Michigan Law Review

Volume 56 | Issue 7

1958

Torts in English and American Conflict of Laws: The Role of the Forum

S. I. Shuman
Wayne State University

S. Prevezer
University College, London

TORTS IN ENGLISH AND AMERICAN CONFLICT OF LAWS: THE ROLE OF THE FORUM†

*S. I. Shuman** and *S. Prevezer***

I. INTERSTATE AND INTERNATIONAL CONFLICTS

"PRIVATE international law owes its existence to the fact that there are in the world a number of separate territorial systems of law that differ greatly from each other in the rules by which they regulate the various legal relations arising in daily life."[1] Where the systems are those of member states[2] of a federal union, there should be less difference in their laws than where they are those of sovereign nations divided by strong cultural, social and political barriers. Interstate conflicts and international conflicts are likely to give rise to somewhat different considerations and rules, and it is surely significant that the relevant branch of law is generally known in the United States as the conflict of laws and in England more usually as private international law. It is, therefore, worth summarizing at the outset the different function which the conflict of laws or private international law performs in the two countries, since this may help to explain why, in the area of torts specifically, their rules appear to be so different. Whether the difference in effect is as great as the difference in appearance would lead one to believe is, however, somewhat questionable.

In the United States, even in the states adjacent to Mexico or Canada and in states which are centers of great commercial activity, the vast majority of civil cases which are heard by the

†In the preparation of this paper the writers were privileged to be able to discuss the material with Professor Paul A. Freund of the Harvard Law School. However, the joint authors are alone responsible for the views presented.

*Professor of Law, Wayne State University. A grant from the Rockefeller Foundation enabled Mr. Shuman to spend the 1956-57 year at the Harvard Law School.—Ed.

**Lecturer in English Law, University College, London. A fellowship from the Harvard Law School enabled Mr. Prevezer to spend the 1956-57 year at the Harvard Law School.—Ed.

1 CHESHIRE, PRIVATE INTERNATIONAL LAW, 4th ed., 3 (1952).

2 Although it would be advantageous to use the word "state" primarily to refer to a political unit which is one of a federation of states, and the word "nation" to refer to a political unit which is itself not part of a federation, it becomes awkward to do so consistently in the discussions of conflict of laws cases. It is therefore hoped that the context will make clear which sense is intended, since the word "state" may sometimes be used in one sense and sometimes in the other.

courts, involving a conflict of laws, are concerned with the interests of sister states of the Union. It seems likely that even without the unifying provisions of the Constitution, the demand for comity between sister states would have produced a degree of recognition not greatly dissimilar to that obtaining today. In actual practice, there is relatively little constitutional compulsion affecting the choice of law rules adopted by state courts[3] and yet, having regard to the quantity and diversity of the problems presented, there nevertheless exists considerable accord on basic issues.

In England, on the other hand, the conflict of laws has a far lesser practical importance and performs a somewhat different function. There the main concern is to regulate the rights of parties whose conduct is affected by the laws of other nations. The policies underlying those laws may sometimes bear little relation to those which would govern similar conduct and results had they occurred solely in England, and the need to provide recognition of the laws of other jurisdictions is hardly as pressing as in the United States. Particularly with regard to civil wrongs in which local penal policies are of decisive importance, such recognition may be even undesirable. On the other hand, the very fact that the issue may often have international as opposed to interstate repercussions suggests the need for some restriction upon the freedom of the forum to apply its own law. Where American courts are confronted with the type of problem which has international complexities, as in the recent case involving the *British Nylon Spinners*,[4] they too may have to act with greater restraint in the application of the domestic law. The scarcity of tort cases in the English conflict of laws is clearly not so much attributable to the apparently inhospitable attitude of the English courts as to the lack of mobility of persons and chattels between England and other nations which is in marked contrast to the degree of such mobility between states of the Union. Combined with a rigorous doctrine of precedent and a relatively unimaginative and conservative judiciary, this scarcity of cases has

[3] Although one may wonder whether it would today take the same attitude, the Supreme Court went so far as to say in Kryger v. Wilson, 242 U.S. 171 at 176 (1916): "The most that the plaintiff in error can say is that the state court made a mistaken application of doctrines of the conflict of laws. . . . But that, being purely a question of local common law, is a matter with which this court is not concerned."

[4] United States v. Imperial Chemical Industries, Ltd., (S.D. N.Y. 1951) 100 F. Supp. 504.

resulted in a failure to develop adequate conflict of laws rules to meet the changing and diverse demands of contemporary conditions. The appropriate rule for tort cases was stated nearly a century ago as a result of two tort situations which came before the courts. These two cases were primarily concerned with the general maritime law as applied to British shipping and with the government of a British colony, as to both of which English rules were therefore particularly relevant.[5] Unfortunately these same rules continue to be mechanically applied to situations entailing substantially different considerations. With London in the latter part of the nineteenth century the commercial capital of the world and the source of legal direction for many parts of the globe, the national conceit of Victorian judges was at least understandable and, in these two cases, perhaps somewhat justifiable. It is, however, instructive to note in passing that the rule of English municipal law[6] which was applied in the first case was later changed[7] to conform to that of the Belgian law which the English court had rejected.

