# JURISDICTION AND CHOICE OF LAW IN TORT

*In this paper Craig Brown looks at the cases and theories centred on the jurisdictional and choice of law questions arising in torts involving a foreign element. The author concludes with proposals for a more simple, practical and direct approach to the problems existing in this currently confused area of the law.*

## I. INTRODUCTION

"One of the most vexed question in the conflict of laws." That is how Lord Denning once described the choice of law problem raised by proceedings involving torts committed abroad.[1] That assessment still holds true. Even a lengthy review of the law in this area by the House of Lords in *Chaplin* v. *Boys*[2] has not helped. In fact, the diversity of opinion expounded there has rendered the identification of clear principles even more difficult.[3]

The difficulties are attributable to a significant degree to the lack of a clear distinction between the question of choice of law and that of jurisdiction. It is the purpose of this paper to attempt to show that by clarifying this distinction, it is possible to resolve foreign torts problems more easily.

"Jurisdiction" here simply describes the prior test, or tests, which must be satisfied before the court will consider the question of what rules of law apply to the merits of the case, be they domestic or foreign rules. "Choice of law" refers to the rules which determine whether the merits should be decided, (a) as if the cause of action had occurred within the country or state in which the court is situated, or (b) by the law which the courts of some other country or state would apply if the cause of action had occurred within that country or state.[4]

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1. *Boys* v. *Chaplin* [1968] 2 Q.B. 1, 20.
2. [1971] A.C. 356.
3. For examples of the diversity of opinion to which the decision has given rise see:
   McGregor, "The International Accident Problem" (1970) 33 M.L.R. 1; Baer, "A Blind Search for a Proper Law" (1970) 48 Can.B.R. 161; North and Webb, "Foreign Torts and English Courts" (1970) 19 I.C.L.Q. 24; Karsten, "*Chaplin* v. *Boys:* Another Analysis" (1970) 19 I.C.L.Q. 35; and Reese, "Comments on *Chaplin* v. *Boys*" (1970) 18 Am.J.Comp.L. 169.
4. Assuming for present purposes, that *renvoi* does not apply.

## II. THE RULE IN *PHILLIPS* v. *EYRE* — THE STARTING POINT

The traditional starting point for an examination of this area of the law is the well-known passage from the judgment of Willes J. in *Phillips* v. *Eyre*:[5]

> 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 nature of the first requirement of this rule presents no great difficulty. On the other hand the second requirement, that the act be not "justifiable" by the law of the place where it was done, has been a subject of debate for some time. While it is not proposed to examine the arguments relating to that problem in this paper, it does now seem that it is a test of "actionability".[6] The question that will be examined here is whether the two-headed formula imposes a jurisdictional test, a choice of law test or a combination of both.

From the words "to found a suit in England" it would be reasonable to conclude that the test is entirely a jurisdictional one. Certainly Willes J. refers elsewhere in the judgment to the second limb in such terms as to suggest it is a jurisdictional requirement,[7] although it is unclear whether this is intended to exclude the first limb as such a requirement. In *Machado* v. *Fontes*[8] the first limb appears to have been treated only as a choice of law rule (the law of the forum applies), a test for jurisdiction being contained in the second limb. Lord Justice Rigby stated:[9]

> We start then from this: that the act in question is prima facie actionable here, and the only thing we have to do is to see whether there is any pre-emptory *bar to our jurisdiction* arising from the fact that the act we are dealing with is authorised . . . in the country where it was committed. If we cannot see that we must act *according to our own rules* in the damages . . . which we may choose to give.

A similar interpretation was adopted by Lords Wilberforce and Pearson in the House of Lords in *Chaplin* v. *Boys*. Lord Wilberforce said:[10]

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5. (1870) L.R. 6 Q.B., 1, 28.
6. See judgments of Lords Hodson, Wilberforce and Guest in *Chaplin* v. *Boys, supra.* This has now been accepted in New Zealand. See *Richards* v. *McLean* [1973] 1 N.Z.L.R. 521, 525.
7. *Phillips* v. *Eyre,* note 5 at 29: " . . . if the foreign law touches only the remedy or procedure for enforcing the obligation . . . such law is *no bar to an action* in this country."
8. [1897] 2 Q.B. 23.
9. *Ibid.,* (emphasis added).
10. Note 2, at 385.

> I accept what I believe to be the orthodox judicial view that the first part of the rule is laying down, not a test of jurisdiction, but what we now call a rule of choice of law: is saying, in effect, that actions on foreign torts are brought in English courts in accordance with English law.

As a result . . .

> . . . the current English law . . . [is] . . . (a) that the substantive law to be applied is the *lex fori*, (b) that, as a condition, non-justifiability under the *lex loci delicti* is required.[11]

Although Lord Pearson stated that both parts of the rule combined to form solely a choice of law rule, the substance of his approach seems to accord with that of Lord Wilberforce.[12]

> . . . the substantive law of England plays the dominant rule, determining the cause of action, whereas the law of the place in which the act was committed plays a subordinate rule, 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.

