given effect to by the connecting factor of territory (place). The second is the communitarian, which stresses community membership, and is given effect to by the connecting factor of domicile (people).
Characteristics of Unilateralism

Like multilateralism, unilateralism is a choice of law approach which is spatially-informed rather than substantively-informed. It is premised on the belief that the putative dispositive laws of states are limited in their spatial application and that the selection of the dispositive law is to be made with regard to this limitation. This, however, is where the similarity between multilateralism and unilateralism ends. We have seen how multilateralism defines the spatial operation of all the putative dispositive laws by use of jurisdiction-selecting principles which are external to the content of the putative dispositive laws.

By contrast, unilateralism holds that the spatial limit of each putative dispositive law is found within the content of that law\(^\text{122}\). Unilateralism is thus rule-selecting as it requires an examination of the content of the various putative dispositive laws. More particularly, unilateralism derives the spatial reach of each of the putative dispositive laws through an examination of the policy which has shaped the content of that law. This means that the unilateralism is based upon internally-generated norms. The reach of the law is based upon norms found within the domestic policies of the enacting state, rather than norms such as comity or political rights (which we have seen are justifications put forward in support of multilateralism) which are outside (or external) to the domestic policies of the enacting state. Furthermore, the form of the unilateralist approach which we will consider - governmental interest analysis - is based on internally-generated norms in a special

\(^{122}\) Kelly, *supra* note 33, p 4.
Governmental interest analysis, as we shall see, contains a distinct bias towards forum law. It first and foremost seeks to advance norms held by the forum state and expressed in the domestic law of the forum.

Governmental interest analysis is the intellectual progeny of Brainerd Currie. The method seeks to resolve choice of law problems by establishing which of the putative dispositive laws claim to have application to the circumstances of the multistate dispute. This is done by analysing the policy which is expressed in each of the putatively dispositive laws and determining whether that policy would be advanced by the application of that law to the dispute. If the underlying policy would be advanced, then that state has an "interest" in the resolution of the dispute. Where only one state has such an interest (a "false conflict") then the law of that state is applied. If two or more states have an interest in the resolution of the dispute (a "true conflict"), or if none of the connected states does (an "unprovided for case"), the law of the forum state is applied. This is because there is no good reason for the forum to reject its own law in these circumstances.

The task of determining whether a state has an interest in having its putative dispositive law applied in the resolution of a multistate dispute is two fold. Firstly, the court must identify the policy which the state's putative dispositive law expresses. Second, the court must establish whether that policy would be advanced by the law's application to the particular dispute. Currie stated that in determining these issues, the forum court "should employ the ordinary processes of construction and interpretation". However, this does

125 Ibid.
not amount to a search for the actual or constructive legislative intent of the enacting state as to how the particular law is to apply in the precise circumstances of the dispute.\textsuperscript{126} This is because the legislature almost certainly did not address its collective mind to the question of how the law would apply to situations containing a foreign element.\textsuperscript{127}

Having eschewed a search for legislative intent, how do proponents of interest analysis go about the two-stage process of identifying whether a state has an interest in having its law applied in the resolution of a multistate dispute? The answer to this is coloured by a particular view of the law-making function of states which is imported into both the first and second stages of the inquiry regarding state interests. This view assumes that a state makes laws to promote the welfare of its own people\textsuperscript{128}, rather than people who belong to other states.\textsuperscript{129}

If respect of the first stage of the inquiry, the assumption that a state has a particular concern in promoting the welfare of its own people predetermines the result of the search for the policy which informs the relevant putative dispositive law. The assumption requires the conclusion that where a state's law is expressed to promote the welfare of a particular class of persons, the policy informing that law is the promotion of the welfare of that class of persons who belong to the enacting state. Thus, as explained by Currie, the policy underpinning a Massachusetts law providing that a guarantee given by a married woman in respect of her husband's debts could not be enforced against her, is the protection of Massachusetts married women.\textsuperscript{130}

\begin{itemize}
\item \textsuperscript{126} \textit{Ibid} at 53, 119 - 128.
\item \textsuperscript{127} \textit{Ibid} at 121.
\item \textsuperscript{128} \textit{Ibid} at 54.
\item \textsuperscript{129} Ely, \textit{supra} note 16 at 17.
\item \textsuperscript{130} B Currie, \textit{Selected Essays on the Conflict of Laws}, Duke University Press, 1963, p85. The precise relationship between a person and a law area which Currie envisioned as making that law area an interest in protecting that person is not clear.
\end{itemize}
The result of the first stage of the inquiry, when conducted in light of the overarching assumption, yields the result that the policy which informs any particular law is the promotion of the welfare of a particular class of the enacting state's people. This conclusion predetermines the result of the second stage of the inquiry regarding the advancement of that policy, and makes short work of the question as to whether a state has an interest in a dispute. Once it has been determined that the policy of a state's law is to promote the welfare of a particular class of that state's people, then that policy will be advanced, and that state will have an interest, if the dispute involves a party from that state and the application of the law would work to the advantage of that party. Conversely, the underlying policy of a law would not be advanced, and the state will not have an interest, if that law was applied to the advantage of a party who does not belong to the enacting state.\textsuperscript{131} To return to Currie's example of the Massachusetts law rendering unenforceable guarantees given by married women, the policy informing the law would only be advanced if the married woman guarantor was from Massachusetts, as the policy informing the law was to advance the interests of people from Massachusetts, specifically Massachusetts women who guarantee their husband's debts. The policy of the law would thus not be advanced if the married woman guarantor was not from Massachusetts. Thus Massachusetts will only have an interest in having its law rendering the guarantee unenforceable if the guarantor is from Massachusetts.

One of the first cases to employ a form of governmental interest analysis was \textit{Babcock v Jackson}. Admittedly, as we have seen, the majority also employed soft multilateralism in selecting New York law.\textsuperscript{132} Further, the majority did not use the specialist discourse of characterising the dispute as a "false conflict", a "true conflict" or an "unprovided for case". What the majority did do, however, was to apply the law of the state with the

\textsuperscript{131} R Sedler, \textit{supra} note 11 at 1439 - 1448.

\textsuperscript{132} Refer to the discussion of the case in Chapter 1.
"most interest in the problem." The way the majority went about ascertaining this clearly shows that they were employing a form of governmental interest analysis. The majority sought to identify the respective interests of New York (where the parties resided and where the motor vehicle was registered and insured) and Ontario (where the accident occurred) by reference to the policies which informed those state's respective laws. And in so doing, the majority divined these policies by reference to the assumption made by governmental interest analysis that a state enacts a law to promote the welfare of its own people.

The majority identified the policy underpinning the Ontario host-guest statute as the protection of insurance companies against claims arising out of the fraudulent collusion between drivers and passengers. In accordance with governmental interest analysis, the majority concluded that the policy informing the statute was to protect Ontario insurance companies. It was not the policy of the statute to protect New York insurance companies. As the defendant's motor vehicle was insured with a New York company, Ontario did not have an interest in having its statute applied.

On the other hand, New York had a policy of requiring negligent drivers to compensate their guests. Despite the fact that the accident occurred outside New York, this policy would be advanced by the application of the New York common law rule as both parties were from New York. True to the precepts of governmental analysis, the majority applied the law of New York, as the state with "unquestionably the greater and more direct" interest in the litigation.

---

133 Supra note 58 at 283 (quoting Auten v Auten 124 NE 2d 99 at 102).
134 Ibid at 284
135 Ibid.
136 Ibid.
We have seen that governmental interest analysis is premised on the belief that states have a special interest in protecting "their own"\textsuperscript{137}. The question then arises, what must the relationship between a state and a person be for that person to be the state's "own" and so give that state an interest in the protection of that person. Currie did not make it clear whether the relevant relationship was residence, domicile or citizenship\textsuperscript{138}. The cases which employ interest analysis suggest that some kind of long-term relationship is required. An example of this is \textit{Tooker v Lopez}\textsuperscript{139}, which was identical in all relevant respects to \textit{Dym v Gordon}\textsuperscript{140}. In \textit{Tooker} the court applied governmental interest analysis to select the law of New York, as the law of the common domicile of the parties, rather than the law of Michigan, where the parties met while they were attending college. This is to be contrasted with \textit{Dym} where the court used soft multilateralism to select the law of the place where the relationship between the parties was formed, rather than the law of the common domicile of the parties. A comparison between \textit{Tooker} and \textit{Dym} shows that whereas soft multilateralism focuses on the relationship between the parties to the dispute, governmental interest analysis focuses on the enduring relationships between states and the parties.

Weintraub\textsuperscript{141} and Sedler\textsuperscript{142} argue that it is the states where the parties live which have a stake in the outcome of the litigation as it is in these places that the consequences of the decision to grant or deny recovery will be felt. The plaintiff who is denied compensation, or the defendant who has to pay compensation, may be rendered destitute and become a financial burden upon the state where he/she lives. Therefore the plaintiff's home state will have an interest if its law is "pro-recovery", and the defendant's home state will have

\textsuperscript{137} See, generally, Ely, \textit{supra} note 16
\textsuperscript{138} \textit{Ibid} at 173 n1.
\textsuperscript{139} 249 NE 2d 394 (1969).
\textsuperscript{140} \textit{Supra} note 108. This case was considered in Chapter 1
\textsuperscript{141} RJ Weintraub, "An Approach to Choice of Law that Focuses on Consequences" (1993) 56 \textit{Albany L Rev} 701 at 701 - 710.
\textsuperscript{142} Sedler, \textit{supra}, note 11 at 1439 - 1440.
an interest if its law is "anti-recovery".\textsuperscript{143} The orthodox approach to governmental interest analysis would seem to require that for a state to be particularly concerned with a given person's welfare, and thus have an interest if its putative dispositive law favours him/her, the person must be domiciled or habitually resident in the state.\textsuperscript{144} In certain types of cases - notably motor vehicle injury actions - the "real" defendant is the defendant's insurer. The argument that the state where the insurer is based has an interest in limiting the compensation payable to the plaintiff under the state's anti-recovery law is that the state has a policy of preventing an increase in the insurance premiums payable by its inhabitants.\textsuperscript{145}

In contrast to the concept of belonging to a community, the factor of an event occurring in a particular place plays a much less significant role in governmental interest analysis. Some advocates\textsuperscript{146} of governmental interest analysis do place some importance on "place" by drawing a distinction between loss-allocating rules (for which "place" is irrelevant) and conduct-regulating rules (which do rely on "place"). Loss-allocating rules deal with the distribution of losses which "result from admittedly tortious conduct".\textsuperscript{147} These rules include: statutory caps on damages in wrongful death actions; vicarious liability; and

\footnotesize
\textsuperscript{143} For a statement of this argument, together with a critique, see Brilmayer, \textit{supra} note 22, pp 78 - 79.
\textsuperscript{144} Cf the United States Supreme court case of \textit{Allstate Insurance Company v Hague} 449 US 302 (1981) where Brennan J (White, Marshall and Blackman JJ concurring) at 313 -315 asserted that a state had an interest in the application of its law for the benefit of a person who was employed in the state but who resided elsewhere. This was so even though the state's law, and the issue involved in the dispute, did not relate to the that person's employment, but rather that person's rights against his insurer who provided first-party uninsured motorist coverage (see Juenger, \textit{supra} note 21 at 24 - 25). It should be noted that although the Supreme Court employed the term "interest", it was not employing governmental interest analysis, or even engaging in choice of law. What the Supreme Court was doing was laying down a test to establish whether the law selected by the State court through its choice of law process could be constitutionally applied to the dispute. The Supreme Court was not concerned with the constitutionality of the choice of law process itself. Given this, the case is of little direct relevance for the operation of governmental interest analysis, which was not even the choice of law method employed by the State court.
\textsuperscript{145} See Weintraub, \textit{supra} note 141 at 708.
\textsuperscript{146} See, for example, R Sedler, \textit{supra} note 11 at 1448 - 1452.
\textsuperscript{147} \textit{Ibid} at 685.
immunities from suit\textsuperscript{148}. In accordance with the general principles of governmental interest analysis discussed above, the policy which underpins a loss-allocating rule is deemed to be advanced where the rule would work to the advantage of the party who belongs to the enacting state. This is because it is the home state of the party where the consequences of the resolution of the dispute will be felt.

By contrast, conduct-regulating rules govern people's "primary conduct" and have an "admonitory effect ... on such conduct in the future"\textsuperscript{149}. Because conduct-regulating rules focus upon the actual conduct which gives rise to the dispute, rather than the allocation of loss through granting or denying recovery, it is the place where the conduct occurred, rather than where the loss will be suffered, which has an interest in having its law applied. This usually amounts to a state having an interest in deterring certain conduct from occurring within its territory. Thus in \textit{Babcock v Jackson}, the majority said that Ontario as the place where the accident occurred would have had an interest if the issue being litigated was whether the defendant had exercised the appropriate standard of care in driving the motor vehicle rather than whether the defendant was immune from suit.\textsuperscript{150}

Although giving lip service to the concept of place through the institution of conduct-regulating rules, courts employing governmental interest analysis seldom recognise "place" as giving rise to a state interest in practice. This was demonstrated in \textit{Schultz v Boy Scouts of America Inc}\textsuperscript{151}. This case concerned an action brought in New York against the Boy Scouts of America by the parents of two New Jersey boys who were sexually abused by their scoutmaster while attending a Boy Scout camp in New York. One of the boys had subsequently committed suicide. The scoutmaster taught at the boys' school in New Jersey and the Boy Scouts of America was headquartered there. The case

\textsuperscript{148} \textit{Ibid.}
\textsuperscript{149} \textit{Schultz v Boy Scouts of America Inc} 480 NE 2d 679 (1985) at 684 - 685.
\textsuperscript{150} \textit{Supra} note 58 at 284.
\textsuperscript{151} \textit{Supra} note 149.
was thus a "reverse" *Babcock v Jackson* in that the tort occurred in New York and involved parties who shared a common domicile outside New York. Under New Jersey law, the defendant was immune from the action because it was a charitable institution. Under New York law this defence was not available.

The majority of the court held that the New Jersey statute applied to the action. The majority had no difficulty in identifying that New Jersey had an interest in the outcome of the litigation. As both parties had associated themselves with New Jersey, that state had an interest in ensuring that they accepted both the benefits and burdens of their choice. Further, New Jersey was said to have a policy of encouraging "the growth of charitable work within its borders".152 This policy would be advanced by the application of its charitable immunity statute.

On the other hand, the majority held that New York did not have an interest in the dispute. The majority came to this conclusion because they perceived the issue of charitable immunity/non-immunity as being loss-allocating rather than conduct-regulating. This meant that the policies of the putative dispositive laws of New Jersey and New York were invoked by community membership rather than by the location of conduct. Thus, although the abuse took place in New York, the fact that none of the parties were from New York meant that New York did not have an interest in having its loss-allocating rule applied.153

The shortcomings of the majority's reasoning are spelt out in a strong dissent by Jansen J. Firstly, it seems immoral to deny protection to outsiders within the state simply because they are outsiders. This constitutes "arbitrary and injudicious discrimination"154 his Honour said155:

---

152 *Ibid* at 686.
153 *Ibid* at 685 n 2, 686.
154 *Ibid* at 691.
155 *Ibid* at 691.
There can be no question that [New York] has a paramount interest in preventing and protecting against injurious misconduct within its borders. This interest is particularly vital and compelling where, as here, the tortious misconduct involves sexual abuse and exploitation of children, regardless of the residency of the victims and the tort-feasors.

This argument strikes at the very heart of interest analysis as it asserts that states other than a person's home state can have an interest in that person's welfare.

Secondly, Jansen J argued that the majority was mistaken in focusing upon the New Jersey law alone in characterising the issue of charitable immunity/non-immunity as loss-allocating. Although it was true that the New Jersey statute which conferred charitable immunity upon the defendant was loss-allocating, this did not mean that the New York law of "non-immunity" (sic) should also be characterised as performing an exclusively loss-allocating function.156 While the New York rule did have a loss-allocating function in providing "compensatory justice and protection to persons victimised by wrongdoing"157, the rule also served a conduct-regulating function in "deterring injurious misconduct"158. This aspect of the New York rule meant that as the relevant conduct took place in New York, New York had an interest in the application of its rule to the dispute. In his Honour's words159:

[I]t cannot be denied that this State has a strong legitimate interest in deterring serious tortious misconduct, including the kind of reprehensible malfeasance that has victimized the nonresident infant plaintiffs in this case. Indeed, this deterrence function of tort law, whether it be in the form of imposing liability or denying immunity, is a substantial interest of the locus state which is almost universally acknowledged by both commentators and the courts to be a prominent factor deserving significant consideration in the resolution of conflicts problems.

It is significant that Judge Jansen refers to the acknowledgment of the deterrence interest of the locus state where its rule imposes liability as "almost universal". The majority's judgment shows that, in practice, governmental interest analysis places much greater emphasis upon the loss-allocating function of tort (which is invoked by community

156 Ibid at 690.
157 Ibid at 692.
158 Ibid.
159 Ibid.
membership) than upon the conduct-regulating/deterrence function (invoked by action within the territory).

The premium which the majority places upon belonging to a community is also reflected in its treatment of the public policy issue. The plaintiffs argued that the New Jersey law should not be applied on the basis that it infringed the public policy of the forum. The public policy doctrine operates to exclude the application of a foreign state's laws which "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal"\textsuperscript{160}. However, according to the majority, in order for the exception to be invoked there had to be sufficient connection between the dispute and the forum. The majority thought that the New Jersey statute might well run counter to the public policy of the forum (which had "discarded the doctrine of charitable immunity long ago"\textsuperscript{161}). However, the majority held that there were "not sufficient contacts between New York, the parties and the transactions involved to implicate [New York's] public policy"\textsuperscript{162}.

Again the majority clearly thought that membership of community took precedence over territory to such an extent that the treatment of outsiders who acted within the forum was not a matter of real concern to the forum. And again, Jansen J has the better view. His Honour said that given that the forum thought charitable immunity was "anachronistic, obsolete and senseless"\textsuperscript{163}, it would be "incongruous ... to apply it here to deny compensatory justice to non-residents who were injured while...in New York"\textsuperscript{164}.

Given the pre-eminence of community membership in the identification of state interests, the concepts of false conflicts, true conflicts and unprovided for cases translate this way.

\textsuperscript{160} Ibid at 688.
\textsuperscript{161} Ibid.
\textsuperscript{162} Ibid at 688 - 689.
\textsuperscript{163} Ibid at 694.
\textsuperscript{164} Ibid.
False conflicts arise most commonly when the parties are from the same state\textsuperscript{165}. They also arise when the parties are from different states with the same law\textsuperscript{166}, in which case one state will have an interest in having its law applied to benefit its party and the other state will not have an interest in applying its law to the detriment of its party. The resolution of false conflicts is easy. The law of the only interested state is applied.

True conflicts arise when the parties are from different states and the law of each state will work in favour of its own party\textsuperscript{167}. Unprovided for cases arise when the parties are from different states but the law of each state would work to the disadvantage of its party\textsuperscript{168}. Under governmental interest analysis true conflicts and unprovided for cases are resolved by applying forum law on the basis that in these cases there is no good reason why the forum court should reject its own law\textsuperscript{169}. This solution for true conflicts has caused significant controversy and will be considered in the section on "Unilateralist Philosophy" below.

Having outlined the technique of governmental interest analysis, we now considered its philosophical underpinnings.

\textbf{Unilateralist Philosophy}

The philosophy of the governmental interest analysis form of unilateralism will be discussed in relation to the methodology's three primary characteristics: (i) its concern with the advancement of the interests of the forum; (ii) its conception of state interests in terms of community membership; and (iii) its assumption that states do in fact have

\[\text{\textsuperscript{165} Eg, Babcock v Jackson.}\]
\[\text{\textsuperscript{166} Eg, Pfau v Trent Aluminium Company, supra note 82.}\]
\[\text{\textsuperscript{167} Eg, Rosenthal v Warren 475 F 2d 438.}\]
\[\text{\textsuperscript{168} Eg Erwin v Thomas 264 Or 454, 506 P 2d 494 (1973).}\]
\[\text{\textsuperscript{169} B Currie, supra note 130, p 119.}\]
interest in the outcome of private litigation. The philosophical aspects of these characteristics will be considered in turn.

**Advancement of forum interests**

Governmental interest analysis bears a general resemblance to the comity justification for multilateralism. Both are concerned with advancing the interests of the forum. However, the two methodologies are quite different in their approach.

As was discussed in Chapter 3, the comity doctrine envisions states coordinating their multilateralist choice of law methodologies so that the state with the greatest interest in the dispute will have its law applied regardless of where the dispute is litigated. The forum state uses multilateralist choice of law rules which may involve deferring to the interest of another state (by applying its law) when that other state has a greater interest in the resolution of the dispute than the forum. The forum state (State X) does this in anticipation that other states will reciprocate by applying State X's law when State X has the greater interest. In this way the long-term interests of a state are maximised because its law will be applied in disputes where it has the greatest interest, regardless of where the dispute is litigated.

By contrast, governmental interest analysis seeks to promote the short-term interests of the forum by applying the law of the forum whenever the forum has an interest in the resolution of a dispute. The application of forum law may not be contentious in disputes which involve false conflicts where, by definition, only the forum has an interest.\(^\text{170}\) However, the application of forum law in true conflict - where another state has an interest

\(^{170}\) Of course, in false conflict disputes where the only interested state is a foreign state, the law of that foreign state is applied. This practice may be likened to the comity version of multilateralism in that the forum may be seen as advancing the interest of an interested foreign state (where the forum has no interest) in the hope of reciprocal treatment from that foreign state.
- is more contentious. Unlike multilateralism which treats forum law and foreign law as being on par, governmental interest analysis shows a distinct forum bias.\(^171\)

One possible alternative to automatically applying forum law to the true conflict situation is to ascertain which of the interested states had the greater interest and applying the law of that state. Currie rejected this suggestion on the basis that it would involve the court in the impermissible task of "weighing" the interests of the concerned states. Currie claimed:\(^172\)

> [The] assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy.

A court is thus obliged to follow the lead of its sovereign legislature and apply the law of the forum whenever the forum has an interest.

Another justification for the application of forum law to true conflicts has been expressed by Herma Hill Kay in terms of the principle of "tolerance"\(^173\).

> Toleration ... connotes the acceptance of difference. It entails the allowance or sufferance of conduct with which one is not in accord; it is expressed by the act of tolerating that which is not actually approved. Toleration may be evidenced in a state's policies through the recognition that other states may choose to follow laws or practices different from those the state has established for itself and its inhabitants.

Kay argues that governmental interest analysis' response to the true conflict involves the principle of tolerance in that it allows each state to claim for itself the right to apply its law to a true conflict, while conceding to other states the same right.

The toleration principle which Kay claims underpins governmental interest analysis, and the comity principle which has been used to justify multilateralism, are both based upon the forum state's respect for the legal systems of other states. Comity manifests the respect for another state's laws by giving way to those laws in anticipation of reciprocal

\(^{171}\) Borchers, \textit{supra} note 19 at 563.

\(^{172}\) B Currie, \textit{Selected Essays} pp 182.

\(^{173}\) Kay, \textit{supra} note 124 at 173.
treatment. Toleration manifests respect for another state's laws by the forum applying its own law, but recognising that the other state would be free to apply its own law if the matter were litigated there.\textsuperscript{174}

Having outlined some of the conceptual similarities and differences between governmental interest analysis and the comity version of multilateralism in the advancement of the forum state's interests, we can now state how governmental interest analysis is superior to multilateralism in achieving this end. We have addressed some of the shortcomings of the comity justification for multilateralism previously.\textsuperscript{175} Our discussion of governmental analysis highlights an additional - and probably the greatest - flaw of the comity justification of multilateralism. Unlike governmental interest analysis, the comity justification is unable to explain how multilateralist jurisdiction-selecting rules are able to identify and promote the interests of states.

Under governmental interest analysis, state interests are defined in terms of the advancement of social and/or economic policies which are expressed in the putative dispositive laws of states.\textsuperscript{176} The existence or absence of a state interest is determined by two factors: the content of the putative dispositive law and the connection between the state and the dispute (usually through the residence of the parties). By contrast, because multilateralism is jurisdiction-selecting, the content of the states' putative dispositive laws cannot be taken into account in assessing which of the states has an interest in the resolution of a dispute. With multilateralism, the choice of law process relies entirely upon the connection between the circumstances of the dispute and a particular state which is nominated in the relevant choice of law rule. And as the particular connection is determined \textit{a priori}, without regard to the content of the states' putative dispositive laws, there is no guarantee that the policy which underpins the dispositive law of the selected

\textsuperscript{174} \textit{Ibid} at 173 - 174.
\textsuperscript{175} See chapter 1.
\textsuperscript{176} Currie, \textit{supra} note 130, p 64
state will be advanced by the application of the law to the dispute. Thus, there is no guarantee that the state with the pre-ordained connection has an interest - let alone the greatest interest - in the disposition of the dispute.

Currie called the jurisdiction-selecting choice of law rules upon which multilateralism is based "empty and bloodless thing[s]"\textsuperscript{177}. He said this because they did not express substantive policies of states, but could very well sacrifice those carefully crafted substantive policies "for the sake of a general legal order"\textsuperscript{178}. In so far as multilateralism seeks justification in the advancement of state interests, Currie is correct in his condemnation. The concept of a state interest only has meaning in terms of effectuating state policies. Because jurisdiction-selecting rules operate without regard to the policies expressed in the putative dispositive laws, multilateralism cannot be justified by reference to state interests. Even if all states joined in the cooperative venture of reciprocity by adopting identical choice of law rules, the justification still does not explain how this will advance the substantive interests of the state which has its putative dispositive law selected through the process. The reciprocity version of the comity justification cannot explain how multilateralism gives effect to state interests. It may envision states cooperating with each other, but it does not identify how the states benefit from the cooperation. It is cooperation without purpose. In this respect, governmental interest analysis is clearly superior to the comity version of multilateralism.\textsuperscript{179}

\textsuperscript{177} Ibid, p 52  
\textsuperscript{178} Ibid, pp 52 - 53.  
\textsuperscript{179} This does not mean that multilateralism cannot be justified on other ground or that the advancement of state interests is the only norm that should shape the choice of law process. Recall, for example, Brilmayer's political rights model (discussed in Chapter 1) which has been used to justify multilateralism and which argues for a constraint upon a state's pursuit of its own interest in the choice of law process.
The nexus between community membership and state interests

In this section we consider the central tenet of governmental interest analysis which provides that the policy underpinning the putative dispositive law of a state will only be advanced, and hence will give rise to a state interest, when that law would work to the advantage of a party who "belongs" to that state. In particular, we will examine the possibility that a state may have an interest in regulating conduct which takes place within its borders, either by encouraging conduct which it regards as desirable or deterring conduct which it regards as undesirable. The question whether a state can have an interest based upon the concept of "place", as well as the concept of "people", is significant in two respects.

The first relates to governmental interest analysis. If a state where conduct occurs has an interest, then the reverse Babcock scenario of an accident occurring in the forum involving persons who share a common domicile outside the forum\(^\text{180}\) is converted from a false conflict into a true conflict. This will result in the increased application of forum law.

The second concerns a possible basis for the reciprocity justification for the hard multilateralist choice of law rule for tort, which requires the application of the law of the place of the tort. It might be argued that by applying the rule, the forum state (State X) advances the interest of the state where the alleged tort occurred (by allowing that state to regulate conduct within its borders) in anticipation of other states applying State X's law in regard to alleged torts occurring within State X. This explanation is only consistent with hard multilateralism, which applies the law of the place of the tort\(^\text{181}\). The

\(^{180}\) Eg Shultz v Boy Scouts of America, supra note 149.

\(^{181}\) Where the tort consists of conduct taking place in one state and loss occurring in another, the theory, so stated, does not identify one of the states, and not the other, as having an interest. This is because an event takes place in each of the jurisdictions (harm causing conduct in one and harm suffered in another). If a state has an interest in controlling the events which occur inside its borders then both the state of acting and the state of injury must be said to have interests, and the choice made between them under a
proposition cannot justify soft multilateralism, as soft multilateralism can allow the selection of the law of a state other than the state where the tort occurred.

It cannot be doubted that states are concerned with the events which occur within its borders. The fact that states have a system of criminal law is proof of this. The state imposes criminal sanctions upon behaviour which it wishes to stamp out. However, the challenge for a choice of law methodology which uses as its normative basis the advancement of state interests is to show that the state wishes to control behaviour within its borders through its body of tort law.

Some support for the view that states do have an interest in having their tort law applied to conduct occurring within their borders is found in the draft bill for choice of law in tort prepared by the English and Scottish Law Commissions ("Joint Commissions"). The general rule envisaged by the Joint Commissions is that the law of the state where the injury was suffered is prima facie applicable, but that this can be displaced, where "it would be substantially more appropriate" to do so, in favour of the law of the state with "which the tort ... had the most real and substantial connection".182 Such displacement would occur where the place of the tort was fortuitous, or where the parties were in a pre-existing relationship or were domiciled or resident in the same state.183

This soft multilateralist approach certainly does not provide great support for the view that a state has an interest in having its tort law applied to conduct occurring within its borders. Rather than relying on the place where the injury-causing conduct occurred, it focuses on (i) the law of the place where the injury was suffered or (ii) the "people" factors of relationships between parties and states. However, what is significant about the Joint multilateralist technique must rely on some explanation other than state interest to choose between them.

182 Joint Commissions' Report, supra note 8, para 3.18, cl 2 (4) of the draft bill attached to the Report. ("Joint Commissions' Draft Bill").
183 Joint Commissions' Draft Bill, supra note 182, cl 3.8.
Commissions' recommendations is the proposed exception\textsuperscript{184} to the general rule in the case of "conduct" the "most significant elements" of which took place in a part of the United Kingdom. In such cases, the law of that part of the United Kingdom is to be applied.\textsuperscript{185} The effect of this exception is twofold. Firstly it reverses the rule that the place of injury, and not the place of acting, provides the dispositive law. Secondly, it does not allow for the displacement of the law of the relevant part of the United Kingdom even if the tort had its most real and substantial connection with another state on the grounds, for example, that both parties were domiciled or resident in that other state.