The situation becomes somewhat paradoxical when it is appreciated that the English rules are today generally applied in Canada where most of the cases involve a conflict between the laws of the provinces. Despite the strong influence of the Privy Council, which was directly exerted until very recently, it seems particularly strange that Canadian courts have not been more affected by some of the more recent developments on the other side of the 49th parallel. Professor Hancock has stated,

> "It seems incredible that because in 1868 the Privy Council refused to enforce a particular rule of Belgian law, the courts of Canadian provinces should refuse to enforce any law of a sister province which happens to differ slightly from their own. Yet this appears to be the prevailing doctrine in Canada today. One would look far to find a more striking example of 'mechanical jurisprudence,' blind adherence to a verbal formula without any regard for policies or consequences."[8]

In English and American law, the term "tort" is used to designate any one of a number of widely different situations

5 "The Halley," L.R. 2 P.C. 193 (1868); Phillips v. Eyre, L.R. 6 Q.B. 1 (1870).
6 Merchants Shipping Act, 17-18 Vict., c. 104 (1854).
7 Pilotage Act, 2-3 Geo. 5, c. 31 (1913).
8 HANCOCK, TORTS IN THE CONFLICT OF LAWS 89 (1942).

which may result in a claim for unliquidated damages by an injured party. In other legal systems, the characterization or classification or qualification of the same act may be different and entail other consequences.

> "The same obligations which arise from torts in English law will be generally classified as arising from delicts, or quasi-delicts in French law. In the German language and in Slav languages they will be termed delictual or quasi-delictual obligations, and more often obligations arising from 'non-permitted acts.' Many obligations which in England are considered as arising from torts will be treated in the law of Continental Europe as arising from contracts."[9]

In England and in the United States, at least, characterization of the "threshold problem," due largely to the same common law heritage, is fundamentally similar. Too often, however, characterization as a tort is such a mechanical process that the connection of the act with other branches of law is practically ignored, and avenues of escape from an unwelcome rule or an unjust conclusion are unwittingly barred. It should be remembered in this connection that "pragmatic common sense, together with a study of the operative features of the foreign transaction or legal institution, will go far to produce sensible results," and that "the problem of characterization may yield more serviceably to criteria of purpose than to analysis in the conventional terms of primary and secondary characterization."[10] In the area under discussion, this approach is particularly relevant, not merely to characterization of the act but also to questions of substance and procedure and measure and remoteness of damages. These will be dealt with more fully later in this article.

Once, however, as in English and American law, various acts are classified alike as torts merely because they are liable to result, in the forum at least, in similar legal consequences, the generic term by which they are named serves to conceal their diverse features and the possible variety of underlying policies, only some of which may be relevant to any particular cause of action. Thus

9 Kuratowski, "Torts in Private International Law," 1 INT. L.Q. 172 (1947).

10 Freund, "Characterization with Respect to Contracts in the Conflict of Laws," in CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS (Summer Institute on International and Comparative Law) 158, 164 and 159 (1949). Illustrative of the non-mechanical disposition of a conflict of laws case in which characterization proved to be a decisive factor is Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 A. 163 (1928). This case is discussed below at note 92.

acts which may be intentional or negligent or may result in injury to substance, feelings or reputation, to persons or to property, or in no injury at all, or indeed even in a profit to the innocent party, or may involve considerable or negligible degrees of moral culpability or be of little or great public concern, may all give rise to an action in tort and yet entail vastly different policy considerations. Where the acts occur in a context containing no foreign elements, it may not be easy to decide in a given case the determinative policy or at least the weight it should be accorded. The problem becomes immeasurably more difficult where the acts occur in a conflict of laws situation involving in varying degrees the interests of two or more jurisdictions, and it should therefore be apparent that a rigid rule mechanically applied to all torts must be inappropriate as a means of according recognition to the true interests of the parties and states involved. It should also be clear that the different facets of a single act may require separate consideration and the application of different rules adopted from, or perhaps analogous to, those of different jurisdictions; in principle, this need is already, though inadequately, recognized by all courts in their characterization of substance and procedure. That this may be crucial to the actual outcome of the case is all too obvious: thus assuming, for example, that actionability is admitted by all the systems of law concerned, a plaintiff may be virtually remediless if the damages rule of one of those systems is mechanically applied without proper investigation of the policies involved and of the just solution to be reached.

II. THE ENGLISH AND AMERICAN "RULES"

Before considering the policy factors which may be relevant to a tort situation involving a conflict of laws, it is worth summarizing at this point the principal choice of law rules which are applied by English and American courts and the theoretical basis, if any, on which those courts purport to rely.

The general rule in the United States is fairly accurately stated in section 384 of the *Restatement* which provides: "(1) If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states. (2) If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state."[11] These conditions will hereafter be

[11] CONFLICT OF LAWS RESTATEMENT §384 (1934).

referred to as the recognition rule and the American justifiability rule, respectively. They are, of course, subject to at least two important qualifications, namely, that the forum adopts its own procedure and may refuse to entertain a cause of action which is contrary to its own public policy. Public policy may be reflected in more than one way: thus, a court may deny access on grounds of forum non conveniens even though, had the conduct and results occurred in the forum, it would have been actionable there. On the other hand, a court may grant recognition to foreign interests despite the fact that the public policy of the forum would prevent the creation of such interests in the forum. With regard to substance and procedure, there is a significant tendency, at least partly due to the influence of the *obligatio* theory,[12] to minimize characterization as procedure by the forum. This approach has met with very general approval and has been strongly endorsed by Cook, perhaps the leading opponent of traditional American theory:

> "If we admit that the 'substantive' shades off by imperceptible degrees into the 'procedural,' and that the 'line' between them does not 'exist,' to be discovered merely by logic and analysis, but is rather to be drawn so as best to carry out our purpose, we see that our problem resolves itself substantially into this: How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?"[13]