Despite Lord Pearson's contention that "the applicable law, the substantive law determining liability or non-liability, is a combination of the *lex fori* and the *lex loci delicti*", he is really employing the second limb as a test of jurisdiction as understood by the court in *Machado* v. *Fontes*.

The alternative interpretation of the Willes formula — that it imposes only a jurisdictional test — is adopted by the other three members of the House of Lords in *Chaplin*. Lord Donovan, for example, stated:[13]

> I would dismiss the present appeal on the ground that an English court was *competent to entertain the action* under the rule in *Phillips* v. *Eyre* and that once it had done so it should award *its own remedies*.

This approach allows no "choice" of law at all. Once the court has assumed jurisdiction, it is simply a matter of applying the law of the forum as if the act occurred in the country of the forum. And Lord Guest, too, seemed to view the rule as solely a jurisdictional one. He said:[14]

> . . . *to justify an action* in England for a tort committed abroad . . . [both the requirements as laid down by Willes J. must be met].

As a choice of law, however, Lord Guest differed in that he considered

11. Note 2, at 387. This interpretation has been applied in New Zealand in *Richards* v. *McLean* [1973] 1 N.Z.L.R. 521, 525.
12. Note 2, at 398.
13. *Ibid.*, at 383 (emphasis added).
14. *Ibid.*, at 381 (emphasis added).

that the law to be applied, once jurisdiction is established, is the *lex loci delicti* for matters of "substance" but that the *lex fori* governs matters of "procedure".[15] Finally, Lord Hobson is apparently quite clear as to his position:[16]

> Willes J. was not, however, concerned with choice of law but only whether the courts of this country should entertain the action.

On a closer reading of the judgment it is difficult to reconcile this statement with Lord Hobson's finding of a choice of law principle in the "general rule" of Willes J.[17]

Thus, it remains unclear whether *Phillips* v. *Eyre* establishes a jurisdictional or choice of law rule, or combination of both.[18] Nevertheless on the question of choice of law simpliciter, there seems to be a definite preference for the law of the forum (subject perhaps to various conditions which, it is submitted, are jurisdictional in nature anyway). But however they formulated their choice of law preferences, Lords Wilberforce, Pearson, Hobson and Donovan all considered it necessary to provide exceptions to prevent the undesirable practice of "forum shopping". Lord Pearson's exception to the general rule as he saw it, was based on public policy grounds. He said:[19]

> In such a case it may be desirable as a matter of public policy for the English courts, for the purpose of discouraging "forum shopping" to apply the law of the natural forum.

Lord Donovan too saw public policy as a means of defeating the forum-shopper and Lord Hobson advocated a "flexible interpretation" of the "general rule" on the basis of public policy.[20]

These approaches refer to the policy of the forum. By way of contrast Lord Wilberforce proposed an exception based, in part at least, on the policy of the country where the tort was committed. If the policy of the foreign lawmakers in promulgating the particular law in question can be established and if such policy obviously requires that the law be applied to *everyone* who commits the wrong to which it relates, then that foreign law should be applied. If, on the other hand, the policy behind the law can be seen to have related only to, say, residents of the foreign state, then the law should not be applied to cases involving only non-residents, at least where some other state has

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15. The nice questions of classification to which this approach gives rise are beyond the scope of this paper.
16. Note 2, at 375.
17. For similar criticism of Lord Hodson's speech see Nygh, *Conflict of Laws in Australia* 2nd ed. (1971) 408 and *Cheshire's Private International Law* 9th ed. (1974) 276.
18. Depending upon how Lord Hodson's speech is interpreted, it is possible to point to a 3—2 majority for the two seemingly contradictory propositions (a) that the rule relates solely to jurisdiction and (b) that it relates in part at least to choice of law.
19. Note 2, at 406.
20. *Ibid.*, at 383 and 378 respectively.

a greater interest in governing the relationship between the persons involved.[21]

In Australia the role of the Willes formula is much clearer than in England. It has been accepted as comprising only a jurisdictional, or "threshold", principle. In *Anderson* v. *Eric Anderson Radio and T.V. Pty. Ltd.* Windeyer J. said:[22]

> But when the two conditions are fulfilled — when the act is wrongful by the law of the forum and in the place where it occurred — what then? The case is one that the court will entertain, but by what law is it to judge it?[23]

The choice of law question contained in the last line of this passage is then answered thus:[24]

> . . . a court that entertains an action based upon a foreign tort must (unless there is a statute to the contrary) decide the rights of the parties as it would in an action on a similar event occurring within its own domain.