In justifying this exception, the Joint Commissions focus upon the parties, referring to their expectations (or at least those of the defendant).\textsuperscript{186} This explanation is unconvincing, as if accepted, it would require that there be an inflexible rule, applicable to torts occurring either within or outside the United Kingdom, that the law of the state where the injury causing conduct should apply. The ideal of fulfilling the expectations of the parties would regard as irrelevant whether the place of acting was inside or outside the United Kingdom. Nevertheless, the Joint Commissions saw fit to advocate two choice of law regimes, one for torts based on conduct occurring within the United Kingdom, and one for torts based on conduct occurring outside the United Kingdom.\textsuperscript{187}

The only justification for a separate rule for torts arising from conduct within the United Kingdom must relate to the interests, or perceived interests, of the particular states which make up the United Kingdom. The Joint Commissions do in fact hint at this. They state

\textsuperscript{184} This proposal was rejected in the Private International Law (Miscellaneous Provisions) Act 1995, s 9(6) of provides that the same tort choice of law regime is to apply irrespective of whether the relevant events occurred within or outside the United Kingdom. See P Kincaid, "Jensen v Tolofson and the Revolution in Tort Choice of Law" (1995) 74 Can Bar Rev 537 at 554.

\textsuperscript{185} Joint Commissions' Report, supra note 8, para 3.16; Joint Commissions' Draft Bill, supra note 182, cl 3 (1).

\textsuperscript{186} Joint Commissions' Draft Bill, supra note182, cl 3.16 - 3.17.

\textsuperscript{187} Also see, P North, "Torts in the Dismal Swamp: Choice of Law Revisited" (1991) 42 NILQ 183 at 197, who argues that the distinction "simply does not stand up to detailed analysis in terms of fairness and justice".
that the exception was borne out of a concern that without the exception enterprises in the United Kingdom which act in accordance with the law of the relevant part of the United Kingdom, but which cause environmental damage outside the United Kingdom, may be liable under the law of the place of injury.\textsuperscript{188} The implication is that the carrying out of the enterprise in accordance with the law of the relevant part of the United Kingdom is for the benefit of that state (by generating wealth or employment, perhaps).

The Joint Commissions also suggested a special rule for the tort of defamation based on statements made in the United Kingdom, which are simultaneously or subsequently published abroad. The Joint Commissions proposed that defamation proceedings in regard to such statements be governed by the law of the forum\textsuperscript{189}, rather than the place of publication, which would otherwise have been applicable\textsuperscript{190}. The exception is designed to cover cases where the statement is not defamatory by the domestic law of the United Kingdom, but would be defamatory under the law of the place of publication. The Joint Commissions explained the defamation exception in terms of a "legitimate public interest in the media and individuals being free to say what they wish within the limits of our domestic law"\textsuperscript{191} which is essential to "the proper functioning of public institutions"\textsuperscript{192}. This exception is very clearly based upon a perceived interest a state has in governing the actions occurring within its borders (in this case in promoting free speech within the state). It is very curious, however, that the law which is applied in the law where the action is heard in the United Kingdom, rather than the law of the part of the United Kingdom where the statement is made.\textsuperscript{193}

\begin{footnotesize}
\begin{enumerate}
\item Joint Commissions' Report, supra note 8, para 3.16.
\item Joint Commissions' Report, supra note 8, pars 3.32 - 3.33; Joint Commissions' Draft Bill, supra note 182, cl 3 (2).
\item Joint Commissions' Draft Bill, supra note 182, cl 3.31.
\item Joint Commissions' Report, supra note 8, para 3.33.
\item Ibid, para 3.31.
\item PB Carter, "Choice of Law in Tort and Delict" (1991) 107 LQR 405 at 416. The same result is yielded by the Private International Law (Miscellaneous Provisions) Act, s 13, which preserves the common law tort choice of law rule for defamation actions. This
\end{enumerate}
\end{footnotesize}
The recommendations of the Joint Commissions that special choice of laws rules exist in regard to activity which occurs within the United Kingdom suggests that the belief that a state has an interest in having its tort law applied to regulate conduct within its borders is a legitimate one. It is easy to construct arguments that some laws do effect a state's interest in regulating the conduct which occurs in the state's territory. Laws which impose liability for conduct which causes injury to others, can be seen as having a deterrent effect. The state regards the conduct as undesirable and, as such, should be discouraged. Conversely, the state may regard some conduct as desirable, even if it causes injury, and should be encouraged by making it immune from liability. However, it is equally plain from the discussion which follows that whether such an interest actually exists in any particular case depends upon the content of that state's law.

There are some laws which are clearly not aimed at regulating conduct within the territory of the relevant state. These are laws which have been identified above as “loss-regulating”. Such laws might exempt or reduce the liability of a party who causes injury to another. These laws are not designed to encourage the injuring conduct, but are concerned with how the loss is to be borne. For example, laws which reduce the liability of tortfeasors for injuries caused in motor vehicle accidents are not designed to encourage careless driving, but to counteract spiralling insurance premiums. In the case of these laws, it is not the occurrence of the accident within the state, but rather the residence of the insurer within the state, which gives the state an interest in having its law applied to the dispute.

choice of law rule limits the defendant's liability to the level of liability imposed by the dispositive law of the forum.

194 The Joint Commissions' hypothetical of the factory in the United Kingdom which acts lawfully by the law of the relevant part of the United Kingdom, but causes environmental damage outside the United Kingdom, is an example of this.
For example, in *Hurst v Leimer*\(^{195}\) the Ontario Court (General Division) considered the scope of a provision of the Ontario *Insurance Act* which limited the recovery in tort of persons injured in motor vehicle accidents in Canada and certain other jurisdictions. The case involved a motor vehicle accident in British Columbia involving vehicles which were insured in British Columbia. The plaintiff, a resident in Ontario, was injured when the vehicle in which he was a passenger was hit by a vehicle driven by the defendant, a resident of British Columbia. The court held that the relevant provision of the Act did not apply to the plaintiff's action for two reasons. The first was that the Canadian (multilateralist) choice of law rule for torts which had been newly formulated by the Supreme Court in *Tolofson v Jensen*\(^{196}\) meant that the law of British Columbia as the law of the locus state applied\(^{197}\). The second reason, which is the relevant one for our purposes, was that as a matter of statutory construction, the provision was "confined to regulating Ontario insurers and motor vehicle policies issued in Ontario"\(^{198}\). Cumming J reached this conclusion on the basis that the policy underpinning the provision was to increase the no-fault, first-party benefits payable to persons injured in motor vehicle accidents, without increasing motor vehicle insurance premiums payable by the Ontario populace. This would be done by curtailing the rights of injured parties to sue in tort and instead giving such parties increased no-fault benefits.\(^{199}\) As the plaintiff was probably not entitled to receive no-fault benefits in respect of the accident\(^{200}\), to deny him the right to sue in tort would defeat the intention of the no-fault scheme.\(^{201}\) To allow the plaintiff to sue in tort "would not influence automobile insurance premiums in respect of Ontario

---

196 Supra note 5.
197 Supra note 195 at 171 - 172.
198 Ibid at 177.
199 Ibid at 176 - 177.
200 Ibid at 179.
201 Ibid at 180.
motor vehicle liability policies" because the defendant's vehicle was insured in British
Columbia. In governmental interest analysis terms - which the judge did not use - Ontario
did not have an interest in having the provision applied to the dispute. The judge left open
the question of what the result would be if the accident involved a motor vehicle insured
under an Ontario insurance policy, in which case the policy behind the provision would be
invoked even if the accident occurred in British Columbia. In such a case the choice of
law rule of applying the law of the locus state and the intent of the Ontario Act would be in
conflict. 203

What this case demonstrates is that even if states do have an interest in regulating conduct
within their borders, states may have other interests in regulating the consequences felt
within their borders, which arise out of conduct occurring outside their borders. For
example, as in Hurst v Leimer, a state may perceive itself as having an interest in keeping
down the level of insurance premiums paid by its residents. In this case, the place of the
accident will not be important. Rather, the residence of the defendant's insurer will be.
The point of all this is that state interest cannot simply be equated with territoriality. This
being so, the content of a state's law will be all important in determining whether or not a
state has an interest in applying its law to the resolution of the dispute. In this respect, the
rule-selecting methodology of unilateralism is far superior to jurisdiction-methodology of
multilateralism in employing the concept of state interest in the choice of law process. We
have noted, however, that the governmental interest analysis form of unilateralism has not
given significant recognition to the interests of states in regulating conduct occurring
within their borders through laws which are intended to encourage or deter certain types of
conduct. 204

202 Ibid.
203 Ibid at 181.
204 See the discussion of Schultz v Boy Scouts of America, supra.
Do states have interests at all?

There are those, however, who argue that states do not have interests in the outcome of private law disputes. As Kegel puts it, “[t]he state has an altruistic rather than egoistic interest in private law, concerning itself with a just ordering of private life.” It is obvious that states with connections to the circumstances of a dispute are not interested in the outcome of the dispute in the same way that the parties to the litigation are. However, this is not the way in which the proponents of governmental interest analysis use the term “interest”. A state is said to have an interest in the outcome of a dispute when the policy under its putative dispositive law would be advanced by the application of the law to the dispute.

Of course, scholars who support Kegel’s view might argue that the content of a specific law of a state reflects that state’s “impersonal standard of justice”. No doubt a state does consider what is “just” in formulating the content of its laws. Yet it cannot be denied that states do not enact laws simply to achieve justice in the abstract, but also to achieve specific ends. Take for example, the Quebec statute considered in Hunt v T&N plc. In the context of the case, this “blocking statute” purported to prohibit the removal from Quebec of certain business records of a Quebec company pursuant to the order of the court of another province. The Quebec legislature did not enact the statute in order to achieve some “impersonal standard of justice” but to implement a specific policy of

---

205 For a sample of scholars subscribing to this view, see Kay, supra note 124 at 79 - 90.
206 Kegel, supra note 25 at 183.
207 Jaffey, supra note 120 at 100.
208 Business Concerns Records Act RSQ 1977, c D-12
protecting Quebec businesses from foreign judicial interference by preventing certain
documents from being used against Quebec businesses in litigation outside Quebec.\(^{211}\)

Similarly a specific purpose underpinned the provisions of certain Queensland
legislation\(^{212}\) considered in *Goryl v Greyhound Australia Pty Ltd*\(^{213}\). These provisions
were enacted in response to Queensland residents being denied compensation under New
South Wales law in respect of bodily injury suffered in motor vehicle accidents in New
South Wales. The effect of the Queensland provisions was twofold. Firstly, Queensland
insurers were required to “top up” the level of compensation payable to Queensland
residents under the law of the accident state to the level which would have been payable
under Queensland law had the accident occurred in Queensland. Secondly, the provisions
limited the amount of damages payable to a person resident in an Australian jurisdiction
other than Queensland who was injured in a motor vehicle accident in Queensland to an
amount which would be payable under the law of the jurisdiction in which they were
resident if the accident had occurred there.\(^{214}\) The Queensland legislation evinced a clear
policy of promoting the welfare of Queensland residents and affording non-residents the
same measure of concern they would be afforded by their own states.

The Quebec and Queensland legislation just considered plainly contradicts the belief that
states do not enact laws for specific purposes. This being so, it is sensible to talk about
states having an interest in furthering the policies which underpin the laws. And if a state
enacts a law which is intended to determine the outcome of certain disputes, then it is
reasonable to speak of the state being "interested" in having its law apply to one such
dispute.

\(^{212}\) *Motor Vehicles Insurance Act 1936* (Qld), ss 16, 17 and 20.
\(^{213}\) *Supra*, note 4.
\(^{214}\) See C Moore, “Our Fragmented Federation: Forum Bias and Forum Shopping in
The Quebec and Queensland legislation considered also supports the proponents of governmental interest analysis in their assertion that states do perceive themselves as having a special interest in protecting "their own" in certain contexts. The term "perceive" has been used as simply because a state regards itself as having such an interest, does not mean that such an interest is legitimate when the state is a part of a federal polity. The perceived interest may promote the welfare of the members of that state at the expense of members of other states in the same federation. In both *Hunt* and *Goryl* the relevant statutory provision was not given effect because it contradicted a federal imperative of the applicable constitution.215

Of course, these statutes only show that at times states regard themselves as having a special interest in protecting their own residents. These statutes do not show that states always have a special interest in advancing the welfare of their own residents, which is the central tenet of governmental interest analysis. A state may enact a statute which provides that the contributory negligence of the plaintiff results in an apportionment of liability between the plaintiff and the defendant, rather than provide a complete defence to the defendant. There is nothing on the face of the statute which shows that the policy of the statute is to only benefit plaintiffs who are residents of the enacting state. Thus with this type of law, governmental interest analysis must look outside the law itself in order to come to the conclusion that the policy underpinning the law is to promote the welfare of its residents only. And in this context, the conclusion seems unwarranted, as the law appears

215 In *Hunt* the Canadian Supreme Court gave constitutional force to the principles of "order and fairness" identified in *Morguard Investments Ltd v De Savoye*, supra note 74. The Quebec Act was denied operation in relation to litigation initiated in the other Canadian provinces. The principles of "order and fairness" were used in *Morguard* to modify the common law rule in respect of recognition and enforcement of a sister province's judgment. In *Hunt* these principles were used to prevent a "pre-emptive strike" by the Quebec legislature to impede litigation initiated in another Canadian province (*Hunt*, supra note 209 at 43). In *Goryl*, supra note 4, the provision of the Queensland Act which purported to limit damages payable to non-Queensland residents to the level payable under the law of their own state was held invalid as it contravened s 117 of the Australian Constitution, which prohibited States from discriminating against residents of other States.
to be one which, in Kegel's terminology, enacts a "just ordering of private life". The
determination of the spatial application of the law based on an alleged state interest would
appear unjustified.

Taking stock, then, one can say that any choice of law methodology which is built on the
concept of state interest must, like governmental interest analysis, be rule-selecting. Some
rules may be territorial in scope, in that they seek to discourage conduct within the
territory of the state which the state thinks objectionable, or encourage within the territory
of the state conduct which the state regards as desirable. By contrast, some laws are
clearly intended to operate upon and for the benefit of a certain class of resident of the
state. Laws which limit the liability of defendants in activities in which they are covered
by insurance, and so stabilise insurance premiums, are examples of these.

**People and Place in Unilateralism**

We have noted that in formulating the concept of state interests, governmental interest
analysis, in practise if not in theory, places a premium on community membership, rather
than the location of events. States are viewed not as territorial units but as entities which
are fundamentally concerned with the welfare of their own people, wherever those people
may physically be present. Furthermore, in the governmental interest analysis
methodology, the main players in the choice of law process are states. It is the states who
are perceived as having a stake in the outcome of the choice of law process. The process
is concerned with which state will have its policy advanced through its application of its
law to the dispute. We also noted that the methodology places a premium upon advancing
the domestic policies of the forum where the forum and a foreign state both have an
interest in the outcome of the litigation.
Under governmental interest analysis, fairness to the parties involved in the dispute does not come into the equation. These individuals are used as means to the end of effectuating state interests. There is no attention given to the question of whether it is fair to do so in the particular case before the court. It should be remembered that the political rights model of multilateralism used community membership as justification of applying a state's law to the disadvantage of a party. By contrast, governmental interest analysis uses community membership as a justification for applying a state's law to the advantage of a party. Thus in true conflicts, forum law can be applied to the disadvantage of the non-forum party without any attempt to legitimate this outcome.

Governmental interest analysis not only elevates the concept of "people" over that of "place", it also elevates the concept of "people" over that of "person", that is an individual who deserves to be treated fairly.
Chapter 3
The Substantive Law Method

Characteristics of the Substantive Law Method

What distinguishes the substantive law method from both multilateralism and unilateralism is that it is "value oriented" rather than "spatially oriented". To use the discourse of our dichotomies, it is substantively-informed rather than spatially-informed. We have seen how multilateralism defined the spatial reach of the putative dispositive laws of states by reference to the connection between those states and the circumstances of the dispute. We have also seen how unilateralism defined the spatial reach of the putative dispositive laws of states by reference to the policies informing these laws and the connection between the enacting state and the circumstances of the dispute. By contrast, the substantive law method is premised on the belief that the choice of law process should be about creating "substantive rules that are responsive to interstate and international realities", and which "further the policy underlying the substantive field involved". According to Juenger - the leading contemporary advocate of the substantive law method - this can be done by the courts themselves formulating a supranational body of superior dispositive rules which apply directly to multistate disputes without the intervention of choice of law rules. This supranational body of law would consist of high quality tort rules, contract rules and family law rules, and so on, which a court would apply to a multistate dispute of the relevant type. These rules would take the

216 Also known as "result-selectivity" or the "teleological" approach. See Juenger, supra note 10, pp 172 - 173.
218 Ibid, p169.
220 Ibid, p 45.
place of, and need not be identical to, what would otherwise be the putative dispositive laws of the states connected with the dispute. The actual dispositive laws of states would operate "not as immutable precepts, but simply as models which the forum court should take into account in framing an appropriate multistate rule of decision".  

As if realising that this supranational approach to choice of law is too ambitious to be actually implemented, Juenger formulates a more modest version of the substantive law method which does not rely upon a pre-existing body of supranational law. According to Juenger:

> [t]he large majority of cases reveals a simple clash between two rules of decision, one of which is clearly superior to the other...The parties to a multistate litigation will avoid complicating their cases, and therefore refrain from relying on rules of a legal system that lacks a sufficiently close relationship with their law suit. If nothing else, the enlightened self-interest of counsel ought to assume that the range of potentially applicable laws is narrowed to the point where the choice is fairly easy.

Juenger thus contemplates the substantive law method as being applied in practice by selecting and applying one of the putative dispositive laws of the connected states on the basis of the relative superiority of those laws. Juenger proposes that the choice of law process be conducted through application of "alternative reference rules". The alternative reference rule he suggests for multistate torts requires consideration of the putative dispositive laws of (i) the state where the injury occurred; (ii) the state where the injury-causing conduct occurred; and (iii) the home states of the parties, and the application of the law "that most closely accords with modern tort law standards".

It must be noted that even with its use of "connecting factors", the more modest form of the substantive law method remains substantively, rather than spatially, informed. The

---

221 *Ibid*, p 192. Strictly, Juenger is referring to "foreign" laws in this context. However, there seems no reason why forum law could not also be used in this way.
224 *Ibid*, pp 750 - 751. This selection is to be made for each issue raised in the dispute.
connecting factors do not perform the same function as they do in multilateralism or unilateralism. Under multilateralism and unilateralism it is the precise connection between a state and the circumstances of the dispute which leads to the selection of that state's dispositive law. Under the substantive law method, the selection of the dispositive law is made without regard to the precise connection between the enacting state and the circumstances of the dispute. The connecting factors are used only to limit the range of putative dispositive laws which need to be examined in order to ascertain which is the superior.

Having looked at the spatially-conditioned/substantively-conditioned dichotomy, we now proceed to examine how the substantive law approach relates to the other classificatory dichotomies. Like unilateralism, the substantive law method is rule-selecting. The selection of the dispositive law is made with regard to the content of the putative dispositive laws of the connected states. But whereas unilateralism has regard to the content of these laws as a step to advancing the governmental policies of the connected states, the substantive law method examines the content of the putative dispositive laws in order to realise substantive policies which are not determined by the governmental policies of the connected states. It is in this way that the substantive law method shares a common characteristic with multilateralism. Both are based upon externally-generated norms. Both methodologies seek to achieve goals which are located outside the policy preferences of the connected states. With multilateralism this goal is either comity to other states or respecting the political rights of the parties to the dispute. With the substantive law method, the goal is the selection of the law which provides the best measure of substantive justice to the parties.

In our analysis of multilateralism and unilateralism in previous Chapters, we saw how the proponents of these respective methodologies each claimed the case of Babcock v Jackson
as embodying their methodology. The substantive law method, too, makes this claim.\(^{225}\)

In writing the majority judgment, Fuld J referred to the requirement that the choice of law process achieve "[j]ustice, fairness and 'the best practical result'"\(^{226}\), as well as the importance of protecting parties to a multistate dispute against "'unfair and anachronistic treatment'"\(^{227}\). Judge Fuld, although somewhat restrained in his language, clearly thought that the New York law which required a host to compensate his or her guest for negligently inflicted injury, was clearly superior to Ontario's statute, which gave the host immunity from suit in respect of such injury. His Honour said that the choice of law question had "never been presented in so stark a manner as in the case before us with a statute so unique as Ontario's."\(^{228}\)

Although \textit{Babcock v Jackson} did not explicitly apply the substantive law method, other cases have. These are cases which have employed Professor Robert Leflar's "choice-influencing considerations"\(^{229}\). According to Leflar, the courts should select the dispositive law to govern the dispute having regard to the following five factors: (i) predictability of results; (ii) maintenance of interstate and international order; (iii) simplification of the judicial task; (iv) advancement of the forum's governmental interests; and (v) application of the better rule of law\(^{230}\). It is true that only the last of these factors - selection of the better law - is on all fours with the substantive law method. However, where Leflar's method has been applied in multistate tort cases, it is on the better law factor which the courts have primarily relied.\(^{231}\)

\(^{226}\) \textit{Babcock v Jackson, supra} note 58 at 283
\(^{227}\) \textit{Ibid} at 282.
\(^{228}\) \textit{Ibid} at 285 (emphasis added).
\(^{229}\) See the cases listed in Juenger, \textit{supra} note 10, p 119 n 728.
\(^{231}\) Borchers, \textit{supra} note 19 at 364. Although the courts which have employed Leflar's choice-influencing considerations in tort cases do occasionally refer to the fourth factor of
The courts employing Leflar's method have not attempted to establish comprehensive guidelines, suitable for application in all circumstances, for determining which of two contending laws is the better one. What emerges from the better law jurisprudence, however, is a vehement dislike by the courts for host-guest statutes. The courts have consistently preferred the forum's common law rule, which allowed the guest to recover where the host was guilty of negligence *simpliciter*, over the accident state's host-guest statute, which allowed the guest to recover only where the host was guilty of gross negligence. The primary reason for the courts so holding is their view that host-guest statutes are an anachronism, an "unrepealed remnant of a bygone age" and "a drag on the coattails of civilisation". The common law position was regarded as the superior in the contemporary context.

In addition to host-guest statutes, Juenger suggests that rules of interspousal immunity and arbitrary caps on damages for wrongful death, are clearly inferior rules of law. However, Juenger asserts that not every law which maximises the amount which the plaintiff is entitled to recover is the better law. Yet if one is denied the polar star of maximum recovery, how is one to ascertain which state's view of an appropriate tort rule is "better" or "best"? We have seen how Juenger formulates his alternative reference rule for torts in terms of "modern tort law standards". However, it will rarely be the case that of two contrary laws one will be clearly modern and the other clearly anachronistic. For the advancement of the forum's governmental interests, because plaintiffs usually sue in a forum which has a pro-recovery law, it is only rarely that the fourth and fifth factors point in opposite directions. See Juenger, *supra* note [multistate justice], pp 119 -120. Further, where the court has relied on the fourth factor in making its selection, it has sometimes defined the governmental interest of the forum in such a way that it resembles the better law factor more closely than Currie's concept of a state interest. Thus in *Milkovitch v Saari*, 203 NW 2d 408 (1973) at 412 the fourth factor was said to include the interest of the forum as a justice-administering state "not [to] be called upon to determine issues under rules which, however accepted they may be in other states, are inconsistent with [the forum's] concept of fairness and equity".

232 See *Clark v Clark* 107 NH 351 (1966), and *Milkovitch v Saari, supra* note 231.
233 *Clark v Clark supra*, note 232 at NH 355, A 2d 209.
instance, in recent times in Australia the choice confronting the court has been between the
common law rule not limiting damages for personal injury in motor vehicle accidents and
statutory rules which limit recovery in respect of non-economic loss. Neither rule is
clearly outmoded, so one finds it difficult to say which is the better on any objective basis.
Juenger clearly prefers the common law rule on the basis that recovery under the accident
state's statutory rule was "meagre". The reason Juenger gives in this context certainly
undermines his denial that maximum compensation is the better law.

The Philosophy of the Substantive Law Method

The substantive law method is premised upon the belief that the choice of law process,
like other areas of law, should "further the ends of material justice". In response to
those who would argue that multistate choice of law should not be concerned with this
value, Juenger argues:

"It is truly astonishing that courts and legal writers should believe that the conflict
of laws bears no responsibility for the outcome it produces in particular cases. There is no other field of law in which one could respectably argue that substantive
results are irrelevant, that what matters is doctrine, and that this doctrine cannot be
evaluated by how it works in practice.

Juenger implores us to remember that multistate disputes involve real people.
Accordingly, the choice of law process should serve the interests of those affected by
multistate disputes rather than articulate abstract assumptions about the allocation of law-
making power which informs multilateralism and unilateralism. Where one of the
putative dispositive laws would "offend the court's sense of justice" then a court

---

236 For example, Stevens v Head supra note [x].
237 Juenger, supra note 235 at 31.
238 Juenger supra note 10, p 199.
239 Juenger, supra note 81 at 11.
240 Ibid.
241 Juenger, supra note 10, p 164.
242 Ibid.
should not be forced to apply it because of some metaphysical notion of the spatial reach of that law through the concept of "conflicts justice" or "governmental interests".

People and Place in the Substantive Law Method

The concepts of being a member of a community or being in a particular place are of little significance in the substantive law method. These concepts might connect the participants in multistate disputes to particular states whose laws will need to be considered in the choice of law process. However, the selection of the dispositive law is made on the basis that no one connection is more significant than any other.

The substantive law method focuses upon the individual. In particular, the method responds to a perceived powerlessness of the individual to avoid the application of sub-standard tort law in the multistate setting. This sets the substantive law method apart from unilateralism and multilateralism.

We have seen how unilateralism focuses upon the advancement of the governmental interests of states at the expense of the individual. Even if one accepts Currie's assertion that a state's laws are the product of the democratic processes of that state, this alone cannot justify the application of a state's law to the detriment of an outsider. We have also seen how Brilmayer's political rights model of multilateralism uses the concepts of people and place to justify the application of a state's law to the detriment of a party. According to Brilmayer, a person who was domiciled or present in a state must be regarded as having submitted himself or herself to that state's authority. By stark contrast, Juenger rejects both the concepts of people and place as justifying the application of sub-standard law.

\[243\] Ibid, p 200
In Juenger's view, the individual is virtually powerless in shaping the laws of a state, even the laws of the state to which he or she belongs. He uses the example of the host-guest statute and the statutory caps on damages for wrongful death as examples of how the law-making process can become hostage to the interests of powerful lobby groups such as the insurance industry. Juenger regards the New South Wales law considered in *Stevens v Head* as "relatively innocuous". He nevertheless questions its fairness in redistributing wealth away from the "victims' community" (by giving them reduced damages awards) and towards the "motoring community" (by lowering their insurance premiums).

What has just been said shows Juenger's clear rejection of the concept of community membership as legitimising the application of sub-standard tort law. Implicit in his thesis is the rejection of the notion that the concept of place legitimates their application. If the application of a sub-standard law to a person who is a member of the enacting state is unfair, then it is even more unfair to apply the law to the detriment of an outsider who may be present within the state, but who lacks "enduring contacts" with the state. Further Juenger reminds us that neither victims or tortfeasors plan to have accidents. What follows from this is that they do not plan where to have accidents. Thus it cannot be said that a person by their presence in the accident state voluntarily submits to the application of that state's law. It is still unfair, therefore, to apply the *sub-standard* law of that state to the detriment of such a person.

---

244 *Ibid*, pp 117 - 118.
245 *Supra* note 4.
247 *Ibid*.
248 *Ibid*.
249 *Ibid* n 7.
In Chapters 1, 2 and 3, we saw how the American experience has reflected multilateralist, unilateralist and substantive approaches to choice of law in tort. We also saw how the concepts of people and place occupy different roles in each of these approaches. In respect of the political rights version of multilateralism (which we saw was the most persuasive), being a member of a particular state, or acting within a state, was seen as a connection between an individual and a state which legitimated the application of that state's law to the detriment of the individual. With regard to the governmental interest form of unilateralism, we saw that being a member of a state or, less frequently, acting within a state, may invoke a policy underpinning that state's law so as to give the state an interest in having its law applied to the advantage of that individual. Lastly, we saw that with the substantive law method, the connection between an individual and a state formed through membership or presence serves a function of convenience; these connections limit the states the laws of which a court should examine in order to find the superior law. We saw that with the substantive law method, the concept of person outranked those of people or place.

In this Chapter we will examine the three most important decisions in shaping the common law\(^{250}\) choice of law rule for multistate torts employed by the English courts. These decisions are: *Phillips v Eyre\(^{251}\)*; *Chaplin v Boys\(^{252}\)*; and *Red Sea Insurance v Bouygoues*

---

\(^{250}\) It must be noted that the common law rule for choice of law in tort, other than defamation actions, has been displaced by the *Private International Law (Miscellaneous Provisions) Act 1995*.

\(^{251}\) *Supra*, note 7.

\(^{252}\) [1971] AC 356.
Each of these cases will be compared to the multilateralist, unilateralist and the substantive law approaches considered in the earlier Chapters. We will also ascertain how the decisions employ the concepts of people and place. In doing this, a deeper appreciation of the policy factors which shape the evolving choice of law rule for multistate torts will be achieved.