One of the basic problems, constantly confronting the American courts, is: Where is a tort committed? This is probably a matter for the *lex fori* and is usually answered by following the lead of the *Restatement* rule that "the place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place,"[14] although this may sometimes entail applying the law of a jurisdiction which has comparatively little connection with the "tort" and whose interest is negligible when compared with that of other jurisdictions. There may easily be cases where the acts occur in one state and the injury is suffered in another, or where both the acts and the injury occur in the same state but the issue in question relates more closely to a

12 See Part III infra.

13 COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 166 (1949).

14 CONFLICT OF LAWS RESTATEMENT §377 (1934).

different state. There has, therefore, been some extremely hostile criticism as to the applicability of the *Restatement* rule in such situations. In view of the tendency, already referred to, to ascribe increasing importance almost automatically to the *lex loci delicti commissi,* the unquestioning application of the rule is particularly meaningful and dangerous. It should, however, be noted at this stage that some inroads have been made on the principle of applying the law of the place of wrong, particularly in cases involving workmen's compensation, defamation and invasion of privacy, administration of estates and inter-family actions.[15] These at least reveal the growing awareness of a belief, which is of central importance in this paper, that mechanical jurisprudence is particularly unsuited to the conflict of laws.

The English rules governing torts in the conflict of laws appear to reflect the difference between interstate and international considerations. Although the Privy Council was already concerned with such problems in 1673,[16] it was largely due to the influence of Lord Mansfield a century later that English courts became accustomed to entertaining tort suits involving a conflict of laws, although an exception, which still substantially exists today, was made in respect of questions involving foreign land.[17] Nevertheless, the true foundation of the modern rules is to be found in three cases in the latter half of the nineteenth century. In the first of these, *"The Halley,"*[18] decided by the Privy Council in 1868, the defendant owners of a British steamship were sued in Admiralty for damages to a Norwegian vessel in the Flushing Roads (Belgian waters) allegedly caused by the sole negligence of the compulsory pilot required by Belgian law. By the then English law, as stated in the Merchant Shipping Act of 1854,[19] the owners were exempted from liability for such negligence, although by Belgian law the owners could have been held liable. It was held that the English court was not bound to apply Belgian law since it was "alike contrary to principle and to authority to hold, that an English Court of Justice will enforce a Foreign Municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, im-

[15] See Part VII infra.

[16] Blad's Case, 3 Swans. App. 603, 36 Eng. Rep. 991 (1673).

[17] British South Africa Co. v. Companhia de Mocambique, [1893] A.C. 602; The Tolten, [1946] P. 135.

[18] L.R. 2 P.C. 193 (1868).

[19] 17-18 Vict., c. 104 (1854).

poses no liability on the person from whom the damages are claimed."[20] This opinion was cited and relied upon in *Phillips v. Eyre*[21] two years later in the Exchequer Chamber when the court was required to consider whether an action for false imprisonment would lie against the defendant who had detained the plaintiff in Jamaica. Following the detention it had been "enacted by the governor, legislative council and assembly of the island, amongst other things, that the defendant . . . was thereby indemnified in respect of all acts . . . done in order to put an end to the rebellion, and all such acts were 'thereby made and declared lawful, and were confirmed.' "[22] That the defendant himself was the governor is not without interest. Unfortunately, as subsequent developments have shown, the decision of Willes, J., was not entirely a happy one. Two conditions, hereafter referred to as the actionability rule and the English justifiability rule, respectively, were laid down: citing *"The Halley,"* the court required, "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."[23] In the light of the second condition, the defendant prevailed.

The third in this trio of English cases came in 1897 with what has since become the most controversial decision in this area, *Machado v. Fontes.*[24] The plaintiff sought damages for an alleged libel contained in a pamphlet published by the defendant in Brazil. The amended defense, with which the decision was concerned, was that "by the Brazilian law the publication of the said pamphlet in Brazil cannot be the ground of legal proceedings against the defendant in Brazil in which damages can be recovered. . . ." Brazilian law would, however, have made him criminally liable. In deciding for the plaintiff, Lopes, L.J., said, ". . . in order to maintain an action here on the ground of a tort committed outside the jurisdiction, the act complained of must be wrongful—I use the word 'wrongful' deliberately—both by the law of this country, and also by the law of the country where it was committed. . . . In the present case there can be no doubt that the action lies, for it complies with both of the requirements

[20] L.R. 2 P.C. 193 at 204 (1868).
[21] L.R. 6 Q.B. 1 (1870).
[22] Id. at 14.
[23] Id. at 28-29.
[24] [1897] 2 Q.B. 231.

which are laid down by Willes J."[25] In reaching the same conclusion, Rigby, L.J., said, "The innocency of the act in the foreign country is an answer to the action. That is what is meant when it is said that the act must be 'justifiable' by the law of the place where it was done. It is not really a matter of any importance what the nature of the remedy for a wrong in a foreign country may be."[26]

These three decisions, and those to which they have given rise, particularly in Canada, have provoked considerable criticism, some of which in the present writers' opinion has been far too extravagant, and the English rules have generally been compared unfavorably to the American rules as presented in the *Restatement*. The contrast, however, is far less acute, at least in one important respect, than it is generally thought to be.