The Scottish courts have adopted a different view again to the *Phillips* v. *Eyre* rule. Both limbs of the rule are deemed to contribute to the choice of law formula, neither being subordinate to the other. A plaintiff cannot obtain a remedy which, although available according to the law of the forum, is not also available under the law of the place where the wrong was committed. This is so even if under the foreign law the wrong is actionable but a different remedy is provided.[25] Thus, the rules which apply to the merits of the case are those which both legal systems have in common.

The traditional Canadian approach is to treat the first part of the formula as a choice of law rule, that is the law of the forum applies; but this is subject to the act's being not justifiable under the *lex loci delicti*[26] — broadly the *Machado* v. *Fontes* interpretation. In at least one case, however, the first part appears to have been considered to be a jurisdictional requirement.[27]

21. Variations on this type of approach are discussed in the next part of this paper.
22. (1965) 114 C.L.R. 20, 41.
23. This position does not appear to have been affected by *Chaplin* v. *Boys;* see Nygh, "*Boys* v. *Chaplin* in the Antipodes" (1973) 4 U.Tas.L.Rev. 161.
24. At 42. For concurring views see Barwick C.J. at 23, and Taylor J. at 35. This aspect of *Anderson's* case seems also to have survived *Chaplin* v. *Boys;* see *Kolsky* v. *Mayne-Nickless Ltd.* (1970) 3 N.S.W.R. 511 and also Nygh, ibid.
25. See *Naftalin* v. *L.M.S. Railway* [1933] S.C. 259, *McElroy* v. *McAllister* [1949] S.C. 110, and *Mackinnon* v. *Iberian Shipping Co.* [1954] 2 Lloyds Rep. 372.
26. See Castel and Crepeau, "Choice of Law in Torts" (1971) 19 Am.J.Comp.L. 17.
27. In *Gagnor* v. *Lecavalier* (1967) 63 D.L.R. (2d) 12, the Ontario High Court treated the Willes formula as a jurisdictional rule: "It cannot . . . be said that the conduct sought to be attributed to the defendant in this action is 'actionable' in Ontario [the forum] and consequently I must hold that the court is *without jurisdiction* to entertain this action." (Emphasis added).

## III. THE "PROPER LAW" OF THE TORT

The traditional English formula has been subject to varying interpretations as far as jurisdiction and choice of law are concerned. Moreover, it has been considered by some to be inadequate and exceptions to it have been suggested. In this regard, mention has already been made of Lord Wilberforce's exception based on the policy of the *lex loci deliciti*, an approach which his Lordship acknowledged as having been developed in the United States. Since this American development may have an increasing influence in English courts, it is perhaps worth a more detailed examination.

Although Lord Wilberforce saw the new concept as amounting merely to an exception to the traditional rule, it has elsewhere been advocated as providing on its own the basis of a choice of law rule in tort. It has become known as the "proper law of the tort"[28] approach, and it broadly favours the application of the law of the country or state with which the parties and the act alleged have the most "significant connection".

The "proper law" doctrine appeared to gain a foothold in England with Lord Denning's judgment in the Court of Appeal in *Boys* v. *Chaplin*.[29] Such a radical innovation was unacceptable to three members of the House of Lords, however, and the "proper law" was expressly rejected.[30] On the other hand, as we have seen, Lord Wilberforce was prepared to utilise some aspects of the approach in a limited way (as also incidentally was Lord Pearson who, despite his expressed opposition to the proper law, was prepared, in some cases, to apply the law of the "natural forum"[31] to defeat a forum shopper). This tentative flirtation by a minority of the House of Lords with the new concept appears to have been authority enough for Lord Denning who stated in a subsequent case:[32]

> . . . we must apply the proper law of the tort, that is, the law of the country with which the parties and the act done have the most significant connection. That is how I put it in *Boys* v. *Chaplin*. I think it is confirmed by what Lord Wilberforce said in the House of Lords, though he put it with more scholarship and precision than I could hope to do.

Quite clearly this is reading too much into Lord Wilberforce's words, not to mention the fact that it ignores the complete rejection of the idea by the majority of the House. Nevertheless, the concept

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28. The phrase seems to have been coined by Morris, "Proper Law of the Tort" (1950-51) 64 Harv. L.R. 881.
29. [1968] 2 Q.B. 1, 20.
30. By Lords Guest, Donovan and Pearson.
31. *Chaplin* v. *Boys* note 2, at 406; "In such a case it may be desirable as a matter of public policy for the English courts for the purpose of discouraging "forum shopping" to apply the law of the natural forum".
32. *Sayers* v. *International Drilling Co.* [1971] 3 ALL E.R. 163, 166.

seems to have attracted some support in England and the extent to which this is so is examined later in this paper.