**Phillips v Eyre**

The earliest leading formulation for the disposition of multistate torts was made in *Phillips v Eyre*\(^{254}\). In delivering judgment for the Court of Exchequer Chamber, Mr Justice Willes pronounced the words which both dominated and confused the tort choice of law agenda for the next century. According to his Honour\(^{255}\):

> As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England ... Secondly, the act must not have been justifiable by the law of the place where it was done.

The one-time dominance of the *Phillips v Eyre* formulation throughout the Commonwealth is reflected in its acceptance, at one time or another, by the Privy Council\(^{256}\), the House of

\(^{253}\) *Supra* note 6. This was a Privy Council decision on appeal from the Hong Kong Court of Appeal. However, the Privy Council decided the case on the basis that the Hong Kong rule for choice of law in tort was identical to the English rule.

\(^{254}\) *Supra* note 7.

\(^{255}\) *Ibid* at 28-29.

\(^{256}\) *Walpole v Canadian Northern Railway* [1923] AC 113 at 119; *McMillian v Canadian Northern Railway* [1923] AC 120 at 124.
Lords\textsuperscript{257}, the Canadian Supreme Court \textsuperscript{258} and the Australian High Court\textsuperscript{259}. All of these courts accepted that in the disposition of multistate torts regard must be had to both the law of the forum and the law of the locus state. The \textit{Phillips v Eyre} rule has also caused great confusion. There has been a profound lack of consensus among the English, Canadian and Australian courts as to the precise role given to the forum and locus legal systems under the rule. The differing interpretations of the rule will be considered in this and following Chapters.

At this stage we should note, however, that despite the uncertainty pertaining to the precise interrelationship between forum and locus law contemplated by \textit{Phillips v Eyre}, a clear pattern has emerged from the cases which have been decided under the rule. This pattern reveals, until very recently in England and Canada, the clear dominance of forum law in the resolution of multistate torts. What is meant by this is that the actual result of the dispute is consistent with the application of forum law only and with no regard being had to locus law. Given this, the decision in \textit{Phillips v Eyre} is ironic in that it militates against the trend for which it has provided the genesis\textsuperscript{260}.

\textsuperscript{257} \textit{Chaplin v Boys}, supra, note 252 per Lord Hodson at 378-380 (with a flexible exception in order to achieve "the ends of justice"); Lord Guest at 388-389; Lord Donovan at 383; Lord Wilberforce at 391 (with a flexible exception in order to "properly do justice") and Lord Pearson at 406 (with an exception 'for the purpose of discouraging "forum shopping").

\textsuperscript{258} \textit{McLean v Pettigrew} [1945] 2 DLR 65 per Taschereau J (Hudson and Estey JJ agreeing) at 76-77.

\textsuperscript{259} \textit{Koop v Bebb} (1951) 84 CLR 629 per Dixon, Williams, Fullagar and Kitto JJ at 643; \textit{Anderson v Eric Anderson Radio & TV Pty Ltd} (1965) 114 CLR 20 per Barwick CJ at 23, Kitto J at 27-28, Windeyer J at 40.

\textsuperscript{260} It is one of the few cases where the plaintiff did not succeed where forum allowed recovery. The reason for this was the enactment by the legislature of the locus state of a statute indemnifying the defendant for the actions in respect for which suit was brought. More representative of the ascendancy of forum law is \textit{The Liverpool, Brazil and River Plate Steam Navigation Company Limited v Henry Benham and Others} (1868) LR 2 PC 193 (Privy Council) ("The Halley"), decided two years before \textit{Phillips v Eyre} and cited by Willes J as authority for the first limb of his "general rule" (\textit{Supra} note 7 at 28-29). \textit{The Halley} involved an action against the owners of a British vessel in respect of a naval collision in Belgian waters. At the time of the collision the British vessel was under compulsory pilotage. Under English law - law of the forum - the liability of the pilot could not be imputed to the British shipowners, whereas under Belgian law the shipowners were vicariously liable. The Privy Council held that the action could not succeed as it was
Irony not withstanding, until the decision of the House of Lords in *Chaplin v Boys*, to be discussed in the next section of this Chapter, it was accepted that forum law was to exclusively govern the resolution of an action based on a tort committed outside the forum, provided it can be shown that the relevant act was *not justifiable* under the locus state.\(^{261}\) This meant that the wider the scope given to the words "not justifiable", the more likely second limb of *Phillips v Eyre* will be satisfied, and the more often the resolution of a multistate tort would be governed by forum law. Prior to the decision in *Chaplin v Boys*, and in isolated cases even after it, the English, Canadian and Australian courts have employed various expansive interpretations of the concept "not justifiable". In this Chapter we will only consider the English interpretation.

A very expansive meaning was given to the second limb of *Phillips v Eyre* by the Court of Appeal in *Machado v Fontes*\(^ {262}\). In that case their Lordships held that "not justifiable" meant "not innocent". Accordingly, the second limb would be satisfied even if the relevant act would not result in civil liability under locus law, provided that it would result in *criminal* liability under the law of that state. Such an interpretation of *Phillips v Eyre* clearly relegates the civil law of the locus state to an insignificant role in the resolution of multistate torts, as civil liability may be imposed under forum law without the presence of any civil liability under the law of the locus state. This was demonstrated by the result in *Machado v Fontes*, where the plaintiff was allowed to recover damages in respect of a libel published in Brazil. Although the law of Brazil did not impose civil liability in

---

\(^{261}\) In *Koop v Bebb*, supra, note 259, Dixon, Williams, Fullagar and Kitto JJ at 643-644 said:

"English law as the lex fori enforces an obligation of its own creation in respect of an act done in another country which would be a tort if done in England, but refrains from doing so unless the act has a particular characteristic according to the lex loci actus. Uncertainty exists only as to what that characteristic must be."

\(^{262}\) [1897] 2 QB 231.
respect of libellous statements, libel was a criminal offence in Brazil. The defendant's act was thus "not justifiable" under locus law and forum law, which did impose civil liability for libel, was applied to the plaintiff's action.

*Rationale for the Phillips v Eyre Rule*

There has been a great deal of criticism of the *Phillips v Eyre* rule, primarily on the basis that the rule places too much importance upon the law of the forum. We will explore the policy justifications for the two-limbed rule. Before doing so, it should be noted that the policy rationale for the *Phillips v Eyre* rule has not received a great deal of attention in the cases. In the main, the courts have regarded the formulation of the *Phillips v Eyre* rule as authoritatively establishing the choice of law rule for torts, and have contented themselves with attempting to divine what the rule actually means. Despite this, there are isolated statements where judges have attempted to explain the policy underpinnings of the rule.

**The First Limb of the Rule**

The clearest statement of the rationale for the application of forum law to multistate torts is found in the judgment of Marks J in *Borg Warner (Australia) Ltd v Zupan*. His Honour adopted the explanation of an academic commentator that the application of forum law derived from the historical perception of the law of torts as being closely associated with the criminal law. This view holds that the origins of the law of torts lay not in the desire to compensate those wrongfully injured but, as with criminal law, in the desire to punish those causing wrongful injury. The conception of torts as being

---

264 In this respect, the courts have regarded the *Phillips v Eyre* rule being of almost statutory force; see Fawcett, *supra* note 66 at 657.
267 *Borg Warner (Australia) v Zupan, supra* note 265 at 460.
quasi-penal in nature necessarily requires the application of forum law to the multistate tort as "there is, of course no question of applying a foreign law in a prosecution in the United Kingdom". The fundamental norms contained in the criminal law, and mirrored in the law of torts, precluded the application of foreign law to multistate torts.

This position was advanced by the great German jurist Friedrich Carl von Savigny, who also advocated the application of the forum law to multistate torts. It has been claimed that Savigny's views became enshrined in the English law through the pre-

Phillips v Eyre decision of The Halley, which was cited by Willes J as authority for the first limb of the Phillips v Eyre rule. Professor Otto Kahn-Freund has referred to Savigny as the "spiritual father of the decision" in The Halley, although Savigny was cited by the appellant's counsel in argument, rather than by the court in judgment.

---

268 Joint Commissions' Working Paper, supra note 8 at para 3.3.
269 A difficulty with this explanation for the application of forum law to multistate torts is that, as a general rule, the forum does not apply its criminal law to events occurring outside the forum. There is a response to this difficulty, however, which lies in the history of the assumption of jurisdiction for multistate torts by English courts. Initially, because of the requirement of the English jury system that a jury be comprised of persons from the neighbourhood where the events occurred, the common law courts refused to assume jurisdiction for events occurring outside England. Over time, these courts did exercise jurisdiction over multistate events, but only through a fiction; they assumed that the event occurred in England. Thus, in particular cases Amsterdam and Hamburg were assumed to be part of London, and Elven, in Poland, was assumed to be in Kent. See A Sack, Conflicts of Laws in the History of English Law: A Century of Progress, 1835 - 1935 , New York University Press, 1937, pp 345, 370-371. In this way, the English common law courts were able to apply forum law, replete with its quasi-penal provisions, to multistate torts without offending their territorial sensibilities.

270 A Treatise on The Conflict of Laws and the Limits of Their Operation in Respect of Place and Time (trans and ed by W Guthrie), T&T Clark, 1880 at s 374. Savigny's views on the disposition of multistate torts is atypical of his system of conflicts jurisprudence which was based upon finding the law area in which legal relationship has its seat (Ibid at s 360). What this involves is the classification of legal problems into the categories of contract, property, family law etc and ascertaining the jurisdiction which is to supply the governing law through the use of predetermined connecting factors. See R de Nova, "Historical and Comparative Introduction to Conflict of Laws", (1966) 118 Recueil des Cours 435 at 459-460.
271 Kelly, supra note 33 at 19 n80.
272 Supra, note 260.
Of course, in the domestic sphere, the law of torts has long since "emancipated" itself from the criminal law, with its "accent" now being compensatory rather than punitive.\textsuperscript{274} It is thus not surprising that a different justification for the Phillips v Eyre rule has been put forward. In Chaplin v Boys Lord Pearson said\textsuperscript{275}:

> The English rule, giving a predominant role to the lex fori in accordance with the Willes formula as interpreted in Machado v Fontes ..., is well established. It has the advantages of certainty and ease of application. It enables the English courts to give judgment according to their own ideas of justice.

This explanation of the raison d'être of the Phillips v Eyre rule is not convincing. Firstly, it is important to note that of the three attributes of the Phillips v Eyre rule expounded by his Lordship, the first two - certainty and ease of application - give no indication as to the substantive policies which underpin the rule. They simply go to the formal needs of any system of jurisprudence.

Secondly, the substantive issue of doing justice according to the forum's notions of justice, is unpersuasive. The foundation of the discipline of the conflict of laws is that in some circumstances a controversy with a foreign legal element should be disposed of by the application of the law of a state other than the forum. In fact, tort is the only substantive legal area where the forum law is applied "as of right". For this to be so, there must be something in the juridical nature of a tort which sets it apart from the other legal forms, such as the contract, succession, property and marriage, where foreign law may, in the relevant circumstances, be applied in the disposition of the controversy. Yet to hold that the law of torts occupies a peculiarly special place in the forum's scheme of what is just is, in substance, to fall back on the anachronistic position that tortious liability is quasi-penal. Under Lord Pearson's reasoning, the normative principles inherent in the

\textsuperscript{274} H McGregor, \textit{supra} note 266 at 6.  
\textsuperscript{275} \textit{Supra} note 252 at 406.
law of torts are elevated to the position of sacred truths. Yet, this does sit well with the
view of tort as a means of loss distribution.

The Second Limb of the Rule
We have examined the purported justifications for the dominance of forum law in the
disposition of multistate torts and found them unconvincing. It is now appropriate to look
at what the courts have said about the rationale for the second limb, namely that the
relevant act must not have been justifiable under locus law. In Phillips v Eyre, Willes J,
in contrast to his silence regarding the policies underlying the first limb of his rule, was
quite explicit in regard to the rationale for the second limb. The reason why an act
committed outside the forum could not be actionable in the forum unless it was not
justifiable under the law of the place it was committed is that "the civil liability arising out
of a wrong derives its birth from the law of the place, and its character is determined by
that law." 276

His Honour's justification for the second limb is not directly grounded in policy but rather
in the logical intricacies of vested rights theory. This theory holds that in the choice of law
process a court does not apply foreign law, but rather forum law, to enforce a right created
under foreign law. The jural attributes of a particular event - namely the rights and
liabilities which attach to it - are defined by a system of law having a particular relationship
with the event, usually the system of law in force in the state where the act occurred. 277

The second limb of Phillips v Eyre is a product of the vested rights theory as it precludes
actionability of the alleged wrong as a tort under forum law if the alleged wrong is not of a
"wrongful" nature under the law of the place where it occurred. Only the law of the state
where the act took place can make the act wrongful and thus give the plaintiff a right
which is legally enforceable in the forum state's courts. Of course, the Phillips v Eyre

276 Supra note 7 at 28.
277 See Nygh, supra note 109, pp 21 - 22.
rule as a whole is contrary to the vested rights approach as it applies forum law to the
disposition of the dispute once the second limb has been satisfied. Thus, forum law,
rather than the law of the locus state, has the far more important role in governing tortious
liability.

The vested rights theory has long since fallen out of favour and has been rejected as an
acceptable justification for the second limb of *Phillips v Eyre*.278 However, the vested
rights thesis can be seen as a logical abstraction of a theory which has much stronger
policy underpinnings. This theory is that a state has a sovereign interest in regulating
conduct which occurs within its borders.279 This is a more generalised interest than the
type of state interest conceived by governmental interest analysis as it does not require the
identification and advancement of the policy which underpins the specific law to be
applied. It might be proposed that the second limb of *Phillips v Eyre* finds justification in
that it is a way in which the forum state affords comity to the sovereignty of the locus
state.

However, the second limb of *Phillips v Eyre* finds only limited support in the notion of
state sovereignty. The way in which the second limb has been interpreted in *Machado v
Fontes* means that sovereign interest of the locus state is only given effect to where the law
of the locus state provides a complete justification for the defendant's alleged wrong.
Where this is not the case, and some civil or criminal liability attaches to the defendant,
locus law has finished its task, and forum law takes over. This means that the locus
state's interest in regulating conduct within its borders is only respected where its relevant
law has the purpose of encouraging certain kind of conduct by absolving a person who
engages in it from liability. Where the relevant law of the locus state is designed to deter

278 *Koop v Bebb*, supra note 259 at 643-644.
279 See A Hill, "Governmental Interest and the Conflict of Laws - A Reply to
Professor Currie" (1960) *Uni of Chicago L Rev* 463 at 482 - 483 and Hill, *supra* note 11
at 1625.
certain conduct by imposing civil liability upon a person engaged in it for injury caused, the *Phillips v Eyre* rule ignores interest of the locus state by allowing forum law to exclusively dispose of the question of civil liability.

In light of the above, it is clear that the concept of state interest does not provide a convincing explanation for the second limb of *Phillips v Eyre* and that justification for that part of the rule must be found elsewhere. An alternate rationale for the second limb is the normative ideal of the forum treating the defendant fairly. Support for the belief that this is the role of the second limb is found in the judgment of Lord Pearson in *Chaplin v Boys*. In stating his support for the *Machado v Fontes* interpretation of the second limb, his Lordship said280:

> The requirement is that the act must not be justifiable by the law of the place [of the wrong]. The reason for that must be that a person could not fairly be held liable in damages for doing something which in the place where it was done was either originally lawful or made lawful by retrospective legislation...[Under the *Phillips v Eyre* rule] the substantive law of England plays the dominant role, determining the cause of action, whereas the law of the place in which the act was committed plays a subordinate role, in that it may provide a justification for the act and so defeat the cause of action but it does not in itself determine the cause of action.

Lord Pearson did not explore in any depth why it would be unfair to subject the defendant to the operation of forum law where the defendant's actions were justifiable under the law of the place of acting. In particular, his Lordship did not enter into the debate as to whether a defendant who accidentally injures the plaintiff is entitled to protection of an exculpatory provision of locus law on the basis that the defendant legitimately expected that provision apply to the injury.281 What is clear from this passage, however, is that it is fairness to the defendant which is the concern of the second limb of *Phillips v Eyre*. This reasoning, encompassing as it does substantive policy, is a radical departure from the blind adherence to the logical symmetry of the vested rights philosophy which formed the rationale of the second limb at the time of its formulation by Willes J.

---

280 *Supra* note 252 at 398.
The value of treating the defendant fairly is also very different for the notion of the sovereign interest of the locus state. The idea that the defendant should be treated fairly by the forum is reminiscent of Brilmayer's political rights justification for multilateralism discussed in Chapter 1. A person, by acting within a state, has voluntarily brought himself or herself into a relationship with that state which legitimates that state applying its law to the detriment of the defendant. However, the Phillips v Eyre rule as a whole does not comply with Brilmayer's political rights model, as once the second limb is satisfied, the defendant is subjected to the full might of forum law. This means that the defendant may be subjected to a much higher level of civil liability under forum law than he or she would have faced under locus law without the defendant ever having voluntarily brought himself or herself into a relationship with the forum. The application of forum law to the detriment of the defendant would thus not be regarded as legitimate under Brilmayer's thesis. The result in Machado v Fontes is an example of this.

Taking stock, then, the Phillips v Eyre rule as interpreted by Machado v Fontes lacks a strong policy basis. The possible justifications for the second limb of the rule by which regard is had to locus law - state sovereignty and fairness to the defendant - are inconsistent with the dominance of forum law under the first limb. Further, no convincing policy has been enunciated which justifies the dominance of forum law. The proclaimed virtue of the forum doing justice in accordance with its own principles seems little more than a revival of the out-moded view of the quasi-penal view of tort.

**Characteristics of the Phillips v Eyre Rule**

Let us now consider the characteristics of the Phillips v Eyre rule, as interpreted by Machado v Fontes. We shall do this in terms of (i) the choice of law methodologies of multilateralism; unilateralism; and the substantive law method; and (ii) the dichotomies of jurisdiction-selection/rule-selection; spatially-conditioned/substantively-conditioned; and
externally-generated norms/internally-generated norms. In the next section of this Chapter we will examine the way in which the rule utilises the concepts of people and place.

The two-limbed nature of the *Phillips v Eyre* rule makes it difficult to classify in terms of the methodologies we have considered in previous Chapters, or even in terms of the relevant dichotomies. The universal application of forum law under the first limb (provided that the second limb is satisfied) is reminiscent of the bias towards the forum’s tort law policies under the governmental interest analysis version of unilateralism. The first limb of *Phillips v Eyre* is even more extreme in its bias than governmental interest analysis. Governmental interest analysis allows the selection of the law of a state other than the forum where that state is the only interested state, whereas the first limb of *Phillips v Eyre* always requires reference to forum law. The second limb of *Phillips v Eyre* is reminiscent of the jurisdiction-selecting aspect of (hard) multilateralism as it requires the application of the law of a state with a single *a priori* connection with the circumstances of the dispute (the locus state). Of course, under the *Machado v Fontes* interpretation of the rule, the application of the law of the locus state is half-hearted. Firstly, locus law is not applied to dispose of the dispute but rather to see if the plaintiff fails outright or is allowed to appeal to forum law. Secondly, the tort law of the locus state can be ignored if the criminal law of the locus state would impose liability upon the defendant.

The mixed nature of the *Phillips v Eyre* rule is also reflected in the dichotomies discussed earlier. The rule is of a jurisdiction-selecting nature in that one knows *a priori* that regard must be had to forum and locus law irrespective of the content of the respective putative dispositive laws. The rule is somewhat influenced by rule-selection in that under the second limb, locus law only has an affect upon the outcome where the defendant's actions were "justifiable" under that law. Otherwise, forum law determines the outcome to the exclusion of locus law. The *Phillips v Eyre* rule also partakes of both externally-generated
and internally-generated norms. We have seen that reference to locus law under the second limb can be (imperfectly) explained by a desire either to respect the sovereign rights of the locus state to regulate conduct occurring within its borders or to respect the rights of the defendant to be free from unjustified state coercion. Both of these two justifications are based upon norms which are external to the domestic law of the forum. On the other hand, the reference to forum law under the first limb is very much based upon norms which are internal to the domestic law of the forum; the policies which inform the tort law of the forum are to be given effect to by the application of forum law to the dispute.

The Phillips v Eyre rule is a hybrid between unilateralism and multilateralism, with a concomitant mix of jurisdiction-selection and rule-selection, externally-generated and internally-generated norms. We now turn to the question of how the rule relates to the substantive law method and that method's performance of a substantively-informed, rather than spatially-informed, function. As the rule is written, the substantive quality of the forum's and locus state's putative dispositive laws is irrelevant to the disposition to the dispute. Both limbs are spatially-informed as they establish particular connections (the place of litigation and the place of the wrong) which determine which of the putative dispositive laws of the connected states are relevant. However, the way in which the Machado v Fontes version of the Phillips v Eyre rule operates may be seen as producing results consistent with the substantive law method. (Provided, of course, that one sees the substantive law method in tort as requiring the application of a dispositive law which maximises the recovery of the plaintiff.) This is because the Machado v Fontes version of the rule - in giving far greater emphasis to forum than locus law - will often result in the selection of a pro-recovery law. This version of the rule encourages the plaintiff to "forum-shop", which in this context means the selection of the state in which to sue on the
basis that the state's domestic law is favourable to the plaintiff. In England, *Machado v Fontes* is itself an example of this, and we will see other examples in our examination of the Canadian and Australian contexts in the next Chapters. However, the consistency of the *Phillips v Eyre* rule with the substantive law method is only maintained where the plaintiff sues in a pro-recovery forum. Where the plaintiff does not do this, the rule will produce results which are at variance with the substantive law method.

This is demonstrated by the decision of *Anderson v Eric Anderson (Radio & TV) Pty Ltd.* In that case the Australian High Court, sitting on an appeal from New South Wales, applied the *Phillips v Eyre* rule to deny the plaintiff recovery. The plaintiff sued in New South Wales in respect of injuries he received when he was involved in a motor vehicle accident in the Australian Capital Territory. The accident was partly caused by the defendants negligence and partly by the negligence of the plaintiff. Under the law of the Australian Capital Territory, the contributory negligence of the plaintiff would result in an apportionment of liability between the parties and a reduction in the damages awarded to the plaintiff. Under the law of New South Wales, the common law position prevailed whereby contributory negligence was a complete defence. This meant that under the dispositive law of New South Wales, the plaintiff was entitled to nothing. The High Court applied New South Wales law to the dispute under the first limb of *Phillips v Eyre*, and the plaintiff's claim failed.

This case shows that there is no formal correspondence between the *Phillips v Eyre* rule and the substantiative law method. In *Anderson* the court applied forum law which was,

---

282 A more general, but nevertheless consistent, definition of forum shopping is found in the Canadian Supreme Court's decision in *Amchem Products Inc v British Columbia (Workers' Compensation Board)*, supra note 83, where forum shopping was said to occur where "a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction...".
on the objective measure of modernity, clearly inferior to the law of the locus state.\textsuperscript{283} In this respect the forum rule is akin to the guest statutes considered, and condemned, in the American cases utilising Leflar's choice-influencing considerations.\textsuperscript{284} The Phillips v Eyre rule thus tends to produce results which are consistent with the substantive law method's approval of maximising the plaintiff's recovery only where the plaintiff sues in a state which has a pro-recovery dispositive law.

Having looked at how the Machado v Fontes version of the Phillips v Eyre rule corresponds to the relevant methodologies and dichotomies, we will now look at how the rule uses the concepts of people and place.

\textit{Function of People and Place in the Phillips v Eyre Rule}

The concept of "people" - belonging to a state - plays no importance in the Machado v Fontes version of the rule. Forum law and locus law are applied to the circumstances of the dispute, under the first and second limbs respectively, without regard to the domicile or residence of the parties. Machado v Fontes is itself an excellent example of this in regard to the first limb. The plaintiff was allowed to succeed through the application of forum law notwithstanding that both the plaintiff and the defendant were Brazilian.\textsuperscript{285} Under soft multilateralism and the governmental interest analysis form of unilateralism, the plaintiff would have failed, because both parties were from Brazil. This fact would have been fatal to the plaintiff under soft multilateralism because Brazil was the state with

\begin{footnotesize}
\begin{enumerate}
\item See PE Nygh "Full Faith and Credit: A Constitutional Rule for Conflict Resolution" (1991) 13 \textit{Syd L Rev} 415 at 415 where the learned author remarks upon the "slowness of New South Wales in departing from the common law rule" regarding contributory negligence.
\item See Chapter 3.
\item Although the report of the case does not specify the domicile or nationality of the parties at the relevant time, it is commonly assumed that the parties were Brazilian. See Chaplin v Boys, supra note 252 per Lord Donovan at 383.
\end{enumerate}
\end{footnotesize}
the closest connection to the dispute (it was also the locus state), and fatal to the plaintiff under governmental interest analysis because Brazil was the only interested state.

An example of the irrelevance of the concept of "people" to the application of the second limb is the old English case of *The Mary Moxham*. In this case both the plaintiff and the defendant ship were English. Despite the common residency of the parties, the court held that the plaintiff's claim failed as no liability could be brought home to the defendant under locus law. This case shows that the second limb of *Phillips v Eyre*, like the first, is applied without regard to the concept of people.

Turning to the concept of place - the relevance of conduct occurring within a particular state - is clearly imported into the rule under its second limb. We have discussed above possible justifications for reference to locus law on the basis of (i) the sovereign rights of the locus state and (ii) the political rights of the defendant. We noted that these justifications are of limited persuasive power given the pre-eminence of forum law under the *Machado v Fontes* interpretation of the rule. The sovereign rights of the locus state, or the voluntary submission of the defendant to the coercive power of the locus state, is ignored once it is demonstrated that there is some level of civil liability, or even if there is criminal liability, under locus law.

The concepts of people and place in the *Machado v Fontes* interpretation of the *Phillips v Eyre* rule are dwarfed by the importance given to the forum's own conceptions of justice found in its own domestic law of tort. We will see in the remainder of this Chapter, however, that the importance given to forum law in the adjudication of multistate torts was not to go unchallenged.

---

286 (1876) 1 PD 107 (CA - England). In this case the English owner of a pier in Spain brought an action in England against an English ship for damage to the pier. Under Spanish law, the owner of the ship was not liable for the negligence of the master. Although not expressly stated in the report, it was implied that under English law the owner would have been liable.
The Machado v Fontes interpretation of the Phillips v Eyre rule prevailed in England until the House of Lords decision in Chaplin v Boys, some seventy years later. This decision altered the meaning given to the rule and also established an exception to it. In so doing, the case strengthened the function played by the concept of place in multistate tort adjudication and, for the first time, introduced the concept of people into the disposition of multistate torts.

Chaplin v Boys concerned a suit brought by the plaintiff in England in respect of injuries he suffered when he was involved in a motor vehicle accident with the defendant in Malta. Both the plaintiff and the defendant were normally resident in England but were temporarily stationed in Malta as members of the British armed services at the time of the accident. The plaintiff suffered various heads of loss in relation to the accident. These included: medical expenses, which were recoverable under the dispositive laws of both England and Malta; and pain and suffering, which was compensable under English, but not Maltese, law.

On appeal, the House of Lords unanimously held that the plaintiff was entitled to recover for all the heads of loss claimed, including those heads not recoverable under locus law. Their Lordships reasons for so doing were disparate. However, it is not necessary to analyse the differences in the respective judgments, as there is a consensus in subsequent English cases\(^ {287} \) that Chaplin v Boys established two principles. Firstly, the Machado v Fontes interpretation of the second limb of Phillips v Eyre was rejected\(^ {288} \), and a new

\(^ {287} \) Church of Scientology of California v Commissioner of the Metropolitan Police (1976) 120 Sol Jo 690; Coupland v Arabian Gulf Oil Co [1983] 2 All ER 434; Johnson v Coventry Churchill International Ltd [1992] 3 All ER 14.

\(^ {288} \) Per Lord Wilberforce at 388; Lord Hodson at 377. Although Lord Guest did not expressly overrule Machado v Fontes, his Lordship did state (at 381) that the second limb of Phillips v Eyre required actionability.
meaning substituted which gave much greater emphasis to locus law. Secondly, the case introduced an exception to the two-limbed operation of \textit{Phillips v Eyre}. These developments, and how they each relate to our dichotomies and the concepts of people and place, will be discussed in turn.

\textit{New Interpretation of the Second Limb}

The enduring effect of \textit{Chaplin v Boys} in this respect arises from the judgments of Lords Hodson and Wilberforce. Their Lordships stated that before the plaintiff was entitled to the application of forum law (under the first limb of \textit{Phillips v Eyre}), the plaintiff must show (under the second limb) that the defendant's conduct created actual civil liability under locus law. Lord Wilberforce reformulated both limbs of the \textit{Phillips v Eyre} rule as follows\footnote{Per Lord Wilberforce at 389.}:

\begin{quote}
[T]he basic rule of English law with regard to foreign torts...[requires] 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.
\end{quote}

Under the reformed rule, it is not enough that the defendant's conduct gives rise to some civil liability under locus law; the plaintiff may only recover in respect of loss compensable under locus law. In the words of Lord Wilberforce\footnote{\textit{Supra} note 252 at 389. Lord Hodson's views, are at 376-378.}:

\begin{quote}
The broad principle should surely be that a person should not be permitted to claim in England in respect of a matter for which civil liability does not exist, or is excluded, under the law of the place where the wrong was committed...[I]n relation to claims for personal injuries one may say that provisions of the \textit{lex delicti} (sic), denying, or limiting, or qualifying recovery of damages because of some relationship of the defendant to the plaintiff, or in respect of some interest of the plaintiff (such as loss of consortium) or some head of damage (such as pain and suffering) should be given effect to.
\end{quote}

The effect of this interpretation of the second limb is that the law of the locus state marks the outer limits of what the plaintiff can recover in that the plaintiff can only recover for
heads of loss compensable under both forum and locus law. Applying the revised Phillips v Eyre rule to Chaplin v Boys would have meant that the plaintiff could recover damages for his medical expenses, which were recoverable under both English and Maltese law, but not damages for pain and suffering, as these were not available under Maltese law. How Lords Hodson and Wilberforce avoided this result, and allowed the plaintiff to also recover damages for pain and suffering, will be addressed shortly.