It is true that the American recognition rule does not apparently require, as does the English actionability rule, that the defendant's conduct be such as would by the internal law of the forum give rise to a cause of action. However, Holmes himself recognized the possibility, sometime after the recognition and actionability rules had become crystallized in decisions, that "when it becomes material to scrutinize the question more closely, the English law will be found to be consistent with our views."[27] *Quaere,* in fact, whether the recognition rule, as actually applied in the cases, does not perform a substantially similar function to that performed by the actionability rule, when regard is had to the vital condition, which is always read into the former, permitting denial of a foreign cause of action which is contrary to the public policy of the forum. Indeed, how many cases are there, particularly since the adoption of wrongful death statutes in all the states of the Union, in which an American forum in fact gave effect to a foreign "tort" when the conduct which gave rise to that "tort" would not have been actionable in some way by the internal law of the forum?[28] This is to be distinguished from cases where

[25] Id. at 233-234.

[26] Id. at 235.

[27] Walsh v. New York and New England R. Co., 160 Mass. 571 at 572, 36 N.E. 584 (1894).

[28] The area of liability without fault may present an exceptional problem because of the strong policy which necessarily underlies making a person who is free of fault liable for unliquidated damages. Thus in Dallas v. Whitney, 118 W. Va. 106, 188 S.E. 766 (1936), the West Virginia court was seemingly prepared to apply the strict liability law of Ohio where blasting in West Virginia caused damage in Ohio, without apparently considering whether West Virginian internal law would permit an action without proof of negligence.

the internal law of the forum differed from the foreign law as to the availability or nature of the remedy, as in questions of family disabilities, rules of limitation and damages. Where the nature of the remedy at the forum differs from that at the place of wrongdoing only because the forum does not give a right to unliquidated damages but makes the conduct criminal or provides a right to workmen's compensation, the similarity of the American to the English rule is still a great deal closer than is generally thought to be the case. However, it is even difficult to find cases where an American forum allows an action on a foreign tort where the conduct would not be actionable in tort at the forum. It may be thought, not without some justification, that where there is, for example, an interspousal disability recognized by the *lex fori* but not by the *lex loci delicti commissi,* then at least according to the law of the forum, not only may the foreign tort not be actionable but the act committed abroad may not be regarded as a tort. Usually, however, the court either treats questions of interspousal disability as substantive and does not apply the *lex fori* as such, or at least recognizes that there is a tort but holds that it is not actionable at the forum, stating that the *lex fori* "recognizes the wrong but denies remedy for such wrong by attaching to the person of the spouse a disability to sue."[29] This, perhaps, would even be the case in England.[30] In such cases of interspousal disability of the pragmatic functioning of the substance-procedure distinctions is readily discernible. Instead of dismissing the injured spouse's action with prejudice, which would be judicial action hostile to the *lex loci delicti commissi,* the forum's refusal to grant relief because of local procedure preserves intact the policy of the *lex fori,* yet may permit the injured spouse to recover elsewhere.

In some early American cases, the requirement of actionability by the *lex fori* was openly conceded in effect by a condition that the foreign law had to be substantially similar to the law at the forum. "And some few American courts have refused relief where the local law, or the right given by the local law, was substantially different from the foreign law, or the right given by the foreign law."[31] Even today, however firmly most of the Ameri-

29 Mertz v. Mertz, 271 N.Y. 466 at 473, 3 N.E. (2d) 597 (1936).

30 See text infra, at notes 140 and 141, and see Broom v. Morgan, [1953] 1 All E.R. 849.

31 STUMBERG, PRINCIPLES OF CONFLICT OF LAWS, 2d ed., 182 (1951).

can cases deny that such similarity is required for the conduct to be actionable at the forum, nevertheless in regard to the wrongfulness or tortiousness of the conduct, public policy now appears to perform much the same function as the old similarity rule. Cases like *Loucks v. Standard Oil,*[32] which strongly indicate the tendency of American courts to limit the role of public policy in barring actions based on "rights created" by sister states, are likely to be concerned not with actionability as such but rather with the nature or availability of the remedy. Indeed, *Slater v. Mexican National Railroad Co.,*[33] which in any event was not concerned with sister states of the Union and was exceptional in that the unavailability of the remedy required by the substantive law of the "tort" decisively affected the question of actionability, really supports this proposition. It should not, however, be assumed that this means that merely because the conduct would be actionable by the internal law of the forum, it will, therefore, be remediable at the forum by its conflict of laws rules. These rules may include a provision as to forum non conveniens and, as is more usual, require actionability by the *lex loci delicti commissi.* That the similarity between the English actionability rule and the American recognition *(cum* public policy) rule is generally overlooked is not surprising in view of the fact that the vast majority of American cases involve interstate contacts, and that as among sister states of the Union there is a high degree of policy uniformity in characterizing the same conduct as tortious.

Not merely does this similarity exist between the effect of the English and American rules, but some parallel can be drawn between the two justifiability requirements. The thrust of the American rule is that any defense against actionability accorded by the *lex loci delicti commissi* will be effective to prevent an action at the forum. Certainly the English requirement, at least as intended in *Phillips v. Eyre,* was designed to achieve the same result. As altered by *Machado v. Fontes,* however, the English rule appears to go further in allowing an action for unliquidated damages at the forum where such may not have been allowed by the law of the place where the wrong took place and had effect. Whether this is necessarily as unfortunate as is often claimed is questionable and will require careful consideration in examining the policy factors which may be relevant to torts involving a con-

[32] 224 N.Y. 99, 120 N.E. 198 (1918).
[33] 194 U.S. 120 (1904).

flict of laws. In any event, is it entirely certain that an American court would, or should necessarily, today reach a different conclusion if confronted with the facts of *Machado v. Fontes*? Indeed, it is in the area of defamation, because of the high incidence of interstate publication, that American courts have been virtually compelled, particularly in recent years, to re-examine the traditional rules relating to foreign torts. Because of this attempt to find less mechanical rules for defamation cases involving foreign interests and to adopt a more profound policy-weighing approach, is it so inevitable that an American court would reject the policies which could have justified the conclusion in *Machado v. Fontes*?