The obvious problem to which the proper law gives rise is how to decide which country or state is the one with which the parties and act have the most "significant connection". Various methods of resolving this have been suggested by American writers. The various approaches have together been referred to, rather loosely, as the "modern rule". They were devised to mitigate the often unjust effects of the inflexible application of the traditional rule in the United States that the *lex loci delicti* always applied.[33] Such terms as "dominant contacts", "governmental interests", "choice-influencing considerations" and "false conflicts", describe variations on the "modern rule" theme. Not surprisingly, this diversity has given rise to some confusion in the courts because several of the approaches overlap.

*Babcock* v. *Jackson*,[34] although not the first in time,[35] is generally regarded as a milestone decision as far as the "modern rule" is concerned. The essence of the approach taken by the court in that case appears in the judgment of Fuld J.:[36]

> Comparison of the relative "contacts" and "interests" of New York and Ontario in this litigation, vis-a-vis the issue here presented, makes it clear that the concern of New York is unquestionably the greater and more direct and that the interest of Ontario is at least minimal. The present action involves injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile, garaged, licensed and undoubtedly insured in New York, in the course of a weekend journey which began and was to end there. In sharp contrast, Ontario's sole relationship with the occurrence is the purely adventitious circumstance that the accident occurred there.

This combines aspects of both the "dominant contacts" and "governmental interest" approaches. Not only are the "contacts" of New York compared with those of Ontario but notice is also taken of the relative "interests" of the two jurisdictions as well. It is to be noted that Morris considered the latter of these to be an important factor in determining the "proper law" in particular cases.[37] It is

33. Although the traditional rule has not been abandoned completely; see Rydstrom, "Modern Status of the Rule that Substantive Rights of Parties to a Tort Action are Governed by the Law of the Place of the Wrong" (1970) 20 A.L.R. (3d) 603, 613-7.
34. (1963) 95 A.L.R. (2d) 1.
35. See for example *Kilberg* v. *Northeast Airlines Inc.* (1961). 2 Lloyds Rep. 406, and *Hagg* v. *Barnes* (1961) 87 A.L.R. (2d) 1301.
36. Note 34, at 9.
37. Morris, "Proper Law of the Tort" (1950-51) 64 Harv. L.R. 881 said: "The problem . . . cannot be solved by a mechanistic application of the last event doctrine, but only by a more sophisticated inquiry into problems of causation and foreseeability coupled with a balancing of the interests of the states whose law is involved."

also comparable, it will be remembered, to the approach taken by Lord Wilberforce in *Chaplin* v. *Boys* in his extension of the traditional English rule.

Perhaps the leading proponent of the governmental interest analysis was Professor Currie. Initially, he contended that where the forum state had *any interest at all* in applying its own law, it should do so; and only where it had no such interest was it necessary to look to the interests of the foreign state involved. "Interests" were determinable from a state's "social, economic and administrative policy".[38] This is hardly a "weighing up" of relative interests as Morris appears to have envisaged and it would be a rare case in which the forum could find no interest *at all* in applying its own law. This position, favouring the forum, was strongly criticised[39] and Currie later modified his views.[40]

A refinement of this approach is the identification of the particular *issue* to be resolved in the case and the application of the law which best relates to that issue. *Babcock* v. *Jackson* provides a good example of this:[41]

> It is hardly necessary to say that Ontario's interest is quite different from what it would have been had the issues related to the manner in which the defendant had been driving . . . Where the defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive concern . . . The issue here, however, . . . is whether the plaintiff, because she was a guest in the defendant's automobile, is barred from recovering damages for a wrong concededly committed. As to that issue, it is New York, the place where the parties resided, where their guest-host relationship arose, . . . which has the dominant contacts and the superior claim for application of its law.

As Faul J. notes later in the judgment, this view is consistent with that of Ehrenzweig who pointed out[42] that, in cases of this nature, host-drivers can only be expected to procure liability insurance which is adequate according to the law of the place where the relationship with the guest arose. Moreover, the host's insurer can only reasonably be expected to calculate premiums by reference to known laws of liability.

Another method of ascertaining which law is most appropriate in

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38. "The Constitution and Choice of Laws: Governmental Interests and the Judicial Function" (1958) 26 U. Chicago L. Rev. 9.
39. For example Juerger, "Choice of Law in Interstate Torts", 1969-70 U. Penn. L. Rev. 118, 202, 206-7.
40. See "The Disinterested Third State" (1963) 28 Law and Contemp. Problems 754; "Comments on *Babcock* v. *Jackson*" (1963) 63 Colum. L.R. 1213, 1233.
41. Note 34, at 9-10.
42. See "Guest Statutes in Conflict of Laws" (1959-60) 69 Yale L.J. 595, 603.

a given case is suggested by Cavers.[43] Rather than formulate a generalised rule, he advocates that the choice be made according to certain criteria which he calls "principles of preference". The particular issue of a case must be identified, as for the other tests, but then an appropriate "principle" is applied to it. It is unnecessary here to examine all the suggested principles in detail; one example will suffice:[44]

> Where the law of a state in which a relationship has its seat has imposed a standard of conduct or of financial protection on one party to that relationship for the benefit of the other party which was *lower* than the standards imposed by the state of injury, the law of the former state should determine the standard of conduct or financial protection applicable to the case for the benefit of the party whose liability that state's law would deny or limit.