By revising its second limb in this way, the Phillips v Eyre rule lost the rule-selecting aspect it had under its Machado v Fontes incarnation and became purely jurisdiction-selecting. Whereas under the Machado v Fontes version locus law was only applied to the extent it absolved the defendant from all civil and criminal liability, under the Chaplin v Boys interpretation all of the tort law of the locus state is putatively applied to the circumstances of the dispute, regardless of its content, and the level of recovery allowed to the plaintiff noted. The same is done with the tort law of the forum. The plaintiff is then allowed to recovery for losses compensable under both legal systems.

The revision of the second limb in this fashion clearly elevates the concept of place to a more exalted station than it occupied under the Machado v Fontes version of the rule. In providing that locus law determines the outer limit of recovery, the function of "place" can be more readily explained in terms of either (i) the sovereign rights of the locus state; or (ii) the political rights of the defendant. In respect of (i), the new interpretation gives greater recognition to the rights of the locus state to regulate activity within its borders. Unlike the Machado v Fontes version, the Chaplin v Boys interpretation does not only recognise the right of the locus state to promote specific types of conduct by exempting or ameliorating the liability of those participating in it. The Chaplin v Boys interpretation also gives effect to locus state law which is designed to deter specific types of conduct by imposing civil liability upon those who participate in it. Yet there is again a limit to the states' rights argument because the revised rule does not guarantee that the plaintiff will be
able to enjoy the full measure of recovery allowable by locus law. This is because the plaintiff is also limited to the level of recovery allowed by the provisions of forum law. And as we saw in relation to Anderson's case, the policies of the locus state being advanced are contingent upon the plaintiff suing in a forum which has a law which is at least as favourable to the plaintiff as locus law.

In regard to the political rights of the parties, the revision of the second limb so that locus law marks the outer limits of recovery certainly can be seen as providing much fairer treatment to the defendant than the Machado v Fontes version did. As the defendant cannot be held liable at a greater level than allowed for by locus law, the Chaplin v Boys version of Phillips v Eyre certainly complies with Brilmayer's political rights model as far as the defendant is concerned. However, as the defendant is also entitled to the protection of any anti-recovery law of the forum under the first limb, the revised rule may be seen as infringing the political rights of the plaintiff not to have the law of a state applied to his or her detriment in the absence of a sufficient connection with that state. Unless the plaintiff was resident in the forum there would not, according to Brilmayer, be a sufficient connection between the plaintiff and the forum to justify the application of forum law to the detriment of the plaintiff. In response to this it may be said that because the plaintiff has selected the forum state in which to sue, the plaintiff has created a relationship between himself or herself and the forum state which justifies the application of an anti-recovery forum law to his or her detriment. Selection of a state in which to sue certainly has the element of voluntariness which underpins the justifying connections of presence or residence advocated by Brilmayer.

The Chaplin v Boys revision of the Phillips v Eyre rule is thus more consistent with Brilmayer's political rights model than it is with the recognition of the sovereign rights of the locus state. The applicability of an anti-recovery law of the forum under the first limb

291 The mutuality requirement of Brilmayer's political rights model would in fact require that both the plaintiff and the defendant be resident in the forum.
is not inimical to the plaintiff's political rights - as the plaintiff chooses where to sue - but it is inimical to the recognition of the sovereign rights of the locus state to deter conduct it thinks undesirable by imposing tortious liability. Additionally, in reformulating the second limb, Lord Wilberforce seems to have been focusing upon the value of treating the parties fairly, rather than upon respecting the sovereign rights of the locus state when he said:\footnote{292}

The broad principle should surely be that a person should not be permitted to claim in England in respect of a matter for which civil liability does not exist, or is excluded, under the law of the place where the wrong was committed.

\textit{Exception to the Phillips v Eyre Rule}

Under the \textit{Phillips v Eyre} rule as revised by Lords Hodson and Wilberforce, the plaintiff would not have been able to recover damages for pain and suffering, as these heads of loss were not available under locus law. Their Lordships avoided this result by asserting that the \textit{Phillips v Eyre} rule should be subject to an exception in order to achieve, in the words of Lord Hodson, "justice in the individual case"\footnote{293} or, in the words of Lord Wilberforce, "the interest[s] of individual justice."\footnote{294} Their Lordships were agreed that such an exception should apply in this case to allow the plaintiff to recover those heads of loss not recoverable under the locus law.

Lord Hodson saw the need for a qualification of the reformulated \textit{Phillips v Eyre} rule because the result which would be yielded by its application would be "if not plainly unjust, at least not... satisfactory."\footnote{295} What would make it so was the lack of any real connection between the action and Malta. Neither of the parties were Maltese and were only temporarily stationed there. Because of the lack of connection of the locus state with

\footnote{292 \textit{Supra} note 252 at 389. Lord Hodson's views, are at 376-378.}
\footnote{293 \textit{Ibid} at 378.}
\footnote{294 \textit{Ibid} at 389.}
\footnote{295 \textit{Ibid} at 379.}
the circumstances of the case, it would be unjust to apply its provisions limiting the heads of loss recoverable. In this circumstance, the Phillips v Eyre rule is to be abandoned in favour of applying "the law of the [state] which because of its relationship with the occurrence and the parties has the greatest concern with the specific issue raised in the litigation...". The state which had such concern was England, as this was where both the plaintiff and the defendant were usually resident. Applying the newly created exception to the Phillips v Eyre rule, the plaintiff was entitled to the application of English law alone, and was thus entitled to recover for the heads of loss recognised by that law.

The exception to the Phillips v Eyre rule proposed by Lord Hodson thus constitutes an abandonment of the entire rule in favour of the greatest concern test. In contrast, the exception to the rule proposed by Lord Wilberforce appears to be more limited in that it operates to remove from consideration the provisions of the locus law which limit or exclude liability. His Lordship outlined the operation of the exception as follows:

Given the general rule...as one which will normally apply to foreign torts, I think that the necessary flexibility can be obtained...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 inquire into 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 the rule was devised to meet.

In Chaplin v Boys, the factor which put Lord Wilberforce on notice that the newly "discovered" exception to the Phillips v Eyre rule might be relevant was the fact that locus law limited the heads of loss recoverable by the plaintiff and that neither party was resident in, or a citizen of, the locus state. Segregating the issue of limiting the heads of loss recoverable from the other issues of the case, and analysing the effect of the application of the Maltese law to the English parties, his Lordship concluded that Malta had no interest in

---

296 Ibid at 380.
297 Although the Privy Council in Red Sea Insurance Co Ltd v Bouygues (to be discussed infra) regarded Lord Wilberforce as not foreclosing a wider application of the exception.
298 Supra note 252 at 391.
having its law excluding recovery for various heads of loss applied in the determination of a controversy between persons resident outside Malta. The absence of a Maltese interest meant that the forum law was to be applied (to the exclusion of the limiting provisions of locus law) in determining the plaintiff's right to recovery. 299

Yet, there seems to be a further prerequisite for the operation of Lord Wilberforce's exception to the Phillips v Eyre rule in addition to the absence of an interest of the locus state. This reason centres around Lord Wilberforce's somewhat cryptic remark that forum law should be exclusively applied because no reason had been put forward that an English court "should renounce its own rule 300. Presumably, although this is not made explicit, Lord Wilberforce conceived that the common residency of the parties in the forum was a positive reason why the forum law should be applied unfettered by the operation of locus law. By analogy with his Lordship's reasoning about the absence of a Maltese interest on the basis of an absence of Maltese residency, the mechanism for the exclusive application of English law based upon a common English residency should be the identification of the existence of an English interest that its law be applied.

It is thus submitted that the essence of Lord Wilberforce's exception to the Phillips v Eyre rule is that, on the basis of the parties' common residency, the locus state has no interest, and the forum does have an interest, in having its law applied. This interpretation finds support in the Victorian case of Corcoran v Corcoran 301. In this case the plaintiff wife sued her defendant husband in respect of injuries incurred by her in New South Wales due to his negligence. Both parties were resident in Victoria at the time of injury. Under the

299  Ibid at 391-392.
300  Ibid at 392. The reference to an English court renouncing or not renouncing its own law seems to indicate that Lord Wilberforce envisioned that the operation of the exception to the Phillips v Eyre rule resulted in the exclusive application of English law as forum law. If this is so, then it would be correct to say that the exception to the Phillips v Eyre rule functions not to abandon the entire rule but rather only its second limb.
law of New South Wales, the wife was precluded from suing her husband because the doctrine of interspousal immunity applied in the relevant circumstances. The doctrine had been abolished in Victoria in the relevant circumstances. Adam J held that the exception to the *Phillips v Eyre* rule as formulated by Lord Wilberforce did apply in this case to exclude the operation of the New South Wales anti-recovery law. In addition to concluding that New South Wales did not have an interest in the application of its law, his Honour also concluded that Victoria did have an interest in having its law applied.\(^{302}\)

From the above discussion it is apparent that the exception to the *Phillips v Eyre* rule envisaged by Lord Wilberforce differs from the exception envisaged by Lord Hodson.\(^{303}\) Lord Hodson would apply the law of the state with the greatest concern with the action where the exception was properly invoked. There is nothing to indicate that this state must always be the forum. In contrast, for Lord Wilberforce the exception would require the exclusive application of forum where the forum had an interest and the locus state did not. The difference between their Lordships in this regard can be demonstrated by varying the facts of *Chaplin v Boys* so that the parties were French, rather than English soldiers. In such a case Lord Hodson would probably regard the case as a proper one for the application of the exception because of the lack of significant connection with Malta. His Lordship would then hold that the state with the greatest concern would be France, due to the common residency of the parties, and would apply French law. However, Lord Wilberforce could very well hold that the exception did not apply. Although Malta as the locus state did not have an interest in applying its law, neither did England have an interest in applying its law to an action involving only French residents. In this case, England

\(^{302}\) *Ibid* at 171.

\(^{303}\) Fawcett is of a contrary view, regarding Lord Wilberforce as advocating, like Lord Hodson, a "proper law" exception rather than simply ignoring the second limb of *Phillips v Eyre* only. See *supra* note 66 at 665-666.
may very well renounce the exclusive application of its own law, but would apply it in conjunction with the limiting provisions of Maltese law.\textsuperscript{304}

In taking into account the residency of the parties, both the Lord Hodson and Lord Wilberforce exceptions introduce the concept of people into the choice of law in tort equation. Yet the differences between the proposed exceptions suggest that the concept of people performs a different function in each version of the exception. In order to see if this is the case, we will examine each version of the exception in regard to the relevant methodologies and dichotomies.

Lord Hodson's exception is (soft) multilateralist, and thus jurisdiction-selecting, in nature. Where the exception is applicable, the law of the state which has a particular connection with the circumstances of the dispute is selected without regard to the content of that law. What follows from this is that the exception is based upon norms which are external to the domestic policies of state which has its law selected. We saw in Chapter 1 that multilateralist rules were usually justified in one of two ways: (i) giving effect to state interests or (ii) respecting the political rights of the parties. In that Chapter we noted that the second justification was the more persuasive. And the basis on which Lord Hodson applied the exception - that both parties were resident in England - is certainly consistent with Brilmayer's political rights model. It will be recalled that under the model the state in which a person is resident may legitimately apply its law to that person's detriment.\textsuperscript{305} Further, the application of the law of the state of common residence satisfies the model's mutuality requirement in that the party who is disadvantaged by the application of that law would have been in a position to be advantaged by it if the positions of the parties were reversed. This is because in the hypothetical mirror image case the party who would be

\textsuperscript{304} This example is based upon one in JG Collier, \textit{Conflict of Laws}, Cambridge University Press, 2nd ed, 1994, p 226.
\textsuperscript{305} Chapter 1.
disadvantaged by the application of the state's law would also be a resident of the enacting state, and thus amenable to the coercive power of that state.

Lord Hodson's exception is thus consistent with Brilmayer's political rights model. Further, in focusing upon the common residency of the parties as the basis for the operation of the exception, his Lordship seems to have had his eye upon securing fair treatment for the parties rather than to give effect to the interests of states. In his Lordship's words, the exception was needed to achieve "justice in the individual case."306

Lord Wilberforce also stated that the norm behind the exception was "flexibility in the interest of justice."307 However, what his Lordship said about the operation of the exception indicates that he conceived it as operating to effect state interests rather than do justice to the parties. We have noted Lord Wilberforce's test as to the applicability of the exception involving an identification of "the policy of the [foreign] rule" and an inquiry "into what situations, with what contacts, it was intended to apply". This was to be undertaken so as to ascertain "whether not to apply it, in the circumstances of the instant case, would serve any interest which the rule was designed to meet."308 Purporting to apply this test, Lord Wilberforce concluded that as neither of the parties were residents of Malta, Malta did not have an interest in having its law applied and that there was no reason "why an English court ... should renounce its own rule".

His Lordship's reasoning bears a very close resemblance to governmental interest analysis in several respects. Firstly, Lord Wilberforce defined a state as having an interest in having its law applied in terms of whether the policy underpinning that law would be furthered by the law's application. Secondly, as is commonplace with the actual

306 *Supra* note 252 378.
307 *Ibid* at 389. His Lordship also said (at 391) that "[n]o 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." (Emphasis added.)
308 *Supra*. note 252 at 391.
implementation of governmental interest analysis in the American courts\textsuperscript{309}, Lord Wilberforce did not actually identify the specific policy underpinning Malta's law, but thought that the fact that neither party was resident in Malta was sufficient to conclude that Malta did not have an interest in having its law applied. Thirdly, consistent with governmental interest analysis, Lord Wilberforce thought that Malta probably would have had an interest in having its \textit{anti-recovery} law applied under the second limb of \textit{Phillips v Eyre} if the defendant had been resident in Malta.\textsuperscript{310} The fact that Lord Wilberforce specifically referred to "the defendant", and not simply "either of the parties", suggests that Lord Wilberforce agreed with the assumption made by governmental interest analysis that state's have a special interest in protecting their own people. Finally, like the practical implementation of governmental interest analysis, Lord Wilberforce did not find it necessary to consider whether Malta's law might serve a conduct-regulating, rather than a loss-allocating function. If the law did serve a conduct-regulating function, then its policy would be invoked by the territorial connection with Malta, even in the absence of a personal connection of the parties.

Thus Lord Hodson's and Lord Wilberforce's respective exceptions are built upon quite different conceptual bases and use the concept of people in very different ways. Lord Hodson used the exception in a soft multilateralist fashion with common community membership operating to connect a dispute to a state without regard to the content of that state's dispositive law. In so doing, his Lordship used the concept of people in a way which is consistent with respecting the right of participants in multistate disputes to be free from illegitimate state coercion. By contrast, Lord Wilberforce's exception operates consistently with the governmental interest analysis form of unilateralism. The exception seeks to ascertain the spatial reach of a particular state's putative dispositive law through a

\textsuperscript{309} See the discussion of \textit{Babcock v Jackson} and \textit{Schultz v Boy Scouts of America} in Chapter 2.

\textsuperscript{310} \textit{Supra} note 252 at 391 - 392.
norm which is internal to (contained with) the law itself. This norm is (allegedly) the policy which has informed the enactment of the relevant law, although we have noted that, consistent with governmental interest analysis, this policy in identified only in terms of promoting the welfare of the state's own people. Lord Wilberforce thus uses the concept of people to invoke state legislative policy, rather than to legitimate state coercion.

A case in which the *Chaplin v Boys* exception was applied without seeming to appreciate the profound theoretical differences between the two approaches was *Johnson v Coventry Churchill International Ltd.*[^287] In this case the plaintiff, who lived in England, was recruited by the defendant, an English employment agency, to work for one of the defendant's clients in West Germany. While working on a site being developed by the defendant's client, the plaintiff was injured. The plaintiff sued the defendant in England, and Deputy Judge Kay QC applied the choice of law rule for multistate torts as set out in the leading English text on conflict of laws.[^1365] This rule was the two-limbed *Phillips v Eyre* rule, as interpreted in *Chaplin v Boys*, with the exception that a particular issue in the litigation "may be governed by the law of the country which, in respect of that issue, has the most significant relationship with the occurrence and the parties."[^119]

Applying the first limb of the *Phillips v Eyre* rule, his Lordship held that under forum law the defendant was liable to the plaintiff in damages as the defendant was in fact the plaintiff's employer and had breached its duty of care to the plaintiff.[^119] However, the law of West Germany - the locus state - provided that an employer was, except in the case of wilful default, exempt from liability for personal injuries suffered by its employees in the course of their employment. This meant that under the second limb, as interpreted in

[^287]: Supra note 287.
[^119]: Ibid.
[^119]: Ibid at 19 - 23.
Chaplin v Boys, the plaintiff was not able to succeed, unless the exception applied which would allow the plaintiff's action to be governed by English law exclusively.

Deputy Judge Kay QC held that the exception did apply. Despite the fact that his reasoning in so doing has drawn applause from one commentator\textsuperscript{315}, his Lordship can be criticised for not knowing what exception he was actually applying. Although his Lordship purported to apply the exception as stated by the conflict of laws text (which strongly resembles Lord Hodson's), his Lordship also relied heavily upon Lord Wilberforce's view of the operation of the exception. The result is an eclectic mix of soft multilateralism and the governmental interest analysis form of unilateralism, with a dash of the substantive law method thrown in for good measure. In this respect, the judgment is reminiscent of Babcock v Jackson which, as we have seen,\textsuperscript{316} drew upon all three of the main choice of law methodologies.

His Lordship used soft multilateralism in concluding that English law should apply exclusively to the dispute. England clearly had the "most significant" relationship with the occurrence and the parties. The plaintiff and the defendant were English and their relationship was formed in England. The connection with West Germany was not great as the plaintiff was only going to work there for a short time (13 weeks).\textsuperscript{317} Consistent with the jurisdiction-selecting nature of multilateralism, the content of the putative dispositive laws was irrelevant to the inquiry.

However, Deputy Judge Kay QC also relied upon the rule-selecting nature of governmental interest analysis in order to avoid the application of locus law. The court ascertained the spatial reach of the West German rule by reference to its underlying policy. His Lordship identified the law as being part of a package which increased benefits

\textsuperscript{315} P Rogerson, "Foreign Tort - Exception to Double Actionability" [1992] CLJ 439 at 439.
\textsuperscript{316} In Chapters 1, 2 and 3.
\textsuperscript{317} Supra note 287 at 25.
payable to injured employees and which removed the need of such employees to prove
fault. German employers contributed towards state benefits payable to injured employees
and in return were freed from the responsibility to compensate employees injured through
the employer's fault. As the plaintiff and defendant participated in a similar scheme in
England, and as the plaintiff was not entitled to the benefits of the West German scheme
after he returned to England, his Lordship concluded that the policy underlying the law
exempting an employer from liability would not be advanced if the law was applied to an
English employer and English employee. 318 This is the form of analysis which Lord
Wilberforce advocated in his outline of the exception to the Phillips v Eyre rule. The level
of analysis in Johnson, however, was much deeper than that carried out by Lord
Wilberforce in Chaplin v Boys.

Lastly, Deputy Judge Kay QC supported his application of the exception with reasoning
consistent with the substantive law method's conception of the participant in multistate tort
litigation. This conception involves viewing the parties (particularly plaintiffs) to
multistate tort disputes as individuals who are relatively powerless and thus deserve fair
treatment through the application of fair laws. 319 His Lordship said that applying English
law exclusively in this situation would not unfairly surprise the defendant who was in a
position to insure, and did in fact insure, against liability to persons in the position of the
plaintiff. His Honour concluded 320 that:

application of English law to this situation would not introduce an element of
uncertainty which might be undesirable. It would afford protection to English
workmen required to work abroad for English companies in countries of whose
system of law they can be expected to have little knowledge.

Deputy Judge Kay QC was clearly impressed with the relative vulnerability of the
plaintiff's position compared to that of the defendant. His Honour thought that the

318 Ibid at 24 - 25.
319 See Chapter 3.
320 Supra note 287 at 25.
exclusive application of English law would yield a substantively just result. This form of reasoning in relation to the applicability of the exception to the two-limbed *Phillips v Eyre* rule was not raised expressly in *Chaplin v Boys*. However there are close similarities between the facts of the two cases. In *Chaplin v Boys*, the car driven by the defendant was insured with an English company. 321 Presumably this meant that the defendant was insured for liability assessed under English law which allowed damages for pain and suffering. The plaintiff could thus receive a more adequate level of compensation without exposing the defendant to an unforeseen level of liability.

We have seen how *Chaplin v Boys* increased the importance of the concepts of people and place. However, the concept of forum retained a residual importance under the first limb of the *Phillips v Eyre* rule. The importance of forum law relative to the concepts of people and place must be assessed in light of the recent Privy Council decision in *Red Sea Insurance Co Ltd v Bouygues SA*. 322

**Red Sea Insurance Co Ltd v Bouygues SA**

This appeal to the Privy Council from the Hong Kong Court of Appeal concerned the content of the Hong Kong choice of law rule for multistate torts. The Privy Council decided the case on the basis that the law of Hong Kong was identical to the law of England in this respect 323, hence the relevance of the case to the material considered in this Chapter.

Bouygues SA and the other respondents were involved in constructing buildings in Saudi Arabia for the Saudi government under contracts governed by the law of Saudi Arabia.

322 *Supra* note 6.
When structural defects in the building were discovered, the respondents brought an action in Hong Kong against the appellant, Red Sea Insurance Co Ltd ("Red Sea"). Red Sea was incorporated in Hong Kong, but had its head office in Saudi Arabia. The respondents claimed indemnification under an insurance policy issued by Red Sea which was governed by Saudi law. Red Sea denied the claim and commenced a counterclaim against certain of the respondents, who were members of a consortium known as "PCG". The gist of the counterclaim relevant to the appeal was that PCG had breached the duty of care it owed to the other respondents and that this gave Red Sea a direct action against PCG.

For the purposes of the appeal, the Privy Council assumed that under the law of Saudi Arabia (being the state in which PCG's alleged negligence occurred and took effect), Red Sea did have an action against PCG. However, under the law of Hong Kong (the forum), Red Sea did not have such an action. This meant that under the two-limbed Phillips v Eyre rule, Red Sea did not have a cause of action against PCG which it could enforce in Hong Kong; although the second limb was satisfied, the first was not. This meant that Red Sea's counterclaim failed unless it could be shown that the exception to the Phillips v Eyre rule arising out of Chaplin v Boys entitled Red Sea to rely upon Saudi law to the exclusion of forum law.

The Privy Council held that Red Sea was entitled to do this. This was because the Chaplin v Boys exception was not limited to invoking forum law to the exclusion of locus law, but also allowed the application of locus law to the exclusion of forum law\(^\text{324}\). This case was an appropriate one for the application of the exception in this new way because of the overwhelming connection of the circumstances of the case with Saudi Arabia. The contractual relationships between all of the parties were governed by Saudi law; the

\(^{324}\) *Ibid* at 762 - 763.
alleged negligent conduct took place in Saudi Arabia and the damage occurred there; and
Red Sea, although incorporated in Hong Kong, had its head office in Saudi Arabia.\textsuperscript{325}

Having briefly outlined the decision, we will consider its characteristics in terms of choice of law methodology and the concepts of people and place. We will then look at the implications of the decision for the importance of the concept of forum.

\textbf{Red Sea: Methodology, People and Place}

One can clearly see from the list of considerations stated by their Lordships that the Privy Council applied the exception in a way which was much more consistent with Lord Hodson's soft multilateralism than with Lord Wilberforce's unilateralism. In selecting Saudi law, the Privy Council concerned itself with the objective connections between Saudi Arabia and the circumstances of the dispute. It was not concerned with ascertaining the presence or absence of a Saudi Arabian or Hong Kong governmental interest determined by reference to the policies underpinning those states' putative dispositive laws.

It may very well have been that the same result would have been reached if Lord Wilberforce's version of the exception was applied.\textsuperscript{326} After all, the putative dispositive law of the forum would have worked to the advantage of the foreign parties and to the detriment of the local party (Red Sea being local to the forum at least on the basis being incorporated there). Thus it is possible that Lord Wilberforce would have agreed the forum did not have an interest in having its law applied.

However, the profound theoretical differences between the multilateralist and unilateralist approaches to the exception would be brought to light if the content of forum law and

\textsuperscript{325} \textit{Ibid} at 763.

\textsuperscript{326} Assuming that his Lordships exception is not limited to the application of forum, and the rejection of locus, law.
locus law were reversed so that forum law gave Red Sea a cause of action and locus law did not. In this case the multilateralist approach would still point to Saudi Arabia given the preponderance of objective connections between the dispute and that state. By contrast, the unilateralist approach would hold that the exception could not apply to exclude forum law as the forum had an interest in having its law applied to the benefit of the local party. It would only be in such a case that an English court would have to choose between the multilateralist and unilateralist conceptions of the exceptions. We could then ascertain whether English law is as firmly committed to the multilateralist version of the exception as the Privy Council's reasoning seems to indicate.

The concept of place is certainly given significant weight in the decision. The fact that all of the relevant acts of the parties took place in Saudi Arabia was an important factor in the Privy Council deciding to apply locus law exclusively. The function performed by the concept of place within the soft multilateralist methodology in this case is not entirely clear as it is possible that the concept may have been used either as a means of (i) respecting the political rights of the parties to be free from illegitimate state coercion or (ii) the forum recognising the sovereign right of the locus to regulate conduct occurring within its borders. In our discussion of Chaplin v Boys we noted that in that case the concept of place was more likely to have served the former function. This is because under the Chaplin v Boys reformulation of the Phillips v Eyre rule itself (rather than the exception to it), forum law could still be used to provide a defence which was not available to the defendant under locus law. We concluded that this was inimical to the sovereign right of

---

327 This scenario is complicated by the fact that Red Sea had its head office in Saudi Arabia. It might be argued that, in light of this, Red Sea did not belong to the forum in a way which was relevant to the governmental interest analysis form of unilateralism. To assess the force of this objection we would need to know if there was some meaningful connection between the forum and Red Sea. For example: what proportion of Red Sea's shareholders were located in the forum?; Did Red Sea pay tax in Hong Kong because it was incorporated there?

328 "The breaches and the alleged damage occurred in Saudi Arabia. The expense of repairing the alleged damage occurred in Saudi Arabia." (Supra note 6 at 763.)
the locus to deter certain conduct within its borders by the imposition of civil liability. However, this objection cannot be raised in relation to Red Sea as forum law was ignored, and full effect was given to the rights of the sovereign state.

However, it is likely that the Privy Council did not use the concept of place as a means of recognising the sovereign rights of the locus state. Rather, their Lordships seemed to be concerned with the fair treatment of the parties. In their Lordships words, the case before them was one of those "appropriate cases [where] the lex loci delicti can be applied to give a just result when the lex fori might not do so."\(^{329}\) The result in the case was certainly consistent with the concept of place performing the function it does under Brilmayer's political rights model. Both PCG and Red Sea voluntarily acted towards Saudi Arabia in a way which entitled Saudi Arabia to apply its law to the benefit or detriment of either party. PCG voluntarily entered into a contract to provide services to the other respondents in Saudi Arabia, and Red Sea voluntarily provided insurance with respect to the project.

Turning now to the concept of people, we find that being a member of a political community did not play a significant part in the selection of the dispositive law. Forum law was rejected even though the appellant company was incorporated in the forum, and the domiciles, residences and places of incorporation of the respondents were not even mentioned. By contrast, Red Sea stresses the importance of relationships formed between the parties themselves, rather than the relationship between the parties and states. In selecting locus law, the Privy Council referred to the fact that the insurance policy and various contracts between the respondents were all governed by locus law. There is a strong parallel between the Privy Council's reliance upon this factor and the concept of the "seat" of the relationship between the parties which has strongly influenced soft multilateralism in America, as evidenced by the case of Dym v Gordon\(^{330}\).

\(^{329}\) Ibid at 762 (emphasis added).
\(^{330}\) Refer to the discussion of the case in Chapter 1.
Red Sea and the Concept of the Forum

What is especially significant about the decision is that it substantially undermines the justification for the reference to forum law under the first limb of Phillips v Eyre. It will be recalled that in Chaplin v Boys Lord Pearson defended the role of forum law on the basis that it enabled English courts to implement their own "ideas of justice". This reasoning has been approved by some commentators on the basis that it provides the forum with the means to control\textsuperscript{331} the imposition of civil liability by "screen[ing] out unfamiliar or controversial torts"\textsuperscript{332}. In Red Sea, however, the exception to the Phillips v Eyre rule was used to prevent the screening out of a cause of action which was not available under forum law. Red Sea thus goes beyond the Chaplin v Boys scenario where forum and locus law agree on the availability of a cause of action and are in conflict only over the availability of the heads of loss recoverable. In Red Sea there was no cause of action under forum law at all. By its decision, the Privy Council seems to indicate that forum law will not be allowed a significant control function in the future. One commentator has suggested that after Red Sea forum law can only be relied on where the forum has some connection with the circumstances of the dispute other than simply being the forum for the litigation.\textsuperscript{333}

*** *** ***

It is fair to say that the Privy Council has left the English choice of law regime for multistate torts is some confusion. This view will be reinforced when, in the following Chapters, we examine the reasonably settled state of the law in Canada and Australia

\textsuperscript{332} A Dickinson, "Further Thoughts on Foreign Torts: Boys v Chaplin Explained" [1994] LMCLQ 463 at 468.
\textsuperscript{333} Ibid at 469 n 36.
following the respective pronouncements of those counties highest courts. It will thus be helpful at this stage to take stock of the English developments.