III. THEORIES FOR DECISION IN CASES OF CONFLICT OF LAWS

What are the theories, if any, on which these rules are said to be based? The classical and most often cited in the American courts is that the forum recognizes and gives legal effect to an obligation created by another state. Relying on the admittedly formidable authority of Holmes, Beale, and Cardozo, American judges are likely, if they recognize any theoretical basis for their decisions, to repeat Holmes' statement that "the theory of the . . . suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio,* which, like other obligations, follows the person, and may be enforced wherever the person may be found. . . . But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation . . . but equally determines its extent."[34] More briefly, in Cardozo's words, "the plaintiff owns something, and we help him to get it."[35]

There has, however, been particularly strong criticism of the *obligatio* theory, notably by Judge Learned Hand and by such eminent writers as Cook, Lorenzen, and Falconbridge, on the grounds that, whatever the court may say, it is in fact the law created by the forum which disposes of the case.[36] Whether or not

[34] Slater v. Mexican National R. Co., 194 U.S. 120 at 126 (1904).

[35] Loucks v. Standard Oil Co. of New York, 224 N.Y. 99 at 110, 120 N.E. 198 (1918).

[36] "But, if the organ of a State, bound by the law of this State, applies the norm of a foreign law to a certain case, the norm applied by the organ becomes a norm of the legal order of the State whose organ applies it. . . . The rule obliging the courts of a State to apply norms of a foreign law to certain cases has the effect of incorporating the norms of the foreign law into the law of this State. . . . Strictly speaking, the organ

it creates a right modelled on the right created by foreign law, as is the view of Learned Hand, or whether it merely looks to the rules of decision of a foreign court and then enforces a right as created by the forum, as was the view of Cook, these local law theories constitute an interesting and suggestive departure from the traditional American approach.[37] In particular, they avoid the embarrassment, which a rigorous and consistent application of the *obligatio* theory should entail, of enforcing in all cases a right created by the whole law of the relevant foreign state, including its rules of conflict of laws and of procedure and perhaps of the forum submerging even its own rules of public policy. Moreover, where the wrongful act occurs in one state and the injury is sustained in another, then the local law theory, at least as expounded by Cook, creates "no impediment to its [the forum] turning to two or even more states if two or more questions are involved."[38] Indeed, its flexibility,[39] particularly under Cook's view, may permit a forum to consider the laws of two or more states even where only one question is to be decided—thus, where the issue is that of compensation for loss of a limb, the forum would be free to consider the damages rule of the place of negligent act, or of the domicile of the parties, as well as that of the place of impact. Since a completely consistent application of the *obligatio* theory would seem to demand that the forum does not apply its own procedure, at least where the foreign law characterizes the particular issue as substantive, it may prevent the forum applying its own damages formula in a suit brought in the forum by one of its domiciliaries against another of its domiciliaries for injuries sustained in a neighboring state, even though perhaps the wrongful acts which caused the harm occurred in the forum. To be sure, even the *Restatement,* of which Beale was the official reporter, ac-

of a State can apply only norms of the legal order of its own State." KELSEN, GENERAL THEORY OF LAW AND STATE 244 (1945).

37 See further Cavers, Comment: "The Two 'Local Law' Theories," 63 HARV. L. REV. 822 (1950).

38 Id. at 830.

39 That the local law theory may not be so flexible is indicated by Yntema: ". . . this theory suffers not merely from the common formalism of all positivistic explanations of law and their nationalistic emphasis, but does so in a subject matter where local doctrines have to be reconciled with international needs—needs the satisfaction of which requires at the very least comparative study of the policies employed under the relevant national laws in dealing with specific cases. In short, except as supplemented by reference to such considerations, it is with deference submitted, the 'local law' theory is in relation to this subject matter an inadequate species of mechanical jurisprudence." Yntema, Book Review, 27 CAN. B. REV. 116 at 117 (1949).

knowledged that the interests of more than one state may require recognition by the forum (so as to deny an action), as in cases where the alleged tortfeasor acted in a jurisdiction in pursuance of a duty or a privilege conferred on him by the law of that jurisdiction even though injury is suffered in another jurisdiction whose law has not recognized that duty or privilege.[40]

To this extent, the *Restatement* shows a greater appreciation of the problems which may be involved than does Cheshire who, although rightly criticizing the English rules, nevertheless is almost equally mechanistic in his application of the *obligatio* theory, as the following passage indicates:

> "Theoretically there is no doubt that the *lex loci delicti commissi* is the most appropriate law to govern the matter. If a plaintiff in English proceedings claims damages for a tort committed against him abroad, it is elementary common sense that the court should adopt the law of the place where the alleged infringement of his right occurred. Only in that way can the true character of his right and of the resultant obligation of the defendant be justly determined. It is that law to which the defendant owed obedience at the decisive moment, and it is by that law that his liability, if any, should be measured."[41]

Cheshire then cites the extract from Holmes already quoted, acknowledges that it has been criticized, and continues:

> "Nevertheless, it seems almost self-evident that the *lex loci delicti commissi* should be decisive and that the *lex fori* should apply only in so far as the recognition of an obligation as nearly equivalent as possible to that created by the foreign law would infringe its own doctrine of public policy or would conflict with its law of procedure."[42]

That this statement is too sweeping will shortly be shown, it is hoped, in the reasons for the submission that there may be cases in which the forum should not only exercise a negative, restraining influence but should grant a remedy even though "the last act necessary to cause injury occurred abroad" and by the law of that place no remedy is granted.