The principles listed are not claimed to constitute an exhaustive list; they merely provide a set of guidelines. Indeed, Cavers leaves open the possibility that other principles will be developed.[45]

A similarly pragmatic approach is that which refers to "choice influencing considerations". This involves "a frank recognition of the considerations that have always expressly or tacitly, underlain common-law decisions involving conflicts of law"[46] and the conscious use of all or some of these considerations as criteria in solving a choice of law problem. A leading proponent of this approach is Leflar.[47] He listed five such considerations: predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum's governmental interests, and application of the better rule of law. Again, these criteria are envisaged more as guidelines than as rules. No special order of priority is claimed among them, nor are all of them considered to be appropriate to every case.[48]

## IV. GENERAL RULES RELATING TO JURISDICTION

While choice of law is being made more complex by the introduction of American approaches, jurisdiction is already complicated by the applicability to torts cases of the rules which govern jurisdiction

43. In his book, *The Choice of Law Process* (1965) University of Michigan Press.
44. Ibid., at 177.
45. Ibid., at 133.
46. Rydstrom, "Modern Status of the Rule that the Substantive Rights of the Parties to a Tort Action are Governed by the Law of the Place of the Wrong" (1970) 29 A.L.R. (3d) 603.
47. Leflar, "Choice Influencing Considerations in Conflicts Law" (1966) 41 N.Y.U.L. Rev. 267. For earlier analyses along the same lines see Cheathem and Reese, "Choice of the Applicable Law" (1952) 52 Colum. L.R. 959 and Yntema "The Objectives of Private International Law" (1957) 35 Can.Bar.Rev. 721.
48. See for example, *Zelinger* v. *State Sand and Gravel Co.* (1968) 29 A.L.R. (2d) 590 where Leflar's views were expressly referred to (p. 597), but where predictability of results was in that instance considered irrelevant since "automobile accidents are not planned".

in conflicts cases generally. For example, if a defendant is served within the territorial boundaries of the jurisdiction in an action *in personam*, the court is competent to hear the action.[49] Equally if a defendant submits to the court's jurisdiction the action will be entertained. Where either of these requirements is not met, a court may nevertheless grant leave to serve the defendant out of the jurisdiction if certain conditions are met. In New Zealand the relevant provisions are contained in Rule 48 of the Code of Civil Procedure.

Leave to serve out of the jurisdiction may be granted under Rule 48(a) "where any act for which damages are claimed was done in New Zealand" and under Rule 48(g) "where any relief is sought against any person domiciled or ordinarily resident in New Zealand". These and paragraphs (d), (e) and (h) of the Rule could obviously apply to actions in tort.[50]

Superimposed on these rules relating to service, both in and out of the territorial jurisdiction, are various common law criteria to guide the courts in the use of their discretion as to whether jurisdiction should be declined or assumed. For example, if a court considers that it is unable to give an effective judgment, it may decline jurisdiction. This approach is normally restricted to cases concerning property situated abroad[51] but has some relevance to tort cases.[52]

An additional criterion which may be applied where an application for leave under Rule 48 is being considered is what has been called the doctrine of *forum conveniens*. Under this, the court may decline jurisdiction where a foreign forum is deemed, in the circumstances, to be a more appropriate or convenient place for the action to be heard. In *Kroch* v. *Rossell et Cie*[53] the English Court of Appeal declined to

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49. For example *Colt Industries Inc.* v. *Sarlie* [1966] 1 All E.R. 673.
50. Paragraph (d) provides that leave may be given "where it is sought to compel or restrain the performance of any act in New Zealand"; (e) "where the subject matter of the action is land, stock or other property situated in New Zealand, or any act, deed, will, instrument, or thing affecting such land, stock, or property — "; and (h) "where any person out of New Zealand is a necessary or proper party to an action properly brought against some other person duly served or to be served within new Zealand".