The most notable aspect of the English jurisprudence on choice of law in tort from *Machado v Fontes* to *Red Sea* is the decreasing importance of the concept of the forum and the corresponding increase in importance of the concept of place. The general rule is now that locus law sets the outer limits of the defendant's liability, with the defendant being able to rely on a defence made available by the dispositive law of the forum. The residual importance of forum law will usually be of little practical importance if the plaintiff is able to bring proceedings in a state with a pro-recovery law. We have seen that the rationale given by the courts for the importance of place is to do justice to the parties, particularly the defendant, rather than to recognise the sovereign rights or interests of the locus state. This is consistent with Brilmayer's political rights model, which asserts that where a dispute arises out of volitional acts of persons within a particular state, that state may legitimately apply its law to the disposition of the dispute.

However, the partnership between forum and locus law under the general rule can be dissolved, so that one or the other applies exclusively in the disposition of the dispute. The factors which lead to the exclusive application of either forum or locus law have been basically two-fold.

First, a pre-existing relationship between the parties to the dispute which was centred in either the forum (*Johnson v Coventry Churchill International*) or the locus state (*Red Sea*) has been held to be relevant. However, in such cases the courts have also relied on an additional factor - such as the common domicile/residence of the parties (*Johnson v Coventry Churchill International*) or the fact that the relationship was centred in the locus state (*Red Sea*) - in exclusively applying the law of that state.
Second, the concept of people - being a member of a particular political community - has also been held to be relevant to the issue of whether forum or locus law can be applied exclusively. The case of *Chaplin v Boys* is evidence of this, where forum law was exclusively applied based upon the common domicile/residence of the parties between whom there was no pre-existing relationship. It remains to be seen whether common domicile/residence of the parties in a state other than the forum or the locus would allow the exclusive application of that state's law. This will depend upon whether Lord Hodson's or Lord Wilberforce's version of the exception carries the day, a question left open in *Red Sea*. This is an important issue. If Lord Hodson’s view prevails, and exclusive effect can be given to the law of a state other than the forum or the locus on the basis of the common domicile/residence of the parties in that state, it can then be said that the concept of people ranks in equal esteem as the concepts of forum and place. If, however, Lord Wilberforce’s view prevails, so that the common domicile/residency of the parties in a state is only relevant where that state is also the forum or the locus, then the concept of people is not on par with the other concepts. All the concept of people can do is to tip the balance in favour of the forum or locus state and so allow the exclusive application of one or the other's law.

---

334 There has not been a case where the common domicile/residence of the parties in the locus state has lead to the application of exclusive application of locus law. However, it is submitted that the combined effect of *Red Sea* (treating both limbs of *Phillips v Eyre* as being amenable to exclusive application) and *Chaplin v Boys* (applying the first limb exclusively on the basis of common domicile/residence of the parties in the forum) would allow this.

335 Their Lordships stated that they were applying Saudi law as the law of the locus state (*Supra* note 6 at 762) which suggests they favoured Lord Wilberforce’s view that the exception operates to ignore one limb of the *Phillips v Eyre* rule. However, there Lordships also said (at 762) that the exception could result in the application of the law of the state which has “the most significant relationship with the occurrence and the parties”, which favours Lord Hodson’s view that the law of a state other than the forum or the locus may be selected. However, if Lord Hodson’s view does prevail then the *Phillips v Eyre* rule has in effect been replaced by soft multilateralism or, as it is known in England, the proper law of the tort (see A Briggs, *The Halley: Holed but Still Afloat* (1995) 111 LQR 18 at 20.)
Lastly, it is necessary to briefly summarise the theoretical underpinnings of the concept of place in the English context. Again, much turns on the difference between Lord Hodson's and Lord Wilberforce's approaches to the exception to the *Phillips v Eyre* rule. For Lord Hodson, the concept of people was relevant in a multilateralist sense. The common domicile/residency of the parties provided a connection between the state and the circumstances of the dispute which made the application of that state's law appropriate. We saw how this is consistent with Brilmayer's political rights model. By contrast, under Lord Wilberforce's unilateralist view of the exception, being domiciled or resident in a state may give the state an interest in having its law applied to the dispute if the law would work to the benefit of that party. This means that the concept of people is given a wider significance under Lord Wilberforce's view as the concept may be invoked where the parties are not domiciled or resident in the same state. A governmental interest may arise where a state's law would work to the benefit of the party who belongs to the state whether the other party belongs to the same state or not.
In this Chapter we will see how the concepts of people and place have influenced developments in the Canadian context. For the purpose of our analysis, we can divide the history of Canadian choice of law into three periods. The first of these is represented by the Canadian Supreme Court's decision in McLean v Pettigrew; the second, by various decisions of the Ontario Court of Appeal; and the third, by the Supreme Court's decision in Tolofson v Jensen. In discussing each of the periods, we will note a parallel with the English experience. The initial ascendancy of forum law declined in favour of the concepts of people and place. In the last period, however, the concept of place alone is determinative.

The First Period - McLean v Pettigrew

This case firmly entrenched the Machado v Fontes interpretation of the Phillips v Eyre rule in Canadian choice of law. It will be recalled that this interpretation requires that if civil or criminal liability is shown to attach to the defendant's act under locus law, forum law is applied exclusively to the dispute.

McLean v Pettigrew involved a single-car accident in Ontario in which the passenger was injured. The passenger and the driver were both residents of Quebec, and the passenger

---

336 Supra note 258.
338 Supra note 5. This decision also involved the appeal from the Ontario Court of Appeal in Lucas v Gagnon.
sued the driver in that province. Under Ontario law, the driver was exempted from any civil liability to the passenger\(^{339}\), although it appeared that the driver had not driven "with due care and attention" as required by Ontario motor traffic law.\(^ {340}\). As the defendant's action was "punishable"\(^ {341}\) under the law of Ontario, the second limb of *Phillips v Eyre* was satisfied. The plaintiff was thus allowed the exclusive application of forum law, under which he was entitled to damages in tort.

*McLean v Pettigrew*, with its adoption of the *Machado v Fontes* interpretation, was applied in a number of Ontario cases\(^ {342}\) brought in respect of motor vehicle accidents in Quebec. In these cases the plaintiffs were allowed to recover damages under the law of Ontario (as the forum), on the basis that the defendant had infringed provisions of the motor traffic laws of Quebec (the locus state). This was notwithstanding that the defendants were not civilly liable under the law of Quebec because of the motor vehicle personal injuries scheme in force in the province.\(^ {343}\)

In the previous Chapter, we analysed the characteristics of the *Machado v Fontes* version of the *Phillips v Eyre* rule in terms of the choice of law methodologies and dichotomies. We noted that the *Machado v Fontes* version of the rule was an eclectic mix of multilateralism and unilateralism, and of jurisdiction-selection and rule-selection. As the *McLean* version is a faithful replica of the *Machado* original, it is not necessary to revisit that discussion here. It is sufficient to note that the *McLean* line of cases show the

\[^{339}\] Section 47(2) of the Ontario *Highway Traffic Act* RSO 1937 prohibited a gratuitous passenger from suing the driver in respect of injuries caused by the negligence of the driver.

\[^{340}\] *Supra* note 258 per Taschereau J at 80 (referring to s 27 of the Ontario *Highway Traffic Act*).

\[^{341}\] *Ibid* per Taschereau J at 80.

\[^{342}\] For example, *Going v Reid Brothers Motor Sales Ltd* 35 OR (2d) 201 (1982); *Lewis v Leigh et al and two other actions* 54 OR (2d) 324 (1986); *Ang et al v Trach et al* 57 OR (2d) 300 (1986).

importance of forum law and the lack of importance given to the concept of place. We do, however, need to make one additional comment. In *McLean*, unlike *Machado v Fontes*, both parties were residents of the forum. It might be asserted - although the court certainly did not - that the decision is justifiable by using the concept of people. One could argue, in a soft multilateralist manner, that the application of forum law was permitted on the basis that it was consistent with the political rights of the parties. Or one could use the governmental interest analysis form of unilateralism that the locus state did not have an interest in having its anti-recovery law applied as no locus defendant or insurer was involved. However, in two Ontario cases *McLean v Pettigrew* was applied where one of the co-defendants was resident in the locus state. Thus in the *McLean v Pettigrew* line of cases, the concept of forum towers above both the concepts of people and place.

The Second Period - Activism of the Ontario Court of Appeal

In England, the rejection of the *Machado v Fontes* version of the *Phillips v Eyre* rule came with the decision in *Chaplin v Boys*, which reinterpreted the *Phillips v Eyre* rule so that locus law marked the outer limits of recovery. In Canada, the Supreme Court's decision in *McLean v Pettigrew* was seen as precluding the adoption of various aspects of *Chaplin v Boys*. However, in a series of cases the Ontario Court of Appeal was able to re-interpret *McLean* in a manner which enabled it to reach results which were consistent with the *Chaplin v Boys* interpretation of *Phillips v Eyre*. We will analyse these cases in turn. In so doing, we will see how these cases align with the choice of law methodologies and

---

344 *Going v Reid Brothers Motor Sales Ltd, spura* note 342 and *Ang v Trach.supra* note 342. Further *Lewis v Leigh supra* note 342 involved actions by plaintiffs who were not resident in the forum, thus removing the justification for the application of forum law under both soft multilateralism and governmental interest analysis.

345 See *La Van v Danyluk* (1970) 75 WWR 500.
dichotomies we have been considering, as well as appreciating the concepts of people and place which emerge from them.

*Grimes v Cloutier*

In *Grimes v Cloutier* the plaintiff, a resident of Ontario, was injured in a motor vehicle accident in Quebec. The plaintiff brought an action in Ontario against the first and second defendants, who were, respectively, the driver and the owner of the other vehicle involved in the accident. Both defendants were residents of Quebec. The first defendant had been convicted of an offence under the Quebec motor traffic legislation. The plaintiff had received compensation from the Ontario insurer of the vehicle in which she was a passenger in an amount equal to the benefits she would have received under the Quebec statutory scheme.

Under the law of Ontario, the plaintiff would have been entitled to an award of damages. Under Quebec law, although the first defendant was "guilty" of a criminal offence, the plaintiff had no civil action against the defendants because of the provisions of the statutory compensation scheme. The Ontario Court of Appeal held that the plaintiff was not entitled to recover damages against the defendants.

In giving judgment for the Court, Morden JA held that the case was to be decided on the basis of the application of the *Phillips v Eyre* rule. His Honour recognised that if the *McLean v Pettigrew* interpretation of the second limb of the rule was applied, the criminal nature of the first defendant's conduct rendered that conduct not justifiable within the meaning of the second limb. As the second limb of the rule would be satisfied, and as the

---

346 Supra note 337.
defendant's conduct would have been civilly actionable in Ontario if committed there, the
dispositive law of the forum would apply to the action to allow the plaintiff recovery.\textsuperscript{347}

His Honour was satisfied that an important difference in the facts of \textit{Grimes} and \textit{McLean} would make the application of the \textit{McLean} gloss inappropriate. The distinction lay in the residency of the parties to the action. In \textit{McLean}, both the plaintiff and the defendant were resident in the forum. In \textit{Grimes}, although the plaintiff was resident in the forum, both the defendants were resident in the locus state. To apply the \textit{McLean} gloss in these circumstances would be unjust; what justice required in this case was the application of a version of the \textit{Phillips v Eyre} rule where the absence of civil liability under the law of the locus state defeated the plaintiff's claim.\textsuperscript{348}

In the Court's opinion, what makes the residency of the parties relevant to a just outcome are the parties' reasonable expectations. As residents of Quebec, the defendants were entitled to expect that, in relation to an accident in Quebec, the provisions of the Quebec statutory compensation scheme would apply. Similarly, the Ontario plaintiff could not reasonably expect that the Ontario law would apply to an accident in Quebec.\textsuperscript{349}

Using the concept of party expectations to justify giving effect to a provision of locus law removing civil liability, may appear reasonable. It is consistent with the intuitive notion that a person should be bound or protected by the law of the place of acting. However, the ideal emerging from \textit{Grimes} that the choice of law rules for tort should give effect to the reasonable expectations of the parties does not sit well with various aspects of the decisions in \textit{Grimes} and \textit{McLean}.

\textsuperscript{347} \textit{Ibid} at 516.
\textsuperscript{348} \textit{Ibid} at 520-524.
\textsuperscript{349} \textit{Ibid} at 524.
Firstly, *Grimes* approves a role for forum by retaining the first limb of *Phillips v Eyre*. Party expectations cannot justify a role for the relevance of forum law in a case such as *Grimes* where the dispute has no real connection with the forum.

Secondly, the court accepted, as it was bound to do, the correctness of the Supreme Court's decision in *McLean* in which no effect was given to the provisions of locus law exempting civil liability. As both of the plaintiff passenger and the defendant driver were residents of the forum, and as the journey commenced in the forum, it is not outside the realm of possibility that the parties would expect that the action would be governed by the forum law. However, unlike *Grimes*, it is certainly not *axiomatic* that the result in *McLean* can be justified in terms of the expectations of the parties.

Thirdly, in *McLean* the parties were not simply residents of the same state; they were also in a pre-existing relationship. The principle in *McLean* is not limited to multistate torts involving parties who are resident in the same state and who were in some form of relationship prior to the dispute. *McLean* extends to the *Chaplin v Boys* scenario where the parties are not in a relationship prior to the tort, but, fortuitously, happen to be resident in the same state. ³⁵⁰ In this situation it is extremely unlikely that applying the law of the state of common residency would meet with the expectations of the parties.³⁵¹

Thus, the ideal of giving effect to the expectations of the parties does not provide a satisfactory means of reconciling *Grimes* with *McLean*. A more convincing way of doing this is to be found in the way the concepts of people and place function under Brilmayer's political rights model. Where both parties share a common residency, as in *McLean*, then

³⁵⁰ An example of this is the *Arbeau v Derouin* action in *Lewis v Leigh* where *McLean* was applied.
the requirements of (i) legitimating connection\textsuperscript{352} and (ii) mutuality\textsuperscript{353} permit the application of that state's law. However, where the parties are resident in different states, as in \textit{Grimes}, the application of the law of the state in which one of the parties is resident does not satisfy Brilmayer's model. This is because in this situation the selection of the law of the state in which one of the parties was resident cannot satisfy both the legitimate connection and mutuality requirements.\textsuperscript{354} Where the parties are resident in different states, then only the application of the law of the locus state will satisfy Brilmayer's political rights model.

Thus the political rights model provides a superior means of reconciling \textit{Grimes} and \textit{McLean} than the notion of party expectations.\textsuperscript{355} Further, the concept of party expectations itself is an unsatisfactory one in this context. That the court was not concerned with what the particular parties actually expected, is evidenced by the court's use of the qualification "reasonable" expectations\textsuperscript{356}. The court is clearly concerned with some societal conception of justice, rather than the idiosyncratic conceptions of the parties.\textsuperscript{357} It would thus be more enlightening if the court avoided reference to party expectations.

\textsuperscript{352} The relationship between an individual and a state which justifies the application of that state's law to the detriment of that party. See Chapter 1.
\textsuperscript{353} The requirement that the law which is applied to the detriment of a party could be legitimately applied to the benefit of that party, and hence the detriment of the other party, if the facts of the case were reversed.
\textsuperscript{354} If the law worked to the detriment of the non-resident party then there is insufficient connection between the state and the party to justify the application of the law. If the law worked to the detriment of the resident party, then although the legitimate connection requirement is satisfied, the mutuality requirement is not because the law could not be applied to the benefit of the resident party if the facts of the dispute were reversed.
\textsuperscript{355} Although the continued relevance of forum law under the first limb of \textit{Phillips v Eyre} is also troublesome for the political rights model.
\textsuperscript{356} \textit{Supra}, note 337 at 524.
\textsuperscript{357} This is recognised by John Swan ('Paradigm Shift or Pandora's Box"?; \textit{Grimes v Cloutier, Prefontaine v Fristle} (1990)\textit{69 Can Bar Rev} 538 at 546) who, in applauding the decision states:

\begin{quote}
I do not want to quibble over what people actually expect to happen should they be so unlucky as to be involved in a traffic accident, particularly when they are outside their home province. What is important now is that justice here has a "tort" content; the "just" result is one that respects what the court believes is fair in the tort context.
\end{quote}
expectations and referred to the need to achieve justice through the fair treatment of the parties. And for those who object that the fair treatment of the parties is too vague a concept, we have Brilmayer's political rights model to guide us.

What we have dealt with thus far is an argument for the application of locus law based upon the fair treatment of the parties. The Court supplemented this argument with one based upon the federal relationship between the Canadian provinces. Morden JA thought that for the forum to ignore the anti-recovery provisions of the locus state would be "'officious intermeddling with the legal concerns of a sister province'". His Lordship did not expand on this short statement, but its meaning seems clear. To ignore the operation of locus state's carefully crafted socio-economic policy in these circumstances would be to interfere with the sovereignty of that state. Where the forum and the locus states are components in the same federal polity, this is unacceptable.

The test of interprovincial interference employed in Grimes allows the decision in that case (where regard was had to the civil law of the locus state) to be reconciled with the result in McLean (where locus law exempting civil liability was ignored). It could be argued that the policy underpinning the relevant locus law in McLean (a host-guest statute) was not invoked in a dispute between parties who were resident in the forum. This meant the forum state was not interfering in the sovereign affairs of the locus state by ignoring the provisions of locus law which exempted the defendant from civil liability. Thus both the fairness to the parties argument (based upon Brilmayer's political rights model and not the party expectations ideal) and the state interest argument used by the Court to justify recognition of locus law in Grimes can be reconciled with the application of forum law in McLean.

A question arises about whether the *Grimes* requirement that the alleged wrong be civilly actionable under locus law is jurisdiction-selecting or rule-selecting. Does *Grimes* apply whenever one party is from the forum and one party is from the locus state, irrespective of the content of locus law? Or does it apply only where the locus law is anti-recovery in operation and the defendant is a resident of the locus state, so that the locus state can be said to have an interest in the application of its law to protect its resident? At one stage in his judgment, Morden JA suggests that his approach may be rule-selecting. In distinguishing *McLean*, his Lordship said that in that case "neither party lived in the 'foreign' jurisdiction where the accident took place and which exempted the defendant from liability." However, this issue was resolved in favour of the jurisdiction-selecting methodology when the Ontario Court of Appeal next considered choice of law in tort in *Prefontaine v Frizzle*. 

*Prefontaine v Frizzle*

This case was heard as a special case in order to determine questions of law only. It involved a series of actions arising out of two separate motor vehicles in Quebec. In each accident, the injured party was a resident of Quebec and the defendant or defendants were residents of Ontario. Although no civil liability lay against any of the defendants in either action, the case proceeded on the assumption that the respective defendants' actions would attract criminal liability under the law of Quebec.

---

359 The court does not make it clear whether the new gloss requires (i) that if there is some level of civil liability under locus law the matter is then disposed of by forum law; or (ii) that locus law marks the outer limits of recovery, as envisaged by Lords Hodson and Wilberforce in *Chaplin v Boys*.

360 *Supra*, note 337 at 516. (Emphasis added.)

361 *Supra*, note 337.
In giving judgment for the court, Griffiths JA stated\(^\text{362}\) that *Grimes* provided the principle by which the case was to be decided. In his Lordship's view\(^\text{363}\), *Grimes* established the proposition that:

> in deciding the choice of law to be applied in Ontario to a tort committed outside the province, generally the two rules in *Phillips v Eyre* ... should apply. The two rules, however, should not be applied where to do so would produce an "unfair and unsound" result.

This, and other statements\(^\text{364}\), may appear to suggest that Griffiths JA envisaged that the *Phillips v Eyre* rule might be abandoned altogether in some cases. It is unlikely that this was his Lordship's intention. Griffiths JA accepted that *Grimes* endorsed the double-barrelled rule in *Phillips v Eyre*, and his Lordship saw himself as applying the *Grimes* principles to the facts before him.\(^\text{365}\) Like Morden JA in *Grimes*, Griffiths JA in *Prefontaine* saw the *Phillips v Eyre* rule as controlling, but amenable to a flexible construction, so as to do justice in the particular case.

As in *Grimes*, the court in *Prefontaine* saw the requirements of justice in the particular case as being governed by the reasonable expectations of the parties. According to Griffiths JA:\(^\text{366}\)

> It seems to me...that it would not be within the reasonable expectations of the parties to apply Ontario law to a claim where the plaintiffs reside in Quebec, the place of the alleged wrong.

Of course, in *Prefontaine* the plaintiffs were resident in the locus state and the defendants in the forum, whereas in *Grimes* the plaintiff was resident in the forum and the defendant in the locus state. His Lordship did not think that this factual difference required a

\(^{362}\) *Ibid* at 281.

\(^{363}\) *Ibid*.

\(^{364}\) "The issue...is whether the laws of Quebec should apply to the claims"; "...it would not produce an unjust result to apply the law of Quebec"; "In neither case can it be said that the law of Ontario is the law having the most significant relationship with the parties (either the defendants or the plaintiffs) or with the occurrence*. *Supra* note 337 at 284

\(^{365}\) *Ibid*.

\(^{366}\) *Ibid* at 285. The remarks about the artificiality of the concept of party expectations made in relation to *Grimes* apply here as well.
different legal result.\textsuperscript{367} Thus, whether locus law worked to the benefit or detriment of the local party was irrelevant to the question of whether the law of the locus state exempting civil liability should be applied. This indicates that the question of whether the \textit{Grimes} version or the \textit{McLean} version of the second limb of \textit{Phillips v Eyre} is appropriate, is decided on a jurisdiction-selecting basis. The determinant is whether at least one party is resident in the locus state.

It is interesting to note that in \textit{Prefontaine}, Griffiths JA relied only upon fair treatment of the parties (by giving effect to their reasonable expectations). His Lordship did not employ the argument regarding the sovereign interests of the locus state in having its law applied which Morden JA used in \textit{Grimes} under the "officious intermeddling" banner. This suggests that Griffiths JA felt that the state interest argument would not be convincing where locus law would work against the interests of the locus resident. If this is correct, then in so far as the concept of state interest is concerned, his Lordship is in the rule-selecting camp of the proponents of governmental interest analysis, rather than in the jurisdiction-selecting one of those who conceive of a generalised state in regulating conduct within its borders. Of course, in the final analysis, Griffiths JA appears to believe that the choice of law process is about fairness to the parties, rather than the interests of states.

\textit{Aftermath}

The decision in \textit{Prefontaine} exorcises any rule-selecting tendency from the \textit{Grimes} gloss on the \textit{Phillips v Eyre} rule. The decision firmly entrenches the version in jurisdiction-selection based upon the ideal of fair treatment of the parties. This development was reaffirmed in the Court of Appeal's decision in \textit{Williams v Osei-Twum}\textsuperscript{368}. In this case the plaintiffs, residents of Ontario, were injured when their car was involved in a collision

\textsuperscript{367} \textit{Supra} note 337 at 284.
\textsuperscript{368} \textit{Supra} note 337.
The driver of the other car was an Ontario resident, but he had rented the car from a Quebec company. The car was insured with a Quebec company. The Court applied the decision in McLean to ignore the provision of Quebec law which exempted the defendant from civil liability. The court did this on the basis that, like McLean, both parties were residents of the forum. The court rejected the defendant's argument that the residence of the non-party owner and the non-party insurer of the vehicle were relevant to the inquiry. Only the residence of the actual parties was relevant.369

This case confirms the jurisdiction-selecting, party-based approach of the Ontario Court of Appeal in applying the Grimes gloss. An analysis of the governmental interests of the locus state would have shown that the locus had an interest in having its law applied to the dispute. This is because the consequences of the awarding or denying the plaintiffs recovery in tort would have been felt in the locus state370, as this is where the insurer of the vehicle was based. If the purpose of the locus law was to provide a reasonable measure of compensation to those injured in motor vehicle accidents while keeping third party insurance premiums at a manageable level, then amounts paid out by locus insurers will impact upon this policy. However, the decision shows that state interests were irrelevant to the result, and supports the reasoning in Grimes and Prefontaine that it is the fair treatment of the actual parties which is the overriding norm.

Swan argues that the choice of law method in Grimes and Prefontaine constitutes a "radically new theory", and is not simply "gloss on the accepted rules"371. He is mistaken in this assessment. The cases leave in place the double-barrelled Phillips v Eyre rule. These cases simply establish that where one party is resident in the locus state, civil liability is required under locus law before forum law is applied. (Although it is unclear whether some civil liability is sufficient or whether locus law sets the outer limits of

369 Ibid at 152.
370 See the discussion of governmental interest analysis in Chapter 2.
371 Swan, supra note357 at 544.
recovery.) The *McLean* position is left unchanged. Where both of the parties are residents of the forum, all that is required is wrongfulness under the law - including the criminal law - of the locus state. Neither *Grimes* or *Prefontaine* go so far as to establish that where both of the parties are resident in the locus state, locus law applies to the exclusion of forum law.

Accordingly, *Grimes* and *Prefontaine* are glosses on the second limb of *Phillips v Eyre* rather than on the first. In this way, the *Phillips v Eyre* rule as expressed in *Grimes* and *Prefontaine* can be seen as Ontario's basic choice of law rule for multistate torts. Further, the holding in *McLean* establishing an exception to the second limb in cases of residency of both of the parties in the forum, can be seen as paralleling the exception envisaged by Lords Hodson and Wilberforce in *Chaplin v Boys*. The decision in *Williams* shows that the exception based upon the common residency of the parties will be employed in a jurisdiction-selecting manner with an emphasis upon the rights of the parties, rather than in a rule-selecting manner with an emphasis on the interests of the connected states.

The relationship between the *McLean* and *Grimes* glosses was shown in the Ontario Court of Appeal case of *Lucas v Gagnon*. This decision was partially reversed on appeal by the Supreme Court of Canada, so it will not be dealt with here in any detail. This case concerned a primary action and a crossclaim arising out of a two motor vehicle accident in Quebec. In respect of the primary action, as the plaintiff and the defendant were both residents of the forum, the Court held that the *McLean* gloss was applicable so that forum law would be applied provided that the defendant's action incurred some civil or criminal liability under locus law. As the crossclaim involved an action brought by a resident of the forum against a resident of the locus state, the court, applying *Grimes*, held that this

372 Supra note 337.
373 Ibid at 136 (per Tarnopolsky JA, Blair and Carthy JJA concurring).
action could not proceed as the act of the defendant to the crossclaim was not civilly actionable under locus law.\textsuperscript{374}

These decisions of the Ontario Court of Appeal reveal an attempt to reduce the importance of forum law by giving increased prominence to the concepts of people and place. However, because of the decision of the Supreme Court in \textit{McLean}, the Court of Appeal was not able to launch a frontal assault on forum law. Instead it could avoid the \textit{McLean} version of the \textit{Phillips v Eyre} rule, and have regard to the civil law of the locus state, only where the concepts of people and place operated together. Thus, it is only where a resident acts or is acted upon at home that regard is to be had to locus law.

This suggests the Ontario Court of Appeal used the concept of people to covertly undermine forum law and to secure the role of locus law. The Court did not see the concept of people as being worthy of promotion in its own right. If giving effect to party expectations is the controlling norm - as seems to be the case after \textit{Prefontaine} - then it seems that a party would expect the application of locus law irrespective of that party’s personal affiliation with another state. Yet \textit{McLean} prevented the Ontario Court of Appeal from replacing forum law with locus law alone. This had to wait until the Canadian Supreme Court revisited choice of law in tort in its decision in \textit{Tolofson v Jensen}\textsuperscript{375}.

\textsuperscript{374} \textit{Ibid} at 139 - 141 (per Tarnopolsky JA, Blair JA concurring; Carthy JA reaching the same conclusion by different means).

\textsuperscript{375} \textit{Supra} note 5.
The Third Period: Tolofson v Jensen

The Decision

In this case the Supreme Court heard appeals from the British Columbia Court of Appeal in Tolofson v Jensen and the Ontario Court of Appeal in Lucas v Gagnon. As only the barest outline of the facts of Lucas has been provided above, these will be set out in greater detail following a description of the facts of Tolofson.

In Tolofson, the plaintiff was injured when the car his father was driving was involved in a collision with another vehicle in Saskatchewan. The plaintiff, who was a minor at the time of the accident, and his father were residents of British Columbia, and the car was registered and insured there. The driver of the other vehicle was a resident of Saskatchewan, and his vehicle was registered and insured there. The plaintiff sued his father and the driver of the other car in British Columbia. Under the law of Saskatchewan: (i) the plaintiff's action was statute barred because the limitation period of one year had run prior to the plaintiff commencing his action; and (ii) a host-guest statute was in force which meant that in order for the plaintiff to recover damages from his father, he needed to show that his father had committed "wilful or wanton misconduct". Under the law of British Columbia: (i) the limitation period had not run; and (ii) the plaintiff could recover from his father on proof of simple negligence.

The British Columbia Court of Appeal applied the McLean interpretation of the Phillips v Eyre rule in holding that British Columbia law (as the law of the forum) would apply to the plaintiff’s action against both defendants provided that the acts of the respective defendants were not justifiable under Saskatchewan law. It will be recalled that an act which incurs criminal liability is "not justifiable" in this context.

376 (1992) 89 DLR (4th) 129.
In *Lucas v Gagnon*, the plaintiff was injured when the car her husband was driving was involved in a collision with another vehicle in Quebec. The plaintiff and her husband were residents of Ontario and the car was registered and insured there. The driver of the other vehicle was a resident of Quebec, and his vehicle was registered and insured there. The plaintiff sued her husband in Ontario, and her husband crossclaimed against the driver of the other car. Under the law of Quebec, no civil liability lay in respect of personal injuries arising out of motor vehicle accidents. Under the law of Ontario, civil liability lay in respect of these injuries.

As noted above, the Ontario Court of Appeal relied on *McLean* in holding that Ontario law applied to the plaintiff's action against her husband (provided that his actions were not justifiable under the law of Quebec). The Court relied on *Grimes* in holding that the plaintiff's husband could not maintain his crossclaim against the driver of the other vehicle as the conduct of the other driver did not attract civil liability under Quebec law.