How relevant are these theories to the English rules? The

40 CONFLICT OF LAWS RESTATEMENT §382 (1934).
41 CHESHIRE, PRIVATE INTERNATIONAL LAW, 4th ed., 256 (1952).
42 Id. at 257.

only significance of the foreign law to an English forum is, at least on the usual interpretation of *Phillips v. Eyre* today, whether it justifies the defendant's action. Unfortunately, there is no English authority determining what is the appropriate foreign law where the laws of at least two foreign jurisdictions may be appropriate and where the forum generally feels itself compelled to choose between the law of the place where the wrongful act occurred and that of the place where the injury was sustained.

Although *Machado v. Fontes* was apparently used by Hohfeld in his lectures at the Yale Law School as the cornerstone in his early formulation of a local law theory,[43] the decision of Willes, J., in *Phillips v. Eyre* on which that case was purportedly based, contains a passage which reads today as though it might have been written at a somewhat later date by Holmes or Beale:

> "The obligation is the principal to which a right of action in whatever court is only an accessory, and such accessory, according to the maxim of law, follows the principal, and must stand or fall therewith. 'Quae accessorium locum obtinent extinguuntur cum principales res peremptae sunt.' A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto."[44]

The most convincing explanation of this parodox is, it is submitted, the one which has been offered by Yntema and approved by Cheshire. Although Willes, J., stated that the conduct would have to be achievable in England before it could there be sued upon, "is it reasonable," asks Yntema, "to construe this as more than the statement of a threshold requirement that a suit on a foreign 'wrong' must be such as to be triable in England, *e.g.*, not an action for trespass to foreign land . . . nor one excluded on principles of policy found for instance in the general maritime law as declared by Parliament (*The Halley*)?"[45] This, of course, was not the interpretation of *Machado v. Fontes* which, in allowing an action for damages supposedly not allowed by the *lex loci delicti commissi,* clearly rejected the *obligatio* theory. To whatever extent the English courts today can be said to follow a local

[43] As FALCONBRIDGE, ESSAYS ON THE CONFLICT OF LAWS 19 (1947) points out, citing Lorenzen, Book Review, 52 YALE L. J. 680 (1943).

[44] L.R. 6 Q.B. 1 at 28 (1870).

[45] Yntema, Book Review, 27 CAN. B. REV. 116 at 119 (1949). But see, e.g., GRAVESON, THE CONFLICT OF LAWS, 3d ed., 428 (1955).

law theory, however unwittingly, it must necessarily be such a theory as has been propounded by Cook and not by Learned Hand since it is generally assumed that there is no compulsion for the forum to create ". . . an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs."[46]

There are then at least two theories which have been influential, particularly in the United States, in determining tort questions in the conflict of laws. Despite the fact that American courts, when they do recognize an underlying theoretical basis for their decisions, generally express allegiance to the *obligatio* theory, nevertheless, in view of the inroads which have been made on it and the important qualifications which in practice have always been read into it, even by those same courts which have professed to adopt it, the explanation of the decisions can more suitably be made in terms of some type of local law theory. In the light of this, it is submitted that the courts would better dispose of tort cases involving a conflict of laws, were they to consider carefully and openly the various policies and interests which merit attention, an examination of which the local law theory, at least as advanced by Cook, encourages if not demands.

IV. PUBLIC POLICY AND THE ROLE OF THE FORUM

What then are some of the factors which should be considered in determining actionability at the forum for relief against allegedly wrongful conduct where the entire collocation of events and interests which constitutes the cause of action involves at least some contact with another jurisdiction? If a mechanical rule, and therefore an unsatisfactory rule, is to be avoided, it is important to bear in mind the fact that "tort" or "wrongful injury" covers a wide range of quite different acts. Where the law of a state which may be the forum itself, discloses an interest which is vital to the security or order of that state, this should obviously be a factor of extreme importance. Alternatively or additionally, interests may be disclosed directed toward the preservation of some special condition of life considered essential by one of the states concerned. In the hierarchical order of interests, security and order are more likely to merit and receive recognition than are such special conditions indigenous to a particular jurisdiction,

[46] Guinness v. Miller, (S.D. N.Y. 1923) 291 F. 769 at 770.

except perhaps where the forum has a like interest in maintaining the existence of such a condition. Thus if the act complained of was one which allegedly gave the plaintiff a right to unliquidated damages solely because the law of the place of utterance, in furtherance of that state's policy to perpetuate segregation, made it actionable per se to call a white man a Negro's friend, there may arise, even as between sister states of the Union, a public policy defense against enforcement of the interest "created" by the foreign law. But if an action were to be pursued in Mississippi or Alabama on such a foreign tort, public policy would almost certainly play a different role from that which it might in an action in New York City. Although there is no Supreme Court decision which has so held, it is likely that the public policy of the forum may operate to prevent action even under the statute of a sister state and this despite a strong reading of *Hughes v. Fetter*.[47] In suggesting that there may be a difference were the action to be brought in New York City or in Alabama, it is not suggested that the former forum would or should necessarily deny recovery. If the plaintiff was injured at the place of action and injury, this may warrant recovery in New York City even though the allegedly slanderous statement would at the place of the forum be more praiseworthy than a true statement as to the plaintiff's feelings toward colored people. However, the denial of relief in New York might readily withstand constitutional attack because of the public policy exceptions to the requirements of full faith.