    In *Adastra Aviation Ltd.* v. *Airparts (N.Z.) Ltd.* [1964] N.Z.L.R. 393, Rule 48(a) was held to be of wider application than the corresponding U.K. provision O.XI r 1 (ee) because of the different wording. See *Richards* v. *Mclean* [1973] 1 N.Z.L.R. 521 for discussion of the scope of Rule 48(h).
51. In *Tallack* v. *Tallack and Brockema* [1927] P. 211, 221, Lord Merrivale P. summarised the text: "Can this court give an effective judgment as to the respondent's propery so as to bind the property? . . . [if not, a decree of the court would be] an idle and wholly ineffectual process."
52. See, for example, the judgment of Lord Herschell L.C. denying the jurisdiction of an English court in a case involving trespass to foreign land in *British South Africa Company* v. *Compania de Mocambique* [1893] A.C. 602, 625. Jurisdiction was declined because a decision would have involved the court's pronouncing upon the title to foreign land.
53. [1973] 1 All. E.R. 725.

assume jurisdiction in a case of alleged defamation. Lord Justice Scott gave the following reasons for the application of the doctrine:[54]

> In this particular case, the writ was issued for libel ,the libel consists of a paragraph, which appeared in the French paper 'Le Petit Parisien'. It describes . . . proceedings . . . [which] are, of course being conducted in accordance with French criminal procedure in the French language, and all the steps in relation to it are steps understood by French lawyers, and understood by a French jury. France is obviously the right place to try that issue.

It has been suggested that this approach may correctly be applied even to cases where service has been effected within the jurisdiction. That is the doctrine of *forum non conveniens* as understood in Scotland and the United States, is applicable in England, and New Zealand.[55] In *The Atlantic Star*,[56] however, the House of Lords rejected the contention that *forum non conveniens* applied in England. While a defendant who had been served in England could apply for a stay of proceedings, the court, in deciding whether or not to grant a stay, is guided by different considerations from those followed in ascertaining the *forum conveniens* in relation to the question of service abroad. The basis of granting a stay of proceedings is principally that the action is "vexatious or oppressive". Although these words are now likely to be interpreted liberally they still do not amount to a *forum non conveniens* approach.[57] It seems also that *forum non conveniens* is not available in Australia.[58]

Obviously, in England at least, these general principles of jurisdiction are applicable to torts cases. Therefore, whether the Willes formula is treated as a jurisdictional test or not, a plaintiff may be obliged to satisfy several requirements before he can have the merits of his case heard. In Australia, too, where the Willes formula is regarded solely as a jurisdictional test, the general rules apply as well. In *Koop* v. *Bebb*[59] the High Court of Australia, before going on to apply the Willes formula as a jurisdictional rule, tested the competence of the Victoria court of first instance by reference to general principles:[60]

> It does not appear whether the writ in this action was served

54. Ibid., at 731.
55. See Inglis, "Forum Conveniens — Basis of Jurisdiction in the Commonwealth" (1964) 13 Am. J. Com. L. 583, and "Jurisdiction, The Doctrine of Forum Conveniens and Choice of Law in Conflict of Laws" (1965) 81 L.Q.R., 380, 394; and discussion of this view in McLean, "Jurisdiction and Judicial Discretion" (1969) 18 I.C.L.Q., 931.
56. [1974] A.C. 436.
57. For discussion of *The Atlantic Star* see McLean, "Foreign Collisions and Forum Conveniens" (1973) 22 I.C.L.Q., 748, and *Cheshire's Private International Law*, 9th Ed. (1974), 125-6.
58. See Nygh, "*Boys* v. *Chaplin* in the Antipodes" (1973) 4 U. Tas. L. Rev., 161, 176.
59. (1951) 84 C.L.R., 629.
60. Ibid., at 638.

upon him in Victoria, but he entered an appearance in the action and by so doing he submitted to the jurisdiction of the court.

From *Richards* v. *McLean*,[61] it appears that the New Zealand courts look both to the Willes formula and to general rules in determining the question of jurisdiction in torts cases. In that case Mahon J. adopted the view that the second limb of the formula was a jurisdictional test. Once it was satisfied, the action could be "properly brought" in New Zealand and that in turn satisfied one of the requirements of Rule 48(h) of the Code of Civil Procedure.

## V. THE ALTERNATIVE APPROACHES TO JURISDICTION AND CHOICE OF LAWS

It is possible now to enumerate the various alternatives, firstly for a jurisdictional rule, and secondly for a choice of law one, which appear to be available from the cases which have been examined.

The possible jurisdictional rules are:

(a) Where the wrong allegedly committed is actionable both by the law of the forum and by the law of the place where it was committed, the court will assume jurisdiction;[62]

(b) jurisdiction will be assumed if the act complained of is actionable by the law of the place where it was committed;[63]

(c) jurisdiction will be assumed if, and only if, the jurisdictional requirements which relate to conflict of laws cases generally are met. The requirements being that the defendant was served in the jurisdiction or submitted to the jurisdiction of the court, or alternatively that leave to serve out of the jurisdiction has been granted in accordance with the rules of court. Superimposed on these rules of service or submission are additional requirements; for example the court is able to give an effective judgment and either that it is the *forum conveniens* (if service is to be effected abroad) or that the action is not vexatious or oppressive;

(d) a multi-headed test comprising the requirements of either (a) or (b), and (c).[64]

Once jurisdiction is assumed, the options for a choice of law rule are —

(i) the law of the forum;[65]

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61. [1973] 1 N.Z.L.R., 521.
62. It is assumed that the Willes formula is now accepted as being one of double-actionability.
63. This is using the second part of the Willes formula only as a jurisdictional rule as in *Machado* v. *Fortes* [1897] 2 Q.B., 23. In such cases it follows that the law of the forum must be applied to the merits.
64. As, for example, in *Koop* v. *Bebb* and *Richards* v. *McLean*, supra.
65. As in *Anderson* v. *Eric Anderson, Radio and T.V. Pty. Ltd.*, note 22.