In delivering the majority judgment, La Forest J\(^\text{377}\) spoke of the need to formulate choice of law rules in light of "the underlying reality in which they operate."\(^\text{378}\) According to his Lordship, this is not to be found in the fictional concept of party expectations, nor in the unanalytical notion of fairness.\(^\text{379}\) Rather, the underlying reality in which choice of law rules operate is that (a) "a state has exclusive jurisdiction within its own territories"\(^\text{380}\) to

---

\(^{377}\) Gonthier, Cory, McLachlin and Iacobacci JJ concurring (*Supra* note 5 at 325). Sopinka and Major JJ agreed with La Forest J subject to one exception which will be dealt with *infra* (*Ibid* at 325 - 326).

\(^{378}\) *Ibid* at 302. Peter Kincaid (*supra* note 184 at 540) praises La Forest J for being one of the few authors of leading choice of law judgments to underpin their prescriptions with "a solid theoretical foundation". Kincaid (*Ibid* at 547) ultimately disagrees with the foundation proffered by his Lordship, preferring instead the ideal of fulfilling the expectation of the parties as the controlling norm.

\(^{379}\) *Supra* note 5 at 302.

\(^{380}\) *Ibid* at 305.
"make and apply law"⁴⁸¹; and (b) "other states must under principles of comity respect the exercise of [a state's] jurisdiction within its own territory".⁴⁸²

What follows from the postulates of territorial sovereignty and comity is that the choice of law rule for multistate torts must be that the dispositive law is "the law of the place where the activity occurred, ie the lex loci delicti".⁴⁸³ The application of forum law under the McLean v Pettigrew doctrine infringes the territorial principle as it involves the courts of one country "defining the nature and consequences of an act done in another country."⁴⁸⁴

His Lordship thought that the territorial principle which was controlling at the international level should also be so within Canada, which, after all, was a "single country with different provinces exercising territorial legislative jurisdiction".⁴⁸⁵ This meant that locus law governed multistate torts occurring within Canada. There is however one difference envisaged by La Forest J between international multistate torts and interprovincial multistate torts. Although with regard to the former there might be very limited cases where it would be appropriate to apply forum rather than locus law in order to avoid injustice⁴⁸⁶, in regard to multistate torts occurring within Canada the rule that locus law governs is inflexible.⁴⁸⁷ The reasons for this will be discussed in the section below. It should be noted that although his Lordship did not find it necessary to ground the rule in the Canadian Constitution, he thought that the rule was undoubtedly consistent with it.⁴⁸⁸

Applying the rule that locus law governs, the result in Tolofson was that the law of Saskatchewan applied. This meant that the host-guest statute would apply to the action of

---

⁴⁸¹ Ibid at 303.
⁴⁸² Ibid at 305.
⁴⁸³ Ibid.
⁴⁸⁴ Ibid at 306.
⁴⁸⁵ Ibid at 315.
⁴⁸⁶ Ibid at 307 - 308. His Lordship did not provide an example of such circumstances.
⁴⁸⁷ Ibid at 314. Sopinka and Major JJ were not prepared to hold that there was no exception in relation to multistate torts occurring within Canada.
⁴⁸⁸ Ibid at 315 - 316.
the plaintiff against his father. The plaintiff sought to escape the application of the
Saskatchewan limitation statute by arguing that the statute was procedural, and therefore
not picked up by the selection of locus law. The Court rejected this argument on the basis
that a law should only be characterised as procedural only if it related to the "manner in
which a court must carry out its functions". A limitation statute, on the other hand,
got to the policy issue of protecting the defendant against stale claims and thus related to
the power of the locus state to define the legal consequences of actions occurring within its
borders. The statute was therefore substantive in operation and therefore should be
applied as part of locus law.

With regard to Lucas, locus law was held to apply to the action of the plaintiff against her
husband, and to the crossclaim by the husband against the other driver. This meant that
the provisions of Quebec law exempting civil liability meant that both actions would
fail.

Choice of Law Methodology

The Supreme Court's new choice of law rule for Canadian multistate torts is hard
multilateralist as it involves selection of the dispositive law by use of a single, exclusive
connecting factor. The content of the putative dispositive laws of the connected states is
irrelevant to the task. Professor Castel has said that this constitutes a return to "the old
historical rule". However, the rule does not mirror the hard multilateralism of the type
arising out of American cases such as Alabama Great Southern Railroad v Carroll,
where the law of the place where the injury occurred was held to govern. In Tolofson, La

389 Ibid at 322.
390 Ibid at 322.
391 Ibid at 325. The substance/procedure distinction in the Australian context will be
discussed in greater detail in Chapter 6.
392 Ibid at 325.
393 J-G Castel, "Back to the Future! Is the 'New' Rigid Choice of Law Rule for
394 Supra note 47, discussed in Chapter 1.
Forest made it clear that the rule had been formulated with an eye to cases where the injury-causing conduct and the injury occurred in the same state. Where the conduct and the injury occurred in different states, his Lordship left open the question as to which of these states, or perhaps even another, would supply the dispositive law.395

Castel is correct in stating that the Tolofson rule does reject the learning of the American conflicts revolution.396 Castel's chief complaint is that the new rule does not allow the selection of the law of the common domicile or residence of the parties397, especially where that state's law provides more adequate compensation than locus law.398 This, after all, is the result often reached by the application of one of the revolutionary choice of law methods such as soft multilateralism, the governmental interest analysis form of unilateralism, or the substantive law method.399 However, it is clear that Forest J rejected an exception based on common residence for Canadian multistate torts. It is also clear that his Lordship also rejected the reasoning behind each of these other choice of law methodologies on the basis of their inconsistency with the territorial principle that underpinned hard multilateralism.

His Lordship rejected the use of soft multilateralism (or the "proper law of the tort") to select the law of the state of common residence on the basis that it would cause constitutional difficulties. His Lordship assumed that allowing the state of common residence legislative jurisdiction would not remove the legislative jurisdiction of the locus state. This would mean that two states would have legislative jurisdiction in respect of the

395 "[In such cases] territorial considerations may become muted; they may conflict and other considerations may play a determining role." Supra note 5 at 305.
396 Castel, supra note 393 at 75.
397 Ibid at 66.
398 Ibid at 67.
399 Recall, for example, Babcock v Jackson, supra note 58; Tooker v Lope, supra note 139 and Clark v Clark, supra note 232.
same event, and this could lead to conflicting laws applying to that event. This result is arguably constitutionally impermissible.400

La Forest J gave similar reasons for rejecting a governmental interest analysis form of methodology. His Lordship said401

[T]he mere fact that another state (or province) has an interest in a wrong committed in a foreign state (or province) is not enough to warrant its exercising jurisdiction over that activity in the foreign state, for a wrong in one state will often have an impact in another.

Again his Lordship was concerned to prevent "a multiplicity of jurisdictions [being] capable of exercising jurisdiction over the same activity in accordance with their own laws."402 This was to be avoided because it would promote forum shopping and inhibit mobility.403 His Lordship did not refer to the same constitutional difficulties that he mentioned in relation to the rejection of soft multilateralism.

Lastly, his Lordship rejected the underpinning notion of the substantive law approach, namely: that the dispositive law which is selected through the choice of law process must be "fair". La Forest J rejected fairness - in terms of the actual content of the dispositive law - as a meaningful concept in choice of law. His Lordship thought that what one really means when one calls a state's law unfair is that one "does not approve of the law that the legislature having power to enact it within its territory has chosen to adopt."404 The territorial principle requires that the stranger who is unlucky enough to be injured in an anti-recovery locus must abide by the decisions made by the residents of that state as to what law should govern events occurring there.405

400 Supra note 5 at 316 - 317. This argument has been advanced by various justices of the Australian High Court, and will be considered in Chapter 6.
401 Ibid at 308 - 309 (emphasis added). The use of the term "impact" suggests that his Lordship was using "interest" in the technical way it is used in governmental interest analysis.
402 Supra note 5 at 309.
403 Ibid at 309.
404 Ibid at 311.
405 Ibid.
Having seen why La Forest J chose hard multilateralism as the appropriate choice of law methodology, and rejected the other choice of law methods, let us see the function performed by the concepts of people and place in *Tolofson*.

*People and Place*

*Tolofson* completes the enterprise initiated by the Ontario Court of Appeal in *Grimes* and progressed in *Prefontaine*. This enterprise is the elevation of the concept of place. Whereas the Ontario Court of Appeal could only do this by combining the concepts of people and place, the Supreme Court was able to elevate place alone. And in doing so, it rejected a role for the concept of people. In the intra-Canadian context, the rejection of "people" has been absolute, as there is no exception to the application of locus law. As his Lordship did not reject out of hand the existence of an exception in the international context, it may be that there will be a limited role for the concept in that sphere. It should be remembered at this point, however, that the choice of law rule which has emerged from *Tolofson* is a rule which has its authority in the common law, rather than in the Constitution. This means that Canadian provinces may be able to avoid the application of locus law in their courts by legislation, although there may be constitutional restrictions upon this.406

In elevating the concept of place, the Supreme Court may have completed a task started by the Ontario Court of Appeal. However, the concept of place performed quite a different function in each of these judicial fora. We have seen that the Court of Appeal used place as a means by which the forum gave effect to the reasonable expectations of the parties. By contrast, the Supreme Court used the concept as a means of the forum giving effect to

---

406 See Castel, *supra* note 393 at 64 - 66 in relation to difficulties such legislation may face in regard to difficulties such legislation may face in regard to the requirements of order and fairness associated with the implied full, faith and credit provision of the Constitution. For difficulties such legislation might face in regard to the express provisions of the Constitution, see E Edinger, "Territorial Limitations on Provincial Powers" (1982) 14 *Ottawa L Rev* 57 and J Swan, "The Canadian Constitution, Federalism and the Conflict of Laws" (1985) 63 *Can Bar Rev* 271.
the sovereign rights of the locus state to regulate events within its borders. The Supreme Court said that the forum would do this out of comity. However, we have previously noted the reasons why comity does not provide a persuasive argument for multilateralist methodology such as that adopted by the Supreme Court. We will revisit those reasons here.

The Supreme Court has asserted that the forum state affords comity to the locus state in order to facilitate "the movement of people, wealth and skills across state lines". This is reminiscent of Huber's conception of comity discussed earlier. This justification may be convincing in respect of planned transactions, but holds little water in regards to unplanned occurrences such as motor vehicle accidents. It would indeed be surprising if the replacement of the McLean rule by the new rule will significantly increase the volume of beneficial interprovincial activity in Canada.

As we have also seen previously, there is an alternative justification for comity. This was formulated by Story, and is based on the notion of mutual self-interest. A state applies the laws of another state (in circumstances where that other state will benefit) in anticipation that the other state will return the favour when the positions are reversed. We saw that there were two objections to this. The first causes immense problems in the international sphere but little difficulty in the interprovincial context. The second is fatal in both the international and interprovincial realms.

The first difficulty with the reciprocity version of comity is that there is no guarantee that the state to which the forum affords comity will reciprocate when the position is reversed.

---

407 See Chapter 1.  
408 Supra note 5 at 303.  
409 See Chapter 1.  
410 See Chapter 1.
This will not be a problem between the units of a federal nation where the constitutional structure can ensure reciprocity. This fact is recognised in Tolofson\textsuperscript{411}.

The second objection to the reciprocity version of comity is more serious as it strikes at the heart of the territoriality principle which underpins Tolofson's hard multilateralism. This objection argues that the interests of states are not limited to events which occur within their borders. If the locus state does not necessarily have an interest in having its law applied simply because it is the locus state, then the whole foundation of the comity justification has been eroded. If the locus state does not have an interest in having its law applied then affording comity to the state will achieve nothing. And we have seen that multilateralism is too blunt an instrument in order to promote state interests. Although the policy behind certain laws will be invoked by a territorial contact, the policy behind other laws will be invoked by the residence of one or both of the parties. We saw an example of such a law in Hurst \textit{v} Leimer\textsuperscript{412} where the purpose of the law was to stabilise insurance premiums and that this policy was indifferent to the location of the particular accident. We have seen that La Forest J also recognised that all state interests are not territorially invoked.\textsuperscript{413} If this is the case, then there is little point in affording "comity" to the locus state if it does not have an interest despite it being the locus of the event.

Thus comity does not afford a convincing argument for the new rule. Although La Forest J used the comity theory as the primary justification for the rule, he also stated that the rule had a number of "practical" advantages. These included meeting the expectation of the parties.\textsuperscript{414} In light of the previous discussion in this Chapter, it seems that the ideal of fair treatment of the parties, through observance of their political rights, seems to be the primary advantage of the multilateralist method.

\textsuperscript{411} at 303.
\textsuperscript{412} \textit{Supra} note 195.
\textsuperscript{413} \textit{Supra} note 5 at 308.
\textsuperscript{414} \textit{Ibid} at 305 - 306.
Like the Canadian experience, the approach taken by the Australian courts to choice of law for multistate torts can be divided into three periods. In the first period, forum law dominated to the almost complete exclusion of the concepts of people and place. In the second period, the importance of forum law declined and the concepts of people and place became more important. In the third period, the Australian High Court entrenched the concept of place to the exclusion of that of people. However, contrary to developments in England, and particularly Canada, the High Court retained an importance of forum law through a formalistic reading of the substance/procedure distinction.

The First Period - The Supremacy of Forum law

We have seen that in England and Canada, forum law initially dominated the choice of law rule for multistate torts under the Machado v Fontes interpretation of Phillips v Eyre. This interpretation involved the exclusive application of forum law provided that some criminal or civil liability attached to the defendant's actions under locus law. The Machado v Fontes interpretation was never adopted in Australia. Instead, the Australian courts were able to secure the domination of forum law by adopting two interpretations of the Phillips v Eyre rule so that forum law exclusively applied provided that the defendant's act bore a particular character under the civil law of the locus state.

415 It was criticised in Varawa v Howard Smith Co Ltd (No 2) [1910] VLR 509 and questioned in Koop v Bebb ,supra note 259.
The first of these interpretations was put forward by Kerr J in *Hartley v Venn* and has been referred to as the "actionable...in the abstract" approach. Under this interpretation, the second limb of *Phillips v Eyre* is satisfied - and the plaintiff allowed access to forum law - where the defendant's action gives rise to a civil action under locus law even though no civil liability attaches to that act. Thus in *Hartley v Venn*, the second limb was regarded as satisfied, and the plaintiff was entitled to relief under forum law, even though the plaintiff's contributory negligence was a complete defence to the plaintiff's action under locus law.

The second interpretation by which a dominant role was secured for forum law is regarding the second limb of *Phillips v Eyre* as satisfied where the defendant's act gives rise to some civil liability under locus law. Once this is shown, then forum law is exclusively applied and may allow recovery in greater measure than allowed for by locus law. This interpretation was used in *Kolsky v Mayne Nickless Ltd* and provided one of the bases for decision in *Kemp v Piper*. The interpretation enabled the plaintiff in the first of these cases to escape the provisions of locus law which reduced damages for contributory negligence where there was no such reduction under forum law. In the second case, the interpretation enabled the plaintiff to recover damages for heads of loss not compensable under locus law.

These two interpretations provide a slightly more significant role for the civil law of the locus state than does *Machado v Fontes*. However, as with the *Machado v Fontes* interpretation, the concept of forum is of much greater significance than the concept of place, and the concept of people was not expressly regarded as important. These interpretations share the characteristics of the *Machado v Fontes* interpretation in terms of

---

416 10 FLR 151 (1967) at 154-155.
417 Joint Law Commissions' Working Paper, supra note 8 at para 2.16.
the methodologies and dichotomies discussed earlier. The interpretation of the rule is a strange mix of multilateralism and unilateralism, jurisdiction-selection and rule-selection, and externally-generated and internally-generated norms. The pre-ordained reference to forum and locus law under the two limbs partakes of the jurisdiction-selecting aspect of multilateralism. However, as locus law only controls the disposition of the action if the defendant's act is not civilly actionable or does not give rise to civil liability, the second limb can be regarded as rule-selecting. The reference to forum law under the first limb is based upon internally-generated norms, while the partial reference to locus law under the second limb can, like the Machado interpretation, be imperfectly explained based upon the sovereign right of the locus state to govern events occurring within its territory or, alternatively, the fair treatment of the defendant.

We have discussed how the Australian courts initially secured the domination of forum law through a reasonably wide interpretation of the second limb of Phillips v Eyre. We should also note that in some cases the courts were able to reach the same result without reference to the Phillips v Eyre rule. The courts did this by means of statutory interpretation whereby a forum statute was construed as applying directly to an event occurring in the locus state without reference to the common law choice of law process, and hence without reference to the dispositive law of the locus state.

An example of this technique is Schmidt v Government Insurance Office of New South Wales\textsuperscript{420}. The case concerned an accident in Victoria involving a New South Wales registered and insured motor vehicle. The plaintiff was a passenger in the vehicle and it was driven by her husband. The plaintiff was injured in the accident and her husband was killed. The plaintiff brought an action in New South Wales against the insurer of the motor vehicle pursuant to a New South Wales statutory provision\textsuperscript{421}. The provision

\textsuperscript{420} [1973] 1 NSWLR 59.
\textsuperscript{421} Section 15(2) of the Motor Vehicles (Third Party Insurance) Act, 1942.
allowed the plaintiff to bring a direct action against the insurer of the vehicle on condition that she would have been able to bring an action against her husband, had he lived. The question to be decided was whether that condition was satisfied.

Section 16B of the New South Wales *Married Persons (Property and Torts) Act, 1901* abolished the common law doctrine of interspousal immunity in respect of injuries arising out of the use of a motor vehicle registered in New South Wales. At the time of the accident, the common law position of interspousal immunity applied in Victoria so that the plaintiff would not have had an action against her husband under locus law. The defendant insurer demurred to the plaintiff's claim, arguing that s 16B only extended to the facts through the *Phillips v Eyre* rule. As the second limb of the rule was not satisfied because no action lay in Victoria against the husband at the suit of the plaintiff, the condition for the direct action against the insurer was not satisfied.

The New South Wales Court of Appeal\(^{422}\) held that the plaintiff was entitled to maintain her action against the insurer as s 16B applied to give the plaintiff a right of action against her husband (had he lived) in respect of the Victorian accident. Section 16B was held to apply to the accident directly without it being made applicable by the forum's choice of law rules. The Court of Appeal held that s 16B allowed the plaintiff to maintain an action against her husband in New South Wales, in respect of negligence occurring in Victoria, as the section operated extraterritorially. The section gave the plaintiff a right of action against her husband "[s]ubject to appropriate proof of negligence under the general law"\(^{423}\). This was so notwithstanding that the injury occurred outside New South Wales.

\(^{422}\) Moffitt and Reynolds JJA, Hardie JA dissenting.
\(^{423}\) *Supra* note 420 at 69.
The court was led to this conclusion by two factors. Firstly, the section was limited in a way which was not territorial; it applied only to injuries arising out of the use of a motor vehicle registered in New South Wales. As the intended field of operation of the section had already been expressed, to imply a territorial restriction would be to redefine the intended field of its operation.424

Secondly, the legislative context in which s 16B was enacted evinced an intention that it apply to relevantly incurred multistate injuries directly and without recourse to choice of law process. The section was seen by the court as forming part of the system of motor vehicle third party insurance scheme in force in New South Wales. The scheme provided that a motor vehicle could not be registered unless it was covered by a third party policy issued by a designated insurer indemnifying the owner and driver against liability for personal injury suffered by any person arising out of the use of the motor vehicle in the States and mainland Territories of Australia. Section 16B was intended to extend the benefits of the scheme, including the right to proceed directly against the insurer425, to those persons, such as the instant plaintiff, who would otherwise be denied access on the basis of interspousal immunity. In order for this end to be realised, s 16B must be given concurrent territorial operation with the scheme.426 Therefore, the section must be given effect to outside New South Wales in accordance with its tenor.

The statutory construction approach to choice of law is a form of unilateralism; it endeavours to ascertain the spatial reach of a particular law and does not attempt to prescribe the reach of the putative dispositive laws of all the connected states. The method is clearly rule-selecting as the reach of the forum statute is determined by the content of the

424  Ibid at 69. This express restriction also served to render the section constitutionally valid as its operation was limited to injuries having a New South Wales element, notwithstanding that the element was not the location of the injury. (Ibid at 67,69).
425  Under s15(2) of the Motor Vehicle (Third Party Insurance) Act, the section ultimately in issue in Schmidt.
426  Supra note 420 at 68-70.
law itself. The method is also based on internally-generated norms as it is the policy of the law which determines its spatial reach. The statutory construction approach is thus similar to governmental interest analysis, but differs in two respects. Firstly, unlike governmental interest analysis, the statutory construction approach can only result in the selection of forum law. This is because the forum only has regard for foreign law when it is directed to it by the forum's choice of law rules. But where the choice of law process is pre-empted by a forum statute which purports to apply to an event by its own force, the choice of law process is circumvented, thus preventing the forum from having regard to the applicability of foreign law. The second way the approach differs from governmental interest analysis is that the spatial reach of the law is based upon the actual legislative intent of the forum legislature.

The Second Period - The Appearance of People

We saw in Chapter 4 that the concept of people was imported into English choice of law in tort through the versions of the flexible exception to the Phillips v Eyre rule introduced in Chaplin v Boys by Lords Hodson and Wilberforce. The concept of people was also introduced in three Australian multistate tort cases which used the flexible exception as the primary or alternative basis for decision. In these cases the parties were all residents in the forum, and forum law was applied under the flexible exception to avoid limitations upon recovery under locus law\(^ {427}\). In these cases Lord Wilberforce's unilateralist, rather than Lord Hodson's soft multilateralist, version of the exception was applied. That is, the courts focused upon the concept of people as invoking the policies which underpinned the

\(^{427}\) Kemp v Piper, supra note 419 (fewer heads of loss recoverable under locus law than forum law for wrongful death actions); Warren v Warren [1972] Qd R 386 and Corcoran v Corcoran, supra note 301 (interspousal immunity under locus law in the relevant circumstances but not under forum law). The existence of the flexible exception as part of the Australian common law was rejected by the New South Wales Court of Appeal in Kolsky v Mayne Nickless Ltd, supra note 418 and, finally, by the High Court in McKain v RW Miller & Co (SA) Pty Ltd, supra note 4.
respective laws of the forum and locus states, rather than simply looking at the objective connection between a state and the parties there resident. Thus, the concept of people in these cases was used in terms of effecting state interests, rather than the fair treatment of the parties.

In *Kemp v Piper*\(^{428}\) and *Warren v Warren*\(^{429}\) the courts purported to apply Lord Wilberforce's version of the exception, but did not attempt any real analysis of the policies underlying locus law to see if the locus state had an interest in having its law applied to the dispute. In *Corcoran v Corcoran*\(^{430}\), however, Adam J went through all the steps outlined by Lord Wilberforce.

In this case, the plaintiff and the defendant were married, and both residents of Victoria. The plaintiff was injured when the motor vehicle in which she was a passenger, and which was driven by her defendant husband, was involved in an accident in New South Wales. The plaintiff brought an action against her husband in Victoria. Under the law of Victoria, the doctrine of interspousal immunity had been abolished generally. Under the law of New South Wales, the doctrine of interspousal immunity applied in this case. The doctrine had only been abolished in respect of injuries arising from the use of motor vehicles registered in New South Wales, and the motor vehicle in which the parties were travelling was registered in Victoria.

Adam J, relying on Lord Wilberforce's construction of the *Phillips v Eyre* rule, held that the second limb of the rule was not satisfied. This was because the defendant's conduct was not actionable under locus law, due to the doctrine of interspousal immunity.\(^{431}\) However, his Honour thought that the case was a suitable one for the application of Lord Wilberforce's flexible exception whereby forum law could be applied to the dispute.

\(^{428}\) *Kemp v Piper*, supra note 419 per Bray CJ at 29 - 30 (Mitchell J agreeing).
\(^{429}\) *Warren v Warren*, supra note 427 at 392.
\(^{430}\) *Supra* note301.
\(^{431}\) *Ibid* at 170.
without reference to locus law on the basis of the interests of the respective states in having their laws applied.

His Honour held that the locus state did not have an interest in applying its anti-recovery law to the circumstances of the case. In so doing, his Honour went beyond the crude assumption that the policy behind the locus law would not be advanced by its application to an action between a married couple who were resident outside the locus state. His Honour conducted a careful analysis of the policy which informed the locus law. The purpose of the law was to remove the immunity where to retain it would be unfair to the wife and of no benefit to the husband. The immunity was removed in relation to injuries arising out of the use of a motor vehicle registered in New South Wales because in such a case there would "in substance be no question of personal litigation between husband and wife." The real defendant in such an action would be the compulsory third party insurer of the vehicle. To apply the New South Wales law in this case would not serve its underlying policy, as in this case the "real" defendant to the action would be the compulsory third party insurer of the vehicle under the scheme established by Victorian law. In fact, to apply forum law to the exclusion of locus law in these circumstances would advance the interests of both states. This was because the policy behind both forum and locus law was the same in these circumstances - to allow the injured spouse to recover damages from the vehicle's compulsory third party insurer.

The reasoning of Adam J is clearly based upon the assumption that the choice of law process should reflect the interests of the relevant states involved. It also shows that the membership of the parties of particular political communities - the concept of people - is relevant in so far as it gives those states an interest in having its law applied to the dispute.

---

432 Ibid at 171.
433 Ibid.
434 Ibid.
The Third Period - Developments in the High Court

Prior to the late 1980s, the High Court considered only two cases dealing with choice of law in tort. The decisions in these cases are not very instructive in terms of elucidating the meaning of the Phillips v Eyre rule. In the first of these cases, the plaintiff succeeded as there was no difference between forum and locus law, and in the second, the plaintiff failed as there was no liability under forum law.

Since this time, however, the High Court has been much more active in the area, and has considered three cases which squarely considered the content of the choice of law rule for multistate torts. These cases reveal disparate views by the members of the High Court as to the appropriate choice of law rule in tort, the theoretical foundation of that rule, as well as the substance/procedure distinction. We will very briefly outline the facts and holding in these cases, and then ascertain how the concepts of people and place have been used by the members of the High Court.

What the High Court Decided

The first of these cases - Breavington v Godleman - concerned a difference between the heads of loss recoverable under forum and locus law. Under forum law, damages were

---

435 Koop v Bebb, supra note 259. The case is of note, however, because of an alternative basis for decision based upon the direct application of the forum statute independently of the common law choice of law process.
436 Anderson v Eric Anderson Radio and TV Pty Ltd, supra note 259.
437 Breavington v Godleman, supra note 4; McKain v RW Miller & Co (SA) Pty Ltd, supra note 4 Stevens v Head, supra note 4. A fourth case - Goryl v Greyhound Australia Pty, supra note 4 - also involved a multistate tort. The case was primarily concerned with the constitutionality of a forum statute, and will also be discussed below.
438 One commentator, writing after the first of these cases was decided, has claimed that the diverse reasoning used by the members of the High Court is reminiscent of the disagreement among the members of the House of Lords in Chaplin v Boys: PM North, (1990) "Reform But Not Revolution" 220 Recueil des Cours 9 at 246.
439 Supra note 4.
recoverable for pain and suffering, loss of amenities of life and economic loss. Under locus law, damages were not recoverable for economic loss in the relevant circumstances. The High Court unanimously held that the plaintiff could not recover damages for heads of loss not compensable under locus law. The majority did so on the basis that locus law, and not the Phillips v Eyre rule, governed multistate torts occurring within Australia. The minority applied the Phillips v Eyre rule as interpreted by Lords Hodson and Wilberforce in Chaplin v Boys so that locus law marked the outer limits of the plaintiff's recovery.

The second case - McKain v Miller - concerned whether the limitation period in force under forum law, as opposed to the shorter limitation period under locus law - which had already expired - applied to the plaintiff's action. The majority of a High Court differently constituted than in Breavington, endorsed the traditional characterisation of statutes of limitation as procedural rather than substantive, and held that the forum's limitation statute therefore applied to the action. As the locus state's statute was procedural, it was not to be applied to the action under the second limb of Phillips v Eyre. The majority also reinstated the Phillips v Eyre rule as the appropriate one for choice of law in tort, but rejected the flexible exception to the rule introduced in Chaplin v Boys as being a part of the common law for multistate torts occurring within Australia. The dissenting justices in McKain, who were part of the majority in Breavington, adopted a narrow definition of procedure and characterised statutes of limitation as substantive, rather than procedural, so that the forum's statute did not apply. Their Honours maintained the view they expressed in Breavington that locus law governed multistate torts within Australia, and therefore stated...
that the locus state's limitation statute (which was part of that state's substantive law) would defeat the plaintiff's action.

The majority and dissenting justices in *McKain* maintained their respective views in the third case of the series - *Stevens v Head*. In this case forum and locus law differed in respect of the calculation of damages for non-economic loss. Under forum law, the common law principles prevailed. Locus law reduced the common law damages which otherwise would be awarded for non-economic loss in accordance with a statutory scale. The majority characterised the provision of locus law as procedural, and therefore as not applicable to the action. The minority characterised the locus statutory provision as substantive, and therefore applicable to the action under their choice of law rule which selected the locus state as providing the dispositive law.

*People and Place in the High Court*

So far we have characterised the disparate views of their Honours in these cases as being in the majority or in the minority. Although this is accurate in so far as the substance/procedure distinction is concerned, it does not represent the different reasoning and assumptions made about the choice of law process in regard to multistate torts. There are in fact three lines of reasoning in these cases. The first is that advocated by the majority in *McKain* and *Stevens v Head*: Brennan, Dawson, Toohey and McHugh JJ. The second is that of Mason CJ. The third is that of Wilson and Gaudron JJ, and Deane J, although, as we will see, there may be differences in their Honours' conception of the function of the concept of place. We should note at this stage that Mason CJ, Wilson and Deane JJ have all retired from the Court. Before doing so, however, Mason CJ

---

444 *Supra* note 4.