Since a public policy defense may prevail, even as among states bound by an enforceable full faith and credit clause and generally adopting somewhat similar policies in characterizing acts as unlawful, it is all the more to be expected when dealing with tort actions involving jurisdictions not subject to such constitutional (or treaty) provisions and adopting somewhat different policies in matters of characterization. Thus the English rule which requires that the conduct which gave rise to the tort be also actionable in England is not entirely without justification and perhaps even merit where the foreign tort involves some interest as to which the forum itself possesses a strong conflicting interest. Were not something like the English actionability and the American public policy limitations available to courts in those jurisdictions, they might be compelled to grant relief for conduct anti-

[47] 341 U.S. 609 (1951).

thetical to the security and order of the forum. But to conclude from this that the public policy limitation should also operate where the allegedly wrongful conduct does not "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal"[48] is to convert the reasonable into the unjust. It is in the effort to avoid this result that writers have sometimes gone to the other extreme in arguing that the "accident" of the forum should be immaterial.

The range of pressures emanating from the policies involved in foreign tort cases and affecting substantial interests of the forum may be illustrated by the following cases which suggest that there are clearly some instances where the public policy of the forum should be determinative and others where it would be improper to allow that policy to have such effect.

(1) *D,* a private citizen of California, while in State *X,* destroys some parcels belonging to *P* because *D* knew they contained dope which was shortly to be smuggled into California. (2) In the process of committing the acts involved in (1), *D* assaults *P.* (3) In the process of committing the acts involved in (1) *D* kills *P.* In each instance, an action is subsequently brought in California. In the first case, it is suggested that the California policy against smuggling dope into the state may be sufficiently strong to outweigh the competing interest of both *X* and *P.* This may be so even though the interest of *X* lies in the generally respected need to prevent private individuals from taking the law into their own hands, while *P*'s interest, which stems from the same policy, is the protection of his goods from confiscation by a private person. *Quaere,* however, whether the interests of California are sufficiently strong to permit its policy to govern in the latter two cases? If "Oklahoma" and "whiskey" were substituted for "California" and "dope" respectively, the cases might be rather more probable though perhaps somewhat less persuasive and it may, of course, be extremely relevant in the California-dope cases whether *X* is Communist China or Hawaii.[49]

Contrasted to cases where the forum may deny relief and the place of action and injury may grant it are those where the re-

48 Loucks v. Standard Oil Co. of New York, 224 N.Y. 99 at 111, 120 N.E. 198 (1918).

49 If cases like The Helena, 4 Ch. Rob. 3, 165 Eng. Rep. 515 (1801), or Santos v. Illidge, 8 C.B. (n.s.) 861, 141 Eng. Rep. 1404 (1860), were to occur today, different conclusions might well be reached by the English courts.

verse occurs. These may present further complexities, since greater "creativeness" and a much more emphatic rejection of the foreign law is required if the forum grants relief for actions or injuries which (where they occur) are not actionable. For the forum to deny relief obtainable at the place of injury or action is, at least in theory, only an inconvenience to the plaintiff who may still institute proceedings elsewhere. But for the forum to grant relief is far more than mere theoretical inconvenience to the defendant. Because this is so, still more should be required before the public policy of the forum should allow relief for actions or injuries which, where they occur, would not be actionable. The English rule for foreign torts, as at present interpreted, precludes relief in any case where the acts are innocent, or at least justifiable, by the *lex loci delicti commissi.* It is clear that this rule may operate to encourage persons to commit acts abroad which, while justifiable there, are by the standards of England and other civilized countries not justifiable even by minimal criteria for civilized conduct. If this is so, the English rule frustrates one of the very purposes of having a body of law like private international law, though whether in practice it would recognize the provisions of the law of an uncivilized haven for tortfeasors is still to be decided. There may be cases where, despite Cheshire's strong admonition to the contrary, it may not be "most startling and . . . most unjust . . . if, in accordance with the *lex fori,* the defendant were held responsible for what would be an innocent act in the place where it was committed."[50]

With regard to this kind of problem, it is worth considering the following cases. On some occasion shortly before World War II, *D,* an anti-semitic Englishman in Germany, sees *P* wearing the identification required at that time to be worn by Jews in Germany. *D* assaults *P* for no reason other than that *P* is too slow in stepping off the pavement as *D* passes by. The assault causes permanent, grievous injury. By the law of Germany the assault is justifiable in each of the following cases: (1) *P* is an English Jew in Germany on business; (2) *P*'s German nationality has been terminated because he is a Jew and he is therefore a stateless person at the time of the assault; (3) *P* is a German national. It is not beyond imagination that a case raising substantially like problems may occur in the United States, if a Negro is assaulted

[50] CHESHIRE, PRIVATE INTERNATIONAL LAW, 4th ed., 256 (1952).

in Lefore County, Mississippi and subsequently sues his assailant in New York City; or again, if in 1943 a Japanese were assaulted in San Francisco with subsequent action in New York City.