(ii) the law of the forum provided that the wrong would also have been actionable by the law of the place where it was allegedly committed, had the action been brought there;[66]

(iii) the law which is common both to the law of the forum and the law of the place of commission.[67]

(iv) the law of place of commission;[68]

(v) rule (i) subject to specific exceptions based on public policy;[69]

(vi) rule (iv) subject to specific exceptions such as those based on public policy or those involving intra-family relationships;[70]

(vii) the "proper law" of the tort i.e., account should be taken of the relative contacts of the parties and other aspects of the event to the countries involved, and the law of the country with which these have the most "significant connection" should be applied. It is necessary to ascertain the issue to be resolved in a particular case and decide which country or state has the greater interest in having its law applied in resolving that issue;[71]

(viii) for all substantive matters, the law of the place where the wrong was committed; for all procedural matters, the law of the forum;[72] and

(ix) a combination of two or more of the above.[73]

This multiplicity of alternatives underlines the confused state of the law at present. At the same time, however, it does show the way to a more satisfactory resolution of the entire problem, if only by enabling the selection from these lists of the jurisdictional rule and the choice of law one which together provide the most satisfactory result. Satisfactory, that is, in terms of ensuring certainty of application while allowing sufficient flexibility to prevent injustice in the individual case.[74] Hopefully this can be achieved without going beyond a consideration of the current law and wthout being inconsistent with the general direction of recent cases.

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66. This is essentially Lord Wilberforce's interpretation of the Willes formula but, as has been argued, the condition imposed is really a jurisdictional test.
67. As in the Scottish cases such as *McElroy* v. *McAllister*, supra.
68. The traditional American and European approach.
69. Lord Pearson's approach in *Chaplin v. Boys*, supra.
70. See Rydstrom, supra, at 617-622.
71. See *Babcock* v. *Jackson*, supra.
72. See Lord Guest's speech in *Chaplin* v. *Boys*, supra.
73. An interesting approach is that proposed by the 1968 Hague Convention on the Law Applicable to Traffic Accidents which sought to achieve a compromise between the law of the place of commission and the proper law. See (1968) 16 Am.J.Comp.L. 589.
74. It is interesting to compare Lord Pearson's concern in *Chaplin* v. *Boys* (note 2, at 405) to maintain certainty, with the attempts in particular by Lords Hodson and Wilberforce, to provide some degree of flexibility.

## VI. SUGGESTED SOLUTIONS

Torts cases in the private international law field could be divided into two categories; those where it is necessary for the plaintiff to obtain leave to serve the defendant abroad, and those where the defendant either is served within the territorial jurisdiction or submits to the jurisdiction of the court. In the former type of case, a court, when considering whether to comply with a request for leave to serve abroad may well be called upon to enquire whether it is the *forum conveniens*. As seen from the excerpt from *Kroch* v. *Rossell*,[75] this involves an investigation of all aspects of the case to ascertain which forum is the most appropriate for trial of the *issue* being contested. Included in this investigation, which is concerned with jurisdiction, is an examination of the legal system which should most appropriately and conveniently govern that issue. The similarity between this approach and the proper law approach to the choice of law question is obvious.[76]

The question then arises, if the new "flexible approach" involving at least some aspects of the proper law concept is, or is to become, part of English law, why should the same factors, which have already been considered in relation to jurisdiction be recanvassed under the heading of choice of law, especially when the same result will ensue. If a plaintiff has his case rejected on the grounds that the court has no jurisdiction, presumably he can (more "conveniently") go to the appropriate foreign court which will apply its own — and more appropriate "proper" — law. Alternatively, if the case is not rejected the forum court, because it is using the same criteria only under a different name, will certainly conclude that the "proper law" is the law of the forum. In such a case, it would be more expedient and certainly no less just, once jurisdiction is assumed, simply to apply the law of the forum.

The solution suggested for cases where leave to serve abroad is necessary is, then, that the general conflicts rules of jurisdiction, in particular the doctrine of *forum conveniens*, constitute the only requirements for jurisdiction and that once these have been met, the law of the forum should apply.