445 *Motor Accidents Act 1988* (NSW), s 79. The formula required that no damages be awarded where the economic loss is less than $15 000; that damages less than $40 000 be reduced by $15 000; that damages between $40 000 and $55 000 be reduced by a particular formula; and that the maximum amount of damaged recoverable be $180 000, and then only in the most extreme case.
abandoned his view, and Deane J stated that lower courts should follow the majority view expressed in McKain and Stevens v Head. Gaudron J. who still graces the court, has also stated lower courts should follow the majority view expressed in McKain and Stevens v Head. However, as these concessions were clearly reluctant, in this Chapter we will concern ourselves with the views which their Honours respectively advocated in Breavington, McKain, and Stevens v Head.

We will now discuss these three lines of reasoning in turn. In the discussion below, the use of the term "State", rather than "state", has been used where their Honours were particularly referring to the States comprising the Commonwealth of Australia, and not simply a law area.

The Majority View

In McKain, Brennan, Dawson, Toohey and McHugh JJ adopted the reformulation of the Phillips v Eyre rule put forward by Brennan J in Breavington450 as the choice of law rule for multistate torts occurring within Australia. The rule is that:

A plaintiff may sue in the forum to enforce a liability in respect of a wrong occurring outside the territory of the forum if - 1. the claim arises out of circumstances of such a character that, if they had occurred within the territory of the forum, a cause of action would have arisen entitling the plaintiff to enforce against the defendant a civil liability of the kind which the plaintiff claims to enforce; and - 2. by the law of the place in which the wrong occurred, the circumstances of the occurrence gave rise to a civil liability of the kind which the plaintiff claims to enforce.

The way in which Brennan J applied the formulation in Breavington indicates that the phrase "liability of the kind" is to be interpreted narrowly. It is not sufficient for the purposes of the second limb that some civil liability attach to the defendant under locus law. In order for the plaintiff to recover for a particular head of damage in the forum, the

---

446 Goryl v Greyhound Australia Pty, supra note 4.
447 Supra note 4 at 438.
448 Ibid.
449 Supra note 4 at 197 - 198.
450 Supra note 4 at 467 - 468.
plaintiff must be able to recover for that head of damage under locus law. In this way, the reformulation of the Phillips v Eyre rule, like the reformulation put forward by Lords Hodson and Wilberforce in Chaplin v Boys, involves the substantive provisions of locus law marking the outer limits of the plaintiff's recovery.

In McKain the majority acknowledged that the reference to forum law under the first limb of the rule could result in different legal results flowing from an event occurring within Australia, depending upon where the matter was litigated. Their Honours did not believe that this infringed any "constitutional imperative". On the contrary, the possibility reflected the federal legal relationship between the Australian States created by the Constitution. In their Honours' opinion:

To describe the States, as Windeyer J once described them as "separate countries in private international law" may sound anachronistic. Yet it is of the nature of the federation created by the Constitution that the States be distinct law areas whose laws may govern any subject matter subject to constitutional restrictions and qualifications. The laws of the States, though recognised throughout Australia, are therefore capable of creating disparities in the legal consequences attached in the respective States to the same set of facts ... That may or may not be thought to be desirable, but it is the hallmark of a federation as distinct from a union.

The majority claimed that to allow the forum to apply its own anti-recovery dispositive law to disputes involving events occurring within its own borders, but not to disputes involving events occurring in other Australian States, would be to "deny the forum State an important legislative power". Yet this line of argument is, with respect, misconceived. The argument might be used to reject an interpretation of the Constitution which prohibits a State from enacting a law which, as in Schmidt, the State legislature expressly or impliedly intended to apply to events occurring outside the State. The argument cannot be used to justify the retention of the first limb of Phillips v Eyre as the common law rule for the disposition of multistate torts which defines the spatial reach of

---

451 Supra note 4 at 470. Dawson J at 483 was of the same view.
452 Supra note 4 at 196.
453 Ibid at 196 - 197 (reference omitted). Also see Brennan J in Breavington at 468.
454 Ibid at 196.
forum law without recourse to legislative intent. It is one thing to say that the forum should be allowed to have its law apply to extra-territorial events if that is the intention of the enacting State. It is quite different to assert, as does the *Phillips v Eyre* rule, that forum law automatically applies to a dispute in tort notwithstanding the nature of the connection between the circumstances of the dispute and the forum.

Additionally, the majority do not explain why tort is the only area of substantive law where to deny automatic reference to forum law would be to "deny the forum State an important legislative power". One is forced to conclude that the majority's reasoning is based upon an unstated assumption. This assumption is that there is something special about tort law which invokes the forum's substantive policies regardless of the connection, or absence of connection, between the forum and the circumstances of the dispute. In Chapter 4 we addressed and, it is submitted, rebutted this notion.

In *McKain* the majority did not directly deal with the policy rationale for the second limb of the *Phillips v Eyre* rule. In *Breavington*, Brennan J, thought that the reference to locus law was justified on the basis of the rights of States to regulate conduct occurring within their territory.\(^\text{455}\) His Honour said that the "mutual legal independence of the States"\(^\text{456}\) meant that the locus State had "the authority to define the kind of civil liability imposed on the tortfeasor."\(^\text{457}\) His Honour thus saw the concept of place as being closely linked with the sovereign rights of States, and that these rights was respected by virtue of the second limb of *Phillips v Eyre*.

Having looked at the majority's treatment of the *Phillips v Eyre* rule, we turn to the majority's treatment of the exception to the rule proposed in *Chaplin v Boys*. In *Breavington*, the existence of the exception was rejected by Brennan and Dawson JJ in

\(^{455}\) Supra note 4 at 470

\(^{456}\) Ibid at 468.

\(^{457}\) Ibid.
respect of multistate torts occurring within Australia\textsuperscript{458}. Toohey J, however, accepted the existence of the exception whereby forum law could be applied without regard to locus law\textsuperscript{459}, but only in "special circumstances where ... it is clear that the lex loci delicti has no real connection with the proceedings"\textsuperscript{460}. In McKain, the majority - including Toohey J - accepted that the flexible did not form part of the choice of law regime for multistate torts occurring within Australia. They did so on the basis that the special circumstances mentioned by Toohey J in Breavington - the lack of a real connection between the law of the locus state and the circumstances of the dispute - would be "out of the ordinary" in respect of disputes based on events occurring within Australia. \textsuperscript{461} Although their Honours did not explain this statement, it seems that it is a truncated form of the argument given by Dawson J in Breavington. In that case, his Honour said\textsuperscript{462}:

> The connection of the parties with a State or Territory in which a wrong is committed in Australia could never be so remote as, for example, the connection of the parties to Malta in Chaplin v Boys. This is so because the very fact of federation tends against the view that one State cannot have a significant interest in the operation of its laws upon acts committed within its borders by persons from another State or Territory.

In this passage, Dawson J clearly asserts that the interest that an Australian State has in regulating events within its borders is to be preferred to the interest another Australian State may have in a dispute by virtue of the residency of one or more of the parties in that State. However, his Honour is going further than simply elevating the concept of place above that of people in the intra-Australian context. His Honour appears to be asserting that in the Australian context, the concept of people relates to belonging to an Australia-wide community, rather than belonging to a political community constituted by one of the Australian States. His Honour envisages a connection between a resident of one Australian State and another State in which that person in temporarily present, which is

\textsuperscript{458} Supra note 4 per Brennan J at 468 - 469 and Dawson J at 483 - 484.  
\textsuperscript{459} Ibid at 490 - 491.  
\textsuperscript{460} Ibid at 491.  
\textsuperscript{461} Supra note 4 at 197.  
\textsuperscript{462} Supra note 4 at 484.
closer than the connection between a person and a truly foreign state in which that person is temporarily present (for example, an Englishman in Malta). The common "Australianness" of the locus State and persons resident in other Australian States means that there is a connection between the dispute and the locus State which renders the flexible exception to the *Phillips v Eyre* rule inappropriate. This line of reasoning is also present in the views of Mason CJ, and it will be discussed again below.

The rejection of the flexible exception by the majority in *McKain* was applied by the Full Court of the Supreme Court of South Australia in *Nalpantidis v Stark (No 2)*. In this case, the plaintiff, who was a passenger in a motor vehicle driven by the defendant, was injured when the vehicle was involved in an accident in Victoria. The plaintiff and the defendant were residents of South Australia and their trip began and was to end in that State. The motor vehicle was registered in South Australia and was subject to the compulsory third party insurance scheme in force in that State. The Full Court held, by majority, that there was no flexible exception to the *Phillips v Eyre* rule, which allowed the plaintiff to escape the limitations upon recovery imposed by locus law. If there ever was a case where the connection between the circumstances of the dispute and the locus state was insubstantial, this was such a case. In this respect the case is reminiscent of *Alabama Great Southern Railroad v Carroll*, discussed in Chapter 1. The parties were resident, and in a pre-existing relationship based, in the forum. The place of the injury was fortuitous, as it could have occurred on either side of the border between the forum and locus States. This case clearly demonstrates the dominance of concept of place over the concept of a State-based people.

The *McKain* majority entrenched the role of locus law in the choice of law regime for multistate torts by establishing, under the second limb of *Phillips v Eyre*, the inflexible

---

463 (Unreported; 19 March 1996).
464 Doyle CJ and Bollen J; Debelle J dissenting.
requirement that locus law marks the outer limits of the plaintiff's recovery. Because of this, the majority's confirmation that forum law, under the first limb, also marks the outer limits of the plaintiff's recovery is of minor importance. Given that initiating process can be served and judgments recognised throughout Australia\(^\text{465}\), a plaintiff should have no difficulty in litigating in the locus State, or another State with a law no less favourable. The real importance of forum law under the majority's choice of law scheme is not by virtue of the first limb of the \textit{Phillips v Eyre} rule. Rather, the majority secured a substantial role for forum law at the expense of locus law in \textit{McKain} and \textit{Stevens v Head} by endorsing the traditional distinction between substance and procedure.

In choice of law doctrine, there is a longstanding distinction between substantive and procedural law. When a state is selected through the choice of law process to provide the dispositive law, it is only the substantive law of that state which is applied to the dispute. Conversely, the procedural law of the forum state is always applied to the dispute, notwithstanding that another state has been selected to provide the (substantive) dispositive law.\(^\text{466}\) As the majority explained in \textit{Stevens v Head}\(^\text{467}\), this means that in the multistate tort context the anti-recovery provisions of locus law which are classified as procedural will be ignored. Thus it is only the substantive law of the locus state which, under the second limb of the \textit{Phillips v Eyre} rule, marks the outer limits of the plaintiff's recovery.

\(^{465}\) Part 2 of the \textit{Service and Execution of Process Act 1992} (Cth), allows the initiating process of a State court to be served throughout Australia without restriction. (Although there is provision for the transfer of proceedings between the State Supreme Courts under the States' cross-vesting legislation, it is extremely unlikely that proceedings initiated in the locus state would be transferred to another State. See \textit{Amor v Mapak Pty Ltd} (1989) 95 FLR 10.) Part 6 of the \textit{Service and Execution of Process Act} provides a scheme for the recognition and enforcement of State court judgments throughout Australia based simply upon the registration.


\(^{467}\) \textit{Supra} note 4 at 355.
The traditional distinction between substantive and procedural law is based on the distinction between rights and remedies. Laws which grant or extinguish a right - in the sense of a cause of action - are substantive. Laws which affect the availability of the remedy which flow from the cause of action are procedural. The decisions of the majority in McKain and Stevens v Head endorse this distinction. In McKain, the majority held that the limitation statute of the locus State was procedural, and thus not relevant to the plaintiff's action. This was so because the statute did not extinguish the plaintiff's right to damages, but only barred the plaintiff's action to enforce that right. Similarly, in Stevens v Head, the majority characterised the locus law which restricted the amount which could be recovered for non-economic loss as procedural as it went to the quantification of damages for a particular head of loss. This was to be contrasted with a law, such as the locus statute in Breavington, which extinguished the plaintiff's right to recover for certain heads of loss.

The broad definition given to the concept of procedure by the majority significantly undermines the advances made in Chaplin v Boys and Breavington regarding the role of locus law. A plaintiff can escape the anti-recovery provision of locus law which is "procedural" under the majority's test by bringing an action in a forum which has a pro-recovery procedural law. This is what the plaintiff did in McKain by bringing an action in the State in which he resided, and also what the plaintiff did in Stevens v Head by bringing an action in the State in which the defendant (and the defendant's insurer) resided. In either case, if the action was commenced in the locus State, the anti-recovery provisions of locus law would have applied as they were procedural, and thus automatically applicable to the resolution of the dispute.

468 R York, "Let It Be: The Approach of the High Court of Australia to Substance and Procedure in Stevens v Head" (1994) 16 Syd L Rev 403 at 405 - 406.
469 Supra note 4 at 200.
470 Supra note 4 at 355, 356.
The question arises as to why the majority construed the concept of procedure in this way. With regard to limitation statutes, it could be said that their Honours were simply following established authority in construing statutes of limitation as procedural.\textsuperscript{471} With regard to the locus law restricting damages for non-economic loss in \textit{Stevens v Head}, however, the matter was not as clear cut. In fact, the majority had to distinguish two contracts cases\textsuperscript{472} which held that limitations on damages imposed by the proper law of the contract were substantive and not procedural. The majority did so on the basis that "there is no valid analogy" between the contractual and tort contexts.\textsuperscript{473}

It thus appears that rather than being constrained by precedent, the majority were quite happy to maintain the wide operation given to the concept of procedure. In \textit{McKain} the majority stated that the distinction between the concept of the underlying right and the availability of a remedy "has operated in practice free from injustice [and] there is no warrant for discarding it."\textsuperscript{474} In asserting that the distinction has operated so as to achieve justice, the majority seem to be focusing upon the relative merits of the relevant provisions of forum and locus law. In this way, the majority can be regarded as engaging in the substantive law approach (ignoring the unsuitability of the term being applied to substance/procedure) to choice of law. In Chapter 3 we noted Juenger's argument about the injustice of the way in which the locus law in \textit{Stevens v Head} sacrificed the fair treatment of motor accident victims in an effort to keep compulsory third party insurance premiums at a politically acceptable level.\textsuperscript{475} The majority must be cognisant of the incentive their definition of procedure will provide to plaintiffs to sue in States which have a more generous remedial law than the locus State. One can only assume that the majority

\textsuperscript{471} See the cases cited by the majority in \textit{McKain}, \textit{supra} note 4 at 198 - 200.
\textsuperscript{472} \textit{Livesley v Horstt}[1925] 1 DLR 159 (Supreme Court of Canada); \textit{Panozza & Co Pty Ltd v Allied Interstate (Qld) Pty Ltd} [1976] 2 NSWLR 192.
\textsuperscript{473} \textit{Supra} note 4 at 356. For criticism of the majority's reasoning, see BR Opeskin, "Statutory Caps on Damages in Australian Conflict of Laws" (1993) 109 \textit{LQR} 533 at 536 - 537.
\textsuperscript{474} \textit{Supra} note 4 at 200.
\textsuperscript{475} A similar argument is made by York, \textit{supra} note 468 at 410 - 411.
is content for this to occur. This attitude elevates the value of substantive fair treatment of the individual above the values reflected by the way in which the concepts of people and place define the spatial reach of dispositive law.

Chief Justice Mason's View

Like the majority, Mason CJ is of the opinion that the Constitution does not prescribe the choice of law rules to be implemented in the Australian courts, and that this task was left to the common law. As we will see, however, his Honour thought that the federal relationship between the Australian States did impact upon the content of the common law rule for choice of law in tort.

Mason CJ accepted that the High Court in Koop v Bebb and Anderson had decided that forum law was to be applied in the resolution of multistate torts under the first limb of Phillips v Eyre. However, his Honour was prepared to re-examine the subject in light of: the abolition of appeals to the Privy Council; the uncertainty of the meaning of the Phillips v Eyre rule as expressed in Koop and Anderson; the possible undermining of the role of forum law by Chaplin v Boys; and the possibilities for forum shopping under the traditional rule.

The starting point for the Chief Justice's analysis was the claim of locus law as the natural solvent for multistate torts.

[T]he law of the place of the wrong is a material factor and, in many cases, the critical factor, in the resolution of the rights of the parties. In most cases the application of that law satisfies the reasonable expectations of the parties. In the United States ... the courts, having rejected the view that the law of the place of the tort should invariably govern the availability of relief for the tort, regard the law of the place of the tort as the basic or prima facie law to be applied...

476 Breavington, supra note 4 at 455; McKain, supra note 4 at 194.
477 Supra note 259.
478 Supra note 259.
479 Breavington, supra note 4 451.
480 Ibid at 452.
In justifying the role of locus law by reference to party expectations, the concept of place in his Honour's reasoning relates to the just treatment of the parties, rather than giving effect to a generalised interest of the locus state in regulating conduct within its territory. However, it is unlikely that Mason CJ was concerned with the actual expectations of the parties to the dispute. Hence, Brilmayer's political rights model provides a much more convincing explanation for the suitability of locus law as the primary rule for multistate torts. As both parties have voluntarily associated themselves with the locus state, it is fair to apply locus law to the resolution of their dispute.

His Honour recognised that the inflexible application of locus law could not "do justice to the infinite variety of cases in which persons come together in a foreign jurisdiction from different legal backgrounds." Because the place of the tort may be fortuitous, and the parties may lack a "substantial connection with the law of that place", there must be an exception to the application of locus law which would operate in these circumstances. After examining a number of sources for this exception, Mason CJ concluded that multistate torts committed outside Australia should be disposed of by:

the application of the [law of the locus state] subject to an exception involving the application of the law of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and the most real connection.

The Chief Justice also sought to justify the application of the exception to locus law in terms of party expectations. In speaking of the question as to "whether the powerful primary claim of the law of the place of the wrong should be discarded", his Honour said:

The justice of the case turns very largely on the need to give effect to the legitimate or reasonable expectations of the parties. They may have acted in reliance upon an

---

481 Ibid.
482 Ibid.
483 Ibid at 451 - 453.
484 Ibid at 451 - 452.
485 Ibid at 453.
assumption that the courts would apply a certain rule or they may have expected that their rights would be determined by the law of a particular place...

The notion of "party expectations" provides an even less convincing justification for the existence of an exception to the rule than it does for the rule itself. If the *Chaplin v Boys* scenario of fortuitous common residency is sufficient to warrant the application of the exception, then the application of that state's law cannot be justified in terms of party expectations. As the identity and residency of the other party to the tort is unknown at the time of the event, it will hardly accord with the expectations the parties had at the time of the event to apply the law of the state of common residency.

At the other extreme, there is the *Corcoran v Corcoran* scenario of a tort involving parties in a pre-existing relationship based outside the locus state and where the conflicting laws are specifically directed at that relationship. In this type of case, the fulfilment of party expectations is still not a convincing argument for the displacement of locus law. Notwithstanding what Mason CJ said about the parties assuming that the laws of a particular state will apply, it is submitted that the parties, if they address their minds to the issue at all, would usually assume that the law of the locus state would apply. Accordingly, the existence of the exception which displaces locus law would probably militate against any extant party expectations.

It is submitted that Brilmayer's political rights model is more successful in explaining the existence of the exception to locus law envisaged by Mason CJ. Where Mason CJ would invoke the exception - because the location of the tort was fortuitous, for example - it is probable that Brilmayer's political rights model would endorse the refusal to apply locus law. This is because the fortuitous location of the tort would mean that the party who would suffer by the application of locus law has not so acted towards the locus state to legitimate the locus state's coercion. In such a case, if the parties have a closer and more
real connection with another state, then the application of the law of that state may be justified under Brilmayer's model.

Take the case of a passenger on an international flight who is injured because of the negligence of a flight attendant. The locus state (the state the airspace in which the aircraft was at the time of the injury) probably does not have a sufficient connection with the parties to apply its law to the dispute. However, the state in which the passenger boarded the aircraft may. Both the passenger and the airline may be seen as having voluntarily associated themselves with that state, so as to justify the application of that state's law in accordance with Brilmayer's model. On the other hand, although the state where the passenger commenced the journey may have a closer and more real connection with the parties than the locus state, it is unlikely that this would accord with the actual expectations of the parties, as claimed by Mason CJ.

We have seen that the exception proposed by Mason CJ reaches the same result as Brilmayer's political rights model in the example. We should also note that, like Brilmayer, Mason CJ sees choice of law as properly conducted through a multilateralist jurisdiction-selection. With respect of the task of ascertaining whether locus law should be displaced, Mason CJ rejected the relevance of the policy underpinning the respective putative dispositive laws of the connected states. In his Honour's opinion, "the interests of the parties themselves are likely to be more material in ascertaining whether another law has a closer connection with the parties and the occurrence with respect to the issue to be litigated." In rejecting rule-selection, Mason CJ shows himself, like Brilmayer, as believing that the choice of law process to be concerned with fairness to the parties rather than effectuating state interests.

What we have considered is Chief Justice Mason's view about the displacement of locus law with regard to multistate torts occurring outside Australia. In respect to multistate

486 *Ibid* at 453.
torts occurring within Australia, Mason CJ regarded the exception to the locus law rule as being rarely, if ever, applicable. His Honour thought:\(^{487}\):

[O]n the international scene, there are situations in which the parties have no substantial connection with the law of a particular jurisdiction, especially the law of the place of the tort.

One cannot make the same comment with the same force about Australian residents with respect to the law of a State or Territory in which they happen to be at a particular time.

Again, Mason CJ used\(^ {488}\) the expectations of the parties to justify his choice of law prescription that locus law applied.

Australia is one country and one nation. When an Australian resident travels from one State or Territory to another State or Territory he does not enter a foreign jurisdiction. He is conscious that he is moving from one legal regime to another in the same country and that there may be differences between the two which will impinge in some way on his rights, duties and liabilities so that his rights, duties and liabilities will vary from place to place within Australia. It may come as no surprise to him to find out that the local law governed his rights and liabilities in respect of any wrong he did or any wrong he suffered in a State or Territory. He might be surprised if it were otherwise.

Again, the argument based on party expectations in this context is not compelling. Surely if it is reasonable for the Australian traveller referred to by Mason CJ to hold the expectation that the law of the locus State governs in relation to Australian travels, then it is just as reasonable for the Australian traveller to expect that locus law will govern in relation to acts done by or to him or her outside Australia. Further, it is more likely that a person travelling between countries will be more conscious of travelling from one legal regime to another than a person moving between the Australian States. Basing a distinction between the treatment of Australian and non-Australian torts on the basis of party expectations lacks logical legitimacy.\(^ {489}\)

One commentator has provided an alternative interpretation of the distinction made by Mason CJ regarding multistate torts occurring within, and those occurring outside,

\(^{487}\) Ibid at 453.

\(^{488}\) Ibid at 453.

\(^{489}\) See Opeskin, supra note 466 at 400 for a similar argument.
Australia. Detmold has interpreted his Honour's meaning in the above passage as follows. When the resident of one Australian State goes to another Australian State he or she is not a foreigner in that State but is just as much a "citizen" of that State as the persons resident in that State. The law of a State is the law which belongs to all Australians who are present in the State and does not have a special relationship with Australians who are resident in the State.\footnote{MJ Detmold, "Australian Law: Freedom and Identity" (1990) 12 \textit{Syd L Rev} 482 at 499.} Detmold's interpretation does provide an explanation as to why Mason CJ thought that locus law could be displaced for multistate torts occurring outside Australia, but not for those occurring within Australia (at least those involving Australians). The connection which an Australian has with the State in which he or she is present can never be so insubstantial as to justify the displacement of that State's law in the resolution of a dispute based upon his or her presence in the State. This is because that State is not foreign to the person, but rather a part of the nation to which the person belongs.

It is important to note that Detmold's interpretation of the Chief Justice's prescription does not represent a victory for the concept of place over that of people. What Detmold's interpretation does do is to redefine the concept of people in the Australian context. It does not conceive the residents of the various Australian States as forming distinct political communities, or "peoples". Instead, there is simply one Australian "people" who are bound by the law in force in the various States (places) in Australia in equal measure. On this interpretation of Chief Justice Mason's rejection of a flexible exception to the rule that the law of the locus State governs has much in common with Justice Dawson's rejection in \textit{Breavington} of a flexible exception to the applicability to the law of the locus State under the second limb of \textit{Phillips v Eyre}.\footnote{MJ Detmold, "Australian Law: Freedom and Identity" (1990) 12 \textit{Syd L Rev} 482 at 499.}
Some measure of support for Detmold's thesis is found in section 117 of the Australian Constitution as interpreted by the High Court in *Goryl v Greyhound Australia Pty Ltd*[^491]. Simply put, section 117 prohibits States from discriminating against residents of other States. *Goryl* considered the validity of Queensland legislation which purported to limit damages payable to non-Queensland residents in respect of injuries received in motor vehicle accidents to the level applicable under the law of the State in which they were resident. The Court held that the Queensland legislation did discriminate against non-Queensland residents and was thus invalid. This interpretation of s 117 is consistent with Detmold's view of a single Australian people to whom the laws of the respective Australian States apply equally.

However, a number of the members of the Court expressed, obiter, that not all forms of differentiation by a State between its residents and residents of other States constitutes discrimination within section 117[^492]. The most obvious of these are State laws which permit only State residents to vote in State elections[^493]. In this context, Detmold's concept of a single Australian people breaks down.

We do not have to abandon Detmold's thesis altogether, however. All that is required is that it be modified to take into account a distinction formulated by Brilmayer[^494]. Brilmayer argues that whether or not it is legitimate to differentiate between residents and non-residents depends upon the context. Brilmayer requires us to distinguish between "the shaping of official values - that is, participation in the process of norm formation" and "the sharing of official values - that is, subjection to the benefits and burdens that legal norms impose"[^495]. She concludes that while it is legitimate to exclude non-residents from

[^491]: Supra, note 4.
[^492]: Ibid per Deane and Gaudron JJ at 437; per Dawson and Toohey JJ at 440 - 441 (Mason CJ agreeing at 433); per McHugh J at 445.
[^493]: Per Dawson and Toohey JJ at 441.
[^495]: Ibid at 393.
participating in the law-making process by voting in elections, it is not usually legitimate to treat non-residents less well than residents under that law.\footnote{Ibid at 402.}

Applying Brilmayer's distinction between "shaping" and "sharing" to Detmold's thesis, it appears that the fact that one cannot conceive of a single Australian people for the purpose of enacting State law does not prevent the conception of a single Australian people for the purpose of choice of law in tort. This being so, Detmold's construction of Chief Justice Mason's distinction between multistate torts occurring within, and multistate torts occurring outside, Australia is certainly an arguable one. It is certainly more convincing than the Chief Justice's reference to party expectations.

We have considered in some depth Chief Justice Mason's prescription for the choice of law rule for multistate torts put forward in Breavington. We will now briefly consider his Honour's conception of the substance/procedure distinction. In McKain\footnote{Supra note 4 at 193.} and Stevens v Head\footnote{Supra note 4 at 348.}, Mason CJ rejected the traditional conception of procedural law, namely a law which affects "the remedy available to a party without touching that party's underlying right"\footnote{Supra note 4 at 189.}. Instead, Mason CJ proposed that a law only be characterised as procedural if it is "directed to governing or regulating the mode or conduct of court proceedings."\footnote{McKain, supra note 4 at 192; Stevens v Head, supra note 4 at 351.} Applying this test, Mason CJ concluded that neither the locus state's limitation statute in McKain\footnote{Supra note 4 at 192 - 193.}, nor the locus state's restriction on the damages recoverable for non-economic loss Stevens v Head\footnote{Supra note 4 at 351 - 352.} were directed at the conduct of court proceedings. Thus both of these laws were substantive, and were to be applied to the respective plaintiff's action under his Honour's choice of law rule that locus law governed multistate torts occurring within Australia.
Chief Justice Mason's narrow definition of procedure clearly elevates the concept of place above that of the forum. We saw in *Breavington* that Mason CJ justified the importance he gave to the concept of place in his choice of law rule for multistate torts in terms of giving effect to the expectations of the parties. By contrast, Mason CJ did not employ party expectations in *McKain* and *Stevens v Head* to justify the importance of place in the substance/procedure distinction. Instead his Honour stated that "choice of law rules should operate to fulfil foreign rights." This statement seems to indicate that his Honour's focus has shifted from the fair treatment of the parties. His Honour's attention now seems to be directed to giving effect to the interest of the State providing the dispositive law to have its law applied in full measure, rather than leaving "remedial" matters to the forum. After all, as shown by *McKain* and *Stevens v Head*, the remedial issues may very well be the most important of the dispute.

**The Views of Wilson, Deane and Gaudron JJ**

Unlike other members of the High Court, their Honours regarded the choice of law regime for events occurring within Australia as being prescribed by the Constitution, rather than simply being left to the common law. Their Honours regarded section 118 as being particularly significant. This section requires that full faith and credit be given throughout the Commonwealth to the laws of States. In their joint judgment in *Breavington*, Wilson and Gaudron said:

> By the constitutional subjection of the Constitutions, the powers and the laws of the States to s 118, the consequence was effected that the one set of facts occurring in a State would be adjudged by only one body of law and thus give rise to only one legal consequence, regardless of where in the Commonwealth the matter fell for adjudication.

Deane J expressed a similar view when he stated that the Australian Constitution created a "comprehensive and truly unitary system of substantive law". This unitary system

---

503 *McKain, supra* note 4 at 191; *Stevens v Head, supra* note 4 at 351.
504 *Supra* note 4 at 462.
505 *Breavington, supra* note 4 at 478.
consists of: the Australian Constitution; the State Constitutions, the primary and delegated legislation of the Commonwealth and State parliaments; and the common law. About this unitary system, Deane J said:

Within that unitary system of national law there is no room for the direct application of private international law principles to resolve competition or inconsistency between a law of the Commonwealth and a law of a State or between the laws of different States. The Constitution itself resolves such competition or inconsistency: by 109 (in the case of inconsistency between a law of the Commonwealth and a law of a State); by the confinement of the operation of State laws by reference to territorial (or predominant territorial) nexus under the constitutional structure and the mandatory directive of s 118 (in the case of competition or conflict between the laws of different States).

As a general proposition, one can say that their Honours thought that the constitutional norm of uniformity of result regardless of forum was to be achieved, for multistate torts occurring within Australia, by the application of the law of the locus State. It appears that their Honours did not definitively rule out the application of the law of a State other than the locus State. Wilson and Gaudron JJ said:

It is sufficient in the present case to note that effect is given to the requirement flowing from s 118 that there should only be one body of State law determining the legal consequences attaching to a set of facts occurring in a State only by the adoption of an inflexible rule that questions of liability in tort be determined by the substantive law that would be applied if the matter were adjudicated in a court exercising the judicial power of the State in which the events occurred.

It is important to note that their Honours did not prescribe an "inflexible rule" requiring application of the dispositive law of the locus State. Instead, their Honours' reference to the "judicial power" of the locus State indicates that their Honour's were prescribing the application of the law that would be applied by the court of the locus State, including its choice of law rules. That this was their Honours' view is indicated by the way in which they framed the general issue at the commencement of their judgment.

---

506 Ibid.
507 Ibid.
508 Breavington, supra note 4 at 462.
510 Breavington, supra note 4 at 455.
The question which arises on this appeal is whether the appellant's right to recover damages is to be determined according to the law of Victoria [the forum], or according to the law which would have been applied if the action had been brought in the Supreme Court of the Northern Territory [the locus State].

As their Honours saw it, the issue was not whether the (dispositive) law of the Northern Territory would apply, but rather whether to apply the (dispositive) law which a Northern Territory court would apply. The conclusion reached by their Honours must have been, although this was not expressed, that a Northern Territory court would apply its own dispositive law to an alleged wrong occurring within the Northern Territory between parties resident in the Northern Territory at the time of commission of the wrong. The inflexible rule thus operates as a "super" or "meta" choice of law rule. It chooses which State's choice of law rules are to apply.511

Like Wilson and Gaudron JJ, Justice Deane saw the dispositive law of the locus State as being prima facie applicable. His Honour was prepared to leave open the possibility that, in some circumstances, the dispositive law could be taken from some other State. His Honour said512:

Under the constitutional structure, State laws are essentially territorial in the sense that they apply to regulate (or to define the consequences or attributes of) conduct, property or status within, or having a sufficient relevant nexus with, that part of the nation which constitutes the territory of the particular State.

...[T]he Constitution enacts a superior policy of national law, namely, that as between the States and in the absence of overriding territorial nexus, legislative competence with respect to what happens within the territory of a particular State lies within the State.

511 In McKain, supra note 4, Gaudron J (at 205) said: "[t]here may be cases in which the place of some act is entirely fortuitous or, for some reason, some other State has a more substantial connection with it than the State in which it occurred. These are matters to be taken into account in identifying the governing body of law." This clearly indicates that her Honour did not envisage the inflexible application of the dispositive law of the locus State. In a similar vein, Deane J in McKain (at 204) also stated that the locus State was free to enact legislation under which the dispositive law of another State could be applied in the resolution of the dispute.

512 Breavington, supra note 4 at 478; 479. (Emphasis added in both passages.)
The italicised parts of passages from his Honour's judgment indicate two alternate bases for an Australian State having its law applied as part of the unitary national law. The first basis is that the relevant event occurred \textit{within} the territory of the State. The second is that the event had a "sufficient relevant nexus" or an "overriding territorial nexus" with the territory of that State. It must be appreciated, however, that under a system of unitary law, the right of a State to have its law applied to an event which occurred in another State on the basis of an overriding territorial nexus, would necessarily preclude the State in which the event occurred from having its law applied to the same event.

It is arguable that this second basis referred to above is wide enough to encompass a connection which is not purely physical, such as common residency of the parties in a State other than the locus State or, \textit{a fortiori}, a pre-existing relationship (such as marriage) between the parties based in a State other than the locus State. This view is supported by a statement\textsuperscript{513} by Justice Deane concerning the utility of using choice of law rules to determine which State has the predominant territorial nexus.

\begin{quote}
Such rules are likely to be relevant, by way of analogy, to the identification of the applicable substantive law to be applied in a case involving circumstances (eg acts, property, status or choice of law by the parties) connected with more than one State.
\end{quote}

The connecting factors employed by the existing choice of law rules relating to the juridical forms, or "circumstances", of status (succession and marriage etc), and choice of law by the parties (contract), are not territorial in a physical sense. Rather, these rules use the connecting factors of domicile and party autonomy which are incorporeal. From this it could be argued that in respect of the juridical form of tort, incorporeal connections such as residency or pre-existing relationship may be considered in the calculus.

\begin{footnote}
\textsuperscript{513} \textit{Ibid} at 479.
\end{footnote}
The question arises whether either Wilson and Gaudron JJ, or Deane JJ, envisaged the displacement of the law of the locus State as being a jurisdiction-selecting, or a rule-selecting, enterprise. This was not a question which their Honours expressly considered, as in none of *Breavington, McKain* or *Stevens v Head* did their Honours raise the possibility that the dispositive law should be provided by a State other than the locus State. However, the fact that their Honours based their choice of law regime upon the constitutional imperative of uniformity of result regardless of forum, strongly suggests that their Honours based the possibility of the displacement of locus law in jurisdiction-selection. The constitutional imperative constrains the individual interests and legislative policies of the Australian States in favour of a norm which their Honours regarded as being an indispensable facet of nationhood.\footnote{Breavington, supra note 4 at 457 - 458, 462 per Wilson and Gaudron JJ, at 472, 478 - 479 per Deane J; McKain, supra note 4 at 200 - 201 per Deane J, at 205 per Gaudron J; Stevens v Head, supra note 4 at 357 per Deane J, at 359, 360 per Gaudron J.}

This indicates that the question of the displacement of locus law is to be decided by an analysis of the objective, factual connection between the various states and the circumstances of the dispute, rather than the perceived interests and legislative policies of those States. In fact, to ascertain the applicability of the displacement of locus law upon the internally-generated norms of the connected State's putative dispositive law would be inconsistent with the externally-generated norm of uniformity of result which drives their Honours' respective judgments. This conclusion is supported by statements of Wilson and Gaudron JJ, and Deane J, that the constitutionally mandated choice of law regime cannot be displaced or pre-empted by forum legislation which purports to apply in circumstances where it would not be "picked up" by the newly identified constitutional choice of law rules.\footnote{Breavington, supra note 4 at 461 per Wilson and Gaudron JJ, at 479 per Deane J; Goryl v Greyhound Australia Pty Ltd supra note 4 at 436 per Deane and Gaudron JJ.} Thus, forum legislation such as that in *Schmidt*, which purports to apply directly to events outside the forum, would not apply to such events by their own force. Their operation would be pre-empted.
by the constitutional choice of law regime whereby the forum's legislative competence is limited by the notion of predominant territorial nexus, and would only apply where they were selected by the constitutional scheme. And if the forum State is prevented from displacing locus law on the basis of actual legislative intent, it is impossible to imagine that locus law could be displaced by virtue of the potential advancement of the policy underpinning the putative dispositive law of a non-locus State. If a State cannot bootstrap itself into displacing locus law directly, it can hardly do so indirectly.

A prerequisite for the realisation of the constitutional imperative of uniformity of result throughout Australia is that a narrow meaning be given to the concept of procedure. As the procedural law of the forum is applied in the resolution of multistate disputes, if a law of the forum which could affect the outcome of the dispute were to be characterised as procedural, then it would be possible for different legal consequences to attach to the same event depending upon where the matter was litigated. This was demonstrated by the majority decision in McKain and Stevens v Head, where different results would have obtained if the proceeding were brought in the locus State. The meaning given by Deane and Gaudron JJ is, accordingly, restricted to matters "regulating", or going to the "institution and conduct", of court proceedings. Their Honours thus characterised the respective locus laws in McKain and Stevens v Head as substantive.

Wilson, Deane and Gaudron JJ saw the constitutional imperative of uniformity of result regardless of forum as being achieved, in the majority of cases, by the application of the law of the locus State. Thus, their Honours' elevated the concept of place above that of

517 Breavington, supra note 4 at 462 per Wilson and Gaudron JJ (by implication)at 479 per Deane J
518 Per Deane J in Breavington, supra note 4 at 479, McKain, supra note 4 at 201 and Stevens v Head, supra note 4 at 358
519 Per Gaudron J in Stevens v Head, supra note 4 at 360.
people and, for that matter, forum. Turning to examine why place was selected to perform this function, one detects two lines of reasoning in their Honours' judgments. These different lines of reasoning are set out side by side by Gaudron J in *Stevens v Head*. In response to the suggestion that it was permissible for different legal consequences to attach to a particular event occurring within Australia depending upon where the matter was litigated, her Honour said:

If that is the law, the law is arbitrary and unjust. It is arbitrary because, subject only to the question of justiciability, the acts or events can be litigated in any State, no matter the extent to which its laws on the topic differ from those of the State in which the acts or events occurred and no matter that, at least ordinarily, those laws will have been developed for local conditions and without regard to their application to events outside the State. It is unjust, not only because of this arbitrariness, but because, to the extent that laws differ, there must be uncertainty as to the legal consequences that will attach to an act or event until it is known in which State it is to be litigated.

The argument proffered by Gaudron J regarding arbitrariness, is based upon the assumption that a State has a particular interest in regulating activity within its own borders and that shapes its laws accordingly. We have seen that states may have an interest in imposing legal consequences upon conduct occurring outside its territory where its residents are concerned. One example of this is the regulation of the rights of resident spouses to sue each other. Another is the attempt by States to keep premiums on compulsory third party motor vehicle insurance at "politically acceptable levels" by restricting recovery from the State's insurers, even where the injury occurred outside the State. However, the fact that a State may have an interest in attaching legal

---

520 *Stevens v Head*, supra note 4 at 360.
521 *Warren v Warren*, supra note 427; *Schmidt v Governmental Insurance Office Of New South Wales*, supra note 420; *Corcoran v Corcoran*, supra note 301.
522 Opeskin, *supra* note 473 at 534.
523 An example of this was the provisison of New South Wales law considered by the New South Wales Court of Appeal in *Guidera v Government Insurance Office of New South Wales* (1990) Aust Torts Reports ¶ 81-040. The provision imposed a less favourable (from the plaintiff's perspective) discount rate for damages for future loss and applied to injuries arising from the use of a vehicle insured under the New South Wales scheme inside or outside New South Wales. The Court held that the provision applied to out-of-state accidents by its own force and thus pre-empted the application of the forum's common law choice of law rules.
consequences to extraterritorial conduct does not mean that the State with the extraterritorial interest is entitled, as the forum State, to advance this interest at the expense of the locus State's interest in regulating conduct within its own territory. To allow this would be inconsistent with the notion of a federal nation. A mechanism must be found to balance the interests of the various States comprising the nation. Wilson, Deane and Gaudron JJ regard this as being done by the Constitution confining the law-making power of the States to, primarily, within the territorial limits of the States, which, after all, defines the concept of the State itself.\footnote{Breavington, supra note 4 at 462 per Wilson and Gaudron JJ and McKain v Miller, supra note 4 at 205 per Gaudron (referring to the identifiable territorial limits of States); Breavington, supra note 4 at 478 per Deane J (stating that State laws are "essentially territorial.")}

Their Honours' views are in accordance with those of Laycock\footnote{D Laycock, "Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law" (1992) 92 Col L Rev 249 at 322}, who argues that "territorialism is the only approach consistent with a federal structure".

State interests, and the balance between them in a federal polity, is not the focus of Justice Gaudron's second line of argument against the possibility of different legal results depending upon the location of the forum. In calling the "uncertainty" created by this possibility, "unjust", her Honour is clearly focusing upon the fair treatment of the parties. However, it is in Justice Deane's judgment in \textit{Breavington}, rather than in the judgements of Wilson and Gaudron JJ, that this theme is strongly articulated. As Deane J argued in \textit{Breavington}\footnote{Supra note 4 at 447 at 473, 479.}:

> there lies at the heart of the legal system embodied in the Constitution acceptance of the principle that an individual should not be exposed to the injustice of being subjected to the requirements of contemporaneously valid but inconsistent laws.

> In that context, it would be to substitute the bedlam of a Babel for an ordered system of law to recognise the right of each of the country's court systems ... to speak at the same time in conflicting terms about the lawfulness, consequences or attributes of a particular act or thing in a particular place at a particular time.
An individual who does not know the legal consequences of a particular legal event involving him or her until the selection of the forum in which the matter is to be litigated is, in substance, the subject of inconsistent legal directions. This is because the individual's rights and liabilities with respect to the event are indeterminate until the forum is chosen. The only way in which this can be avoided is that the same legal consequence attach to the act irrespective of where the dispute is litigated.

It is important to note that equating the fair treatment of the parties with uniformity of result regardless of forum, is significantly more rigorous than the prescriptions of the leading contemporary American writers who regard fairness as the controlling choice of law norm. As we saw in Chapter 1, Brilmayer's political rights model does not require uniformity of result as it allows either the law of the locus State, or the law of the State of common residence of the parties, to be applied.\(^{527}\) Similarly, Dane argues\(^{528}\) that the choice of law rules of the forum should be such that, if applied by another forum, that other forum would reach the same result. This does not require the different fora to apply the same rule. All that is required is that the rule not include reference to the law of the forum \textit{qua} forum.

Justice Deane explains this more rigorous requirement of uniformity of result in terms of the proper role of the courts in the adjudication of disputes. In Breavington\(^{529}\), Deane J said:

\begin{quote}
Basic to the jurisprudence of this country is the notion that the courts apply, as distinct from make the law, that is to say, that the law operates contemporaneously to regulate lawfulness and consequences of conduct independently of judicial proceedings.
\end{quote}

\(^{527}\) Brilmayer, \textit{supra} note 22, p 229.  
\(^{528}\) P Dane, "Vested Rights, 'Vestedness' and Choice of Law" (1987) 96 \textit{Yale L J}1191 at 1205 - 1206. 
\(^{529}\) Breavington, \textit{supra} note 4 at 447 at 478 - 479. In Stevens v Head,\textit{supra} note 4, Gaudron J (at 360) expressed a similar view in stating that "the laws of the State that govern an act or event as it happens [must] also governs its legal consequences."
Justice Deane asserts that laws exist separately of their application by the courts or, to use his Honour's language, "independently of the awakening of judicial power". Although law does not exist physically, it can exist normatively, in the sense of operating to guide the actions of individuals. For Deane J, it is a fundamental principle that the law which will be applied to an individual in respect of particular conduct must be able to be ascertained at the time the conduct occurred, and must not be ascertainable only at the time legal proceedings are brought.

Opeskin agrees that the principle identified by Deane J is a profound legal truth. Opeskin locates the principle within the "rule of law" which requires that "government in all its actions is bound by rules fixed and announced beforehand". He also says that it is indispensable to the "deontological principle of respect for human dignity, which entails treating humans as persons capable of planning and plotting their future."

There are thus two parts to Justice Deane's choice of law prescription. The first is that the legal consequences which flow from an act must be the same no matter where the matter is litigated. The second is that the legal consequences of an act must be able to be ascertained at the time the act occurred. The first of these requirements would be able to be satisfied by a number of choice of law rules; for example, the law of the State in which the plaintiff (or defendant) was resident, the law of the State in which older (or younger) of the parties resided. Such choice of law rules would not satisfy the second requirement, however, as such facts may not be ascertainable at the time the relevant event occurred. By contrast, the concept of place is able - in the majority of cases - to fulfil the second, as well as the first, requirement. As Laycock explains, "I can be in only one place at a

530 Ibid at 473.
531 Detmold, supra note 490 at 504 - 505.
532 Ibid.
535 Laycock, supra note 525 at 319.
time, and I can know where I am." The application of locus law thus allows a person to know the State the law of which will govern his or her actions as they occur, as well as ensuring that that State's law will be applied regardless of where any proceedings are brought.

This is somewhat different from the argument used by Mason CJ that the application of locus law fulfills the expectations of the parties. The Chief Justice's argument is backward looking; it purports to look at the expectations of the parties at the time of the accident as to the State which would supply the dispositive law. The reasoning of Deane J is forward looking; it asks what principle will allow the parties to plan their future behaviour, including the activities and precautions they should take. Deane J is not concerned with the actual expectations of the relevant parties. Instead, his Honour is concerned with establishing a principle which arms individuals with the ability to foresee potential legal consequences in the multistate context, regardless of whether or not many will actually take advantage of this.

Thus, in Justice Deane's choice of law regime, the concept of place can perform a dual function in regard to multistate torts. It can give effect to the federal balance by reconciling the competing interests of the constituent States by limiting the ability of State law to operate extra-territorially. It can also ensure the fair treatment of individuals who engage in multistate activity by providing certainty with regard to the legal system which will govern that activity at the time it is undertaken.

*** *** ***

The majority and minority of the High Court have elevated place to an important position in choice of law methodology. In so doing, they have moved away from the importance of the concept of forum. The minority have been prepared to go much further than the majority by giving a much narrower meaning to procedural law. The much wider,
traditional meaning given to procedure by the majority retains a significant importance for forum law. The majority, as well as Mason CJ, have also rejected the importance of the concept of a State-based people, at least in so far as the "sharing" of the benefits and burdens of State law is concerned.
The concepts of people and place operate normatively in the formation of choice of law methodologies dealing with multistate torts. The particular significance which a methodology gives to the parties either belonging to ("people"), or acting within ("place") a state indicates the purposes which the methodology is designed to achieve. We have seen that in multilateralism, the concepts of people and place are used to ensure that the dispute is resolved in a manner which is fair to both parties. This is done by identifying a state which can legitimately apply its law to the detriment of either party. An alternate, but less persuasive, explanation for the use of people and place in multilateralism - and one which is substantially limited to the concept of place - is that these concepts are used by the forum, out of comity, to give effect to the interests of other states.

In the governmental interest analysis form of unilateralism, choice of law is conducted to give effect to state interests. In this context, the concepts of people and place are relevant to the inquiry as to which state has a law the policy of which would be advanced by its application to the dispute. We noted that the concept of people was of much greater importance than that of place in this regard.

Under the substantive law method, the concepts of people and place are used for reasons of convenience. It is only the putative dispositive laws of those states connected to the dispute in these ways which need be examined in order to ascertain the substantively best law.

In analysing the English, Canadian and Australian developments in choice of law for multistate torts, we noted that under the original construction of the Phillips v Eyre rule the forum's own tort law policies were given much greater importance than the concept of place, and that no importance was given to the concept of people at all. This has changed
in all of these jurisdictions by giving emphasis to the values represented by these concepts.

In England, the decision in *Chaplin v Boys* increased the importance of place by reinterpreting the *Phillips v Eyre* rule as a means of ensuring fair treatment of the defendant. The defendant could not be subjected to a greater level of liability in the forum than to which he or she would have been subject under the law of the place in which he or she acted. The case also created an exception to the rule which introduced the concept of state interest into the choice of law process. The policies of the conflicting laws of the states connected with the dispute were now to be taken into account in selecting the dispositive law. In accordance with the learning on which governmental interest analysis was based, the policy underpinning a state's law was construed in terms of advancing the welfare of its residents. In this way, the concept of people was introduced into the choice of law process.

After *Chaplin v Boys*, the choice of law process attempted to achieve two quite distinct ends: the fair treatment of the parties; and effecting the interests of the concerned states. The first of these ends focused upon the concept of place; the second on the concept of people. The *Chaplin v Boys* decision did not indicate how these competing ends and concepts were to be reconciled. This uncertainty was increased by the decision in *Red Sea*. Given that the reference to either forum law or locus law can now be displaced, it is unclear if the concepts will serve any principled function at all. This state of affairs is exacerbated by the use in *Red Sea* of an additional factor, namely the seat of the relationship formed between the parties themselves. It is not clear how these concepts will be balanced. Nor is it clear what end is sought to be achieved by the balancing process. The English common law choice of law regime for multistate torts is in a state of significant confusion.
By contrast, in Canada, multistate tort choice of law has been simplified - perhaps overly so - by the Supreme Court in *Tolofson v Jensen*. By holding that the law of the locus state inflexibly governs the resolution of multistate torts occurring within Canada, the decision uncritically elevates the concept of place to an unchallenged position, and leaves no room for the concept of people. The reasons given by the Supreme Court for doing this are unconvincing. It did not follow the lead given by the Ontario Court of Appeal in recently decided cases and use the most persuasive explanation for the inflexible application of locus law, namely the fair treatment of the parties. Instead, the Supreme Court asserted that the locus state had a sovereign right to regulate activity occurring within its borders. In formulating the rule, however, the Supreme Court has appeared to ignore the importance of an interest a state has in applying its law to an event occurring outside its territory, where the consequences of the application or non-application of that state's law will be felt within the state.

In the paper we have seen several examples of this in the context of insurance coverage. A state may enact an anti-recovery law for the purpose of stabilising insurance premiums paid by its residents. When an action is brought against a defendant who is indemnified by an insurer doing business within the enacting state, and the application of the law would reduce the plaintiff's recovery, then the state has an interest in having the law applied to the dispute. This is so even if the event giving rise to the dispute occurred outside the territory of the state. Alternatively, a state may have a policy that gives a cause of action to a person, who would otherwise be without one, because the other party is protected by liability insurance. (We saw an example of this in *Corcoran v Corcoran* in relation to the abolition of the defence of interspousal immunity in motor vehicle accident cases.) Again, the place where the event occurred is irrelevant to the advancement of the enacting state's policy that its resident's loss be shifted from that particular resident to all of the residents of the state with the relevant form of insurance.

---

536  *Supra* note 301. The case was analysed in Chapter 6.
These examples show that if the justification for a particular choice of law regime is effectuating state interests, then a hard jurisdiction-selecting rule employing the concept of place will not meet this end. Instead, what is needed is a rule-selecting method which is responsive to state policies designed to advance the welfare of the state’s population as a whole. Only a rule-selecting approach is flexible enough to distinguish between state policies which are invoked by territory, and those invoked by membership of the state. Of course, it can be argued that effecting state interests may result in the unfair treatment of a non-resident party. And this may very well be the case. However in justifying the inflexible application of locus law in terms of the internally-generated norm of state interest, the Canadian Supreme Court has foreclosed the possibility of relying upon the externally-generated norm of fairness.

The same criticisms levelled against the Canadian Supreme Court’s decision in Tolofson, can be brought against the current majority view in the Australian High Court regarding choice of law for multistate torts. The majority used the concept of state interest to justify their holding that under the Phillips v Eyre rule, locus law inflexibly marks the outer limits of the plaintiff’s recovery. In doing this, the majority have ignored the desirable results reached in cases such as Corcoran v Corcoran, where the anti-recovery law of the locus state was displaced by the use of a state interest based upon the concept of people. The result was desirable because the decision did truly give effect to state interests. The locus state had no conceivable interest in having that law applied to protect the non-resident husband (and his non-resident insurer). By contrast, the state in which the parties were resident had made a deliberate policy decision to shift the plaintiff’s loss to a much wider section of the state’s population.

There may be cases where a state does have an interest in regulating events within its territory. And in such a case there may be a conflict between that state’s interest and the interest of another state based upon the concept of people. The American experience
notwithstanding, it is reasonable for the highest Canadian and Australian courts to require that, where the interests of the constituent parts of a federation are in conflict, there be some way of resolving these conflicts other than by means of forum preference. This being so, it could be argued that the inflexible application of locus law places a principled restraint upon the pursuit of state interest where this may interfere with the federal relationship between the states.

However, this argument ignores the way in which the displacement of the reference to locus law has worked when the exception has been applied in the manner advocated by Lord Wilberforce. In *Corcoran v Corcoran*, and to a lesser extent, *Johnson v Coventry Churchill International Ltd*\(^{537}\), the conflict between the putative dispositive law of the locus state and the putative dispositive law of the state of common residence was limited to those laws’ operation in the multistate context. It was only because there was a foreign element in the dispute that the conflict arose. In their domestic operation, the laws of both states reached the same or similar ends.\(^{538}\) Thus in *Corcoran v Corcoran*, both states had abolished interspousal immunity in the domestic setting. It was only because the locus state had not abolished the doctrine for cases with a specific foreign element (namely, the place of registration of the vehicle) that the conflict arose. In *Johnson*, both states had a policy of employers compensating their employees for injuries caused to them. The locus state did this through a no fault scheme and the state of common residence through a fault-based regime. The difficulty was caused by the fact that the locus scheme would not compensate the foreign plaintiff once he left the country. In cases where the policies of the locus state and the state of common residence are in "harmony"\(^{539}\), but the foreign element takes the dispute out of the field of operation of the locus state's law, locus law can be displaced without one federal unit interfering in the affairs of another. This way of

\(^{537}\) *Supra* note 287. The case was analysed in Chapter 5.


\(^{539}\) *Ibid.*
reconciling the pursuit of substantive policy by a unit of a federation with the need to maintain the federal balance, has the support of the Australian Law Reform Commission.\textsuperscript{540}

We have seen that the argument for the elevation of place over people on the basis of effecting state interests is flawed. We must now consider the argument that the inflexible application of locus law is more likely to result in the fair treatment of the parties.

The application of locus law seems preferable in the \textit{Chaplin v Boys} scenario where the fact of common residency is fortuitous. Under Brilmayer’s political rights model, either presence or common residency is seen as legitimating the application of a state’s law because of the voluntary association of the individual with the state. However, where the common residency of the parties is fortuitous, then the application of that state’s law smacks of the arbitrariness and lack of personal control that the political rights model seeks to condemn. The identity of the other party does not seem to be in the control of a person as much as the place of the accident.

However, there are a number of problems with rejecting the concept of people in all situations. Firstly, one must note that Deane J, the most articulate advocate for the application of locus law on fairness grounds, did not require the inflexible application of locus law. His Honour maintained an exception for the application of the law of a state with the overriding territorial nexus. This suggests that his Honour thought that the fair treatment of the parties was a value which should not always displace the right of a state to implement its substantive policy. Secondly, one must be wary not to overstate the ability of individuals operating in the multistate context to make informed judgments about what activities or precautions they should take under the law in force in the states in which they are present from time to time. This is where Juenger’s point comes into play about the powerlessness of the individual in shaping the laws to which he or she is subject in the

\textsuperscript{540} \textit{Supra} note 9 at para 6.65 and cl 81D(8)(b) of the draft bill attached to the Report.
multistate context. And the majority of the High Court appear to have been influenced by the type of concerns voiced by Juenger. In maintaining the traditional distinction between substance and procedure, their Honours give the injured individual an opportunity to avoid the operation of certain harsh laws after the event (by forum shopping), where he or she had no real chance to avoid the operation of the law beforehand.

The English, Canadian and Australian courts were clearly dissatisfied with the dominance of forum law under the pre-Chaplin v Boys interpretation of the Phillips v Eyre rule. In response to this they strengthened the role played by locus law under the second limb. However, this development could also produce undesirable results, and an exception to the operation of locus law was introduced by reference to the concept of people. (In Canada, because of McLean, these developments occurred in the opposite order.) However, when the shackles of forum law were thrown off in Canada (by Tolofson) and England (by Red Sea), the utility of the concept of people was forgotten. What we have shown in this Conclusion, is that the forgetting of people is undesirable from the perspective of effecting state policies. The elevation of place at the expense of people may be seen as justified in terms of the formal fair treatment of the parties, assessed in terms of the voluntary association envisaged by Brilmayer's political rights model. However, the forgetting of people may be undesirable from the perspective of substantive fair treatment envisaged by Juenger. In this respect, cases employing Lord Wilberforce's exception show that the concept of people can be used as a surrogate for concept of "person" (an individual who deserves fair treatment).
<table>
<thead>
<tr>
<th>Author(s)</th>
<th>Title</th>
<th>Publication details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black, V, and Flack,</td>
<td>&quot;Choosing the Applicable Law for Cross-Border Auto Accidents&quot; (1992) 15 CCLT (2d) 73.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>&quot;Conflicts Pragmatism&quot;(1993) 56 Albany L Rev 883</td>
<td></td>
</tr>
</tbody>
</table>


--------


--------


----------


----------


Juenger, RM,


Kahn-Freund, O,


Kay, HH,


Kegel, G,

"The Crisis of Conflict of Laws" (1964) 112 Recueil des Cours 91.

"Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers" (1979) 27 Am J Comp L 615.

Kelly, D,


Kincaid, P,


Kramer, L,

"Rethinking Choice of Law" (1990) 90 Col L Rev 277.

"Return to Renvoi" (1991) 66 NYLR 979.

Law Commission, The, (Working Paper No. 87) and Scottish Law Commission, The, (Con Mem No. 62)


Law Commission, The, (No. 193) and Scottish Law Commission, The, (No. 129),


Law Reform Commission (Australia), The,


Lorenzen, EG,  ---


---------


Nadelman, KH,  Conflict of Laws; International and Interstate Martinus Nijhoff (1972).

North, PM,  "Reform But Not Revolution" (1990) 220 Recueil des Cours 9.

---------


Savigny, FC von, A Treatise on The Conflict of Laws and the Limits of Their Operation in Respect of Place and Time (trans and ed by W Guthrie), T&T Clark, 1880.


Shreve, GR, "Interest Analysis as Constitutional Law" (1987) 48 Ohio State L.J 51.


"Paradigm Shift or Pandora's Box"?: Grimes v Cloutier; Prefontaine v Frizzle' (1990)69 Can Bar Rev 538.