It may be argued against this approach that under certain circumstances it could be impracticable or unjust for a plaintiff to have to bring this action in a particular foreign court, even though the case as a whole has no significant connection with the forum. This is largely countered by the nature of the doctrine of *forum conveniens*. There is authority for a court to deem itself to be "conveniens" if it is unjust, according to its own standards, to require the plaintiff to take his case to what would otherwise be the appropriate forum.[77]

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75. Supra.
76. Compare, for example, the considerations taken into account in *Babcock* v. *Jackson*, supra.
77. See *Oppenheimer* v. *Louis Rosenthal and Co.* [1937] 1 ALL.E.R. 23.

The advantage of this approach is that it provides a reasonable balance between certainty and flexibility without really venturing far from accepted English doctrines. The provision of the *lex fori* as the sole choice of law ensures more than a small degree of certainty. On the other hand, the discretion vested in the court in respect of the question of jurisdiction, particularly through the doctrine of *forum conveniens*, provides sufficient flexibility to permit a just decision in a particular case. The dreaded evil of forum shopping is easily avoided.[78]

Since the House of Lords, in *The Atlantic Star*, has rejected the notion that there is a general doctrine of *forum conveniens* (or *forum non conveniens*) in England[79] and that this position seems also to prevail in Australia, it is necessary to exclude from this suggested approach cases where service is effected within the jurisdiction and where the defendant has submitted to the jurisdiction. The criteria governing the granting or withholding a stay of proceedings in such cases is sufficiently different from those governing the court's use of its discretion under Rule 48 to preclude a close comparison with proper law considerations. Where an application for a stay of proceedings is considered and then denied, the allegation of unnecessary duplication cannot be made in relation to any subsequent search for the proper law to be applied to the merits of the case. While it would be much tidier if the courts were to accept a general *forum conveniens* doctrine, they most certainly at this stage do not, and therefore cases not involving service abroad must be treated differently.

Where there is no machinery such as *forum conveniens* to sift out the chaff at the jurisdiction stage, it is obviously not appropriate to be so dogmatic about the application of the *lex fori* to the merits of the case. If a desirable degree of flexibility is to be retained, and if such flexibility[80] is not available with regard to jurisdiction, obviously it must be provided in the choice of law rule. A proper law approach is surely the way to achieve this.

While it can be said that a majority of the House in *Chaplin* v. *Boys* expressed a dislike of the proper law concept, it can equally be maintained that a majority also desired that a degree of flexibility

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78. Interestingly, in *John Walker and Sons Ltd.* v. *Henry Ost and Co. Ltd.* [1970] 2 All E.R. 106, 123 Foster J. rejecting a claim that the plaintiffs were forum-shopping said he could see no reason why an English Court was not the "proper forum".
79. In *The Atlantic Star*, note 56, the House of Lords rejected the "general" doctrine of *forum non conveniens* with specific reference to the form in which it applies to Scots Law. In addition, however, it was made clear that the criteria which govern the *forum conveniens* concept at English Law in relation to applications for leave to serve abroad were not applicable to cases where service had already been effected.
80. Some flexibility is available with respect to the granting of a stay of proceeds especially with the more "liberal" interpretation of "vexatious or oppressive" which was favoured by the House of Lord in *The Atlantic Star*. This is, however, well short of that permitted by the wider criteria which the proper law and forum conveniens approaches incorporate.

be attached to the traditional rule, principally to thwart the blatant forum shopper. The idea of such flexibility implies that in some cases application of the *lex fori* is inappropriate and that some other law should more correctly govern the rights and obligations of the parties. How is this other law ascertained? Only Lord Wilberforce attempted to answer this in any depth but it seems obvious that to find a more appropriately applicable law it is necessary either to investigate relative contacts, interests and the like, i.e. ascertain the "proper law", or to refer mechanically to the *lex loci delicti*. The latter option, though, is itself singularly devoid of flexibility.

It is to be concluded from this that our courts now have available to them a proper law approach, whether it is called that or not. Admittedly its use appears to be restricted at present in the sense that it is available only as an exception to the traditional "general" rule contained in *Phillips* v. *Eyre*, but is this a real restriction? Would not a court, in any case, have made some assessment as to whether or not the so-called exception should apply, and would not this assessment, itself involve an investigation of the contacts of the parties and perhaps even the interests of appropriate governments? Possibly the enquiry would be based upon the presumption that the law of the forum would prevail unless reason for its not doing so could be found, but this in essence would only be one influence in the overall weighing-up process.[81]

## VII. CONCLUSION

The suggestion then, is that in cases where service has been effected, the general conflicts rules alone should govern jurisdiction and that the choice of law problem be resolved by a proper-law type approach — an approach which is not inconsistent with concepts which have already been accepted in some form by the courts.

Where no service has been effected, the general conflicts rules of jurisdiction should apply and once these have been satisfied the *lex fori* should apply to the merits.

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81. This, it will be recalled, is close to Currie's version of the modern rule. See, "The Constitution and Choice of Laws: Governmental Interests and the Judicial Function" (1958) 26 U. Chicago L. Rev. 9.

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