Although the suggested analysis of the above hypothetical cases may entail the extraterritorial application of the *lex fori,* such an application is not without some support even from the *Restatement* and the cases. Both the *Restatement of the Conflict of Laws* and the proposed *Restatement of the Conflict of Laws, Second* provide for situations where the forum may apply its own law so as to require a course of conduct in another jurisdiction.[51] Indeed, the *Restatement Second* in section 94 deliberately alters the original section 94 so as to omit the requirement in the original Black-Letter rule that the required act "is not contrary to the law of the state in which it is to be performed."[52] Although for practical reasons this change may have in part been compelled by some recent decisions,[53] the Reporter for the *Restatement Second* bases the change on a much wider ground, namely, that "it is believed that there is no jurisdictional limitation, strictly speaking, that the defendant should not be ordered to do an act in a state which is contrary to that state's law."[54] The philosophy underlying the change in section 94 of the *Restatement of the Conflict of Laws* even more clearly underlies section 9(c) of the proposed *Restatement of the Foreign Relations Law of the United States* which provides, "A state has jurisdiction to prescribe rules governing conduct occurring: . . . (c) Entirely outside its territory if the conduct has effects within its territory which have a reasonably close relationship to the conduct."[55]

51 Sections 94, 95, 96 and 97 in both *Restatements.* It is interesting to note that these sections of the *Restatements* find support in the statement of the Master of the Rolls in British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd. He there states: ". . . there is no doubt that it is competent for the courts of a particular country, in a suit between persons who are either nationals or subjects of that country or are otherwise subject to its jurisdiction, to make orders in personam against one such party, directing it, for example, to do something or to refrain from doing something in another country affecting the other party to the action." [1952] 2 All E.R. 780 at 782.

52 CONFLICT OF LAWS RESTATEMENT §94 (1934).

53 See, e.g., Societe Internationale, etc. v. McGranery, (D.C. D.C. 1953) 111 F. Supp. 435, affd. 225 F. (2d) 532 (1955), cert. den. 350 U.S. 976 (1956); United States v. Imperial Chemical Industries, Ltd., (S.D. N.Y. 1951) 100 F. Supp. 504; United States v. Holophone Co., (S.D. Ohio 1954) 119 F. Supp. 114, affd. 352 U.S. 903 (1956). Also see note, 69 HARV. L. REV. 1452 (1956), and further citations therein.

54 CONFLICT OF LAWS RESTATEMENT, SECOND 9 (Tent. Draft No. 4) (1957).

55 THE FOREIGN RELATIONS LAW OF THE UNITED STATES RESTATEMENT §9c (Tent. Draft No. 1) (1957). Section 9c, however, was sent back for further consideration by the Reporter and in Tent. Draft No. 2, §9c appears as §8c and reads: "A state has jurisdiction

These *Restatement* provisions have become virtual necessities because of the antitrust and cartel cases.[56] The reasoning of these provisions, however, is clearly not to be confined only to such situations, provided the interests of the forum are sufficiently affected to warrant application of its own internal law. This is not to deny that there may be very serious practical difficulties where there are conflicting national policies as was well illustrated by the *British Nylon Spinners* case,[57] but such difficulties constitute only one of many factors, all of which must be weighed. As a recent note discussing the American antitrust cases points out, "the relevant factors appear to be (1) location of the violation, (2) relationship of the defendant to the United States, (3) extent of conflict with foreign law, and (4) nature of the remedy sought."[58] Clearly the list is not exhaustive and in cases other than those involving antitrust problems there may be an equally complex combination of relevant factors.

A word of caution may here be in order to suggest that we are not attempting to defend the theory that the philosophical basis for private international law is some natural law theory of justice, except to the extent that natural law implies only that a jurisdiction should be free to do more than mechanistically apply conflict of laws rules where these rules were intended to apply only as between nations or states of comparable standards of civilization. The two-part English rule for foreign torts is in appearance like the full faith and credit clause of the American Constitution in its rigidity. Both may through their very inflexibility achieve laudable results provided their proper area of application is also made a part of the rule. Unfortunately, the English rule for international torts, unlike the American full faith and credit clause, is not strictly limited in its operation, but may apply as would the full faith and credit clause, were its area of effectiveness extended to the "Acts, Records and Judi-

to prescribe rules attaching legal consequences to conduct, including rules relating to property, status or other interests with respect to conduct occurring: . . . Entirely outside its territory if the conduct has, or is intended to have, effects within its territory which have a reasonably close relationship to the conduct." This section was again subjected to extensive discussion and has again been sent back for further consideration by the Reporter.

[56] See note 53 supra.

[57] British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd., [1952] 2 All E.R. 780.

[58] Note, 69 HARV. L. REV. 1452 at 1453 (1956).

cial Proceedings" of any sovereign nation or state. It should be noted, however, that there has thus far been no conclusive ruling by the House of Lords, either that the rules as stated for foreign torts are determinative in the usual case or, a fortiori, that they should apply to cases where the foreign standards of conduct deviate markedly from those which obtain in England or other civilized countries. What underlies the present argument as to the extent to which the public policy of the forum may govern interests created or affected by conduct which occurs elsewhere is not some natural law theory but something like a theory of maximum tolerance. This theory is not premised on any conviction as to the nature of man but only on a belief that, given something like the level of civilization which obtains at the forum, it may properly serve as the basis for decision in certain types of cases. However, it should not necessarily be expected that the forum should defer to the laws of a jurisdiction whose standards fall below the minima permitted even by maximum tolerance.

When it is urged that the forum should enjoy greater freedom to permit its own policy to operate, this in no way implies that the policies of the other possibly appropriate jurisdictions are to be ignored. Were they to be ignored, as was once suggested by the exponents of the extreme *lex fori* theory, this would be a reversion to the most primitive stage of private international law and quite opposed to the direction here considered to be desirable. The usual American rules for foreign torts as well as the English justifiability rule indicate some awareness of the importance of the foreign law. Indeed, as suggested above, often too much importance is attributed to the foreign law, particularly in the United States, as a result of unimaginative and mechanical application of that law. Assuming that the courts should attempt to make use of the rules in ways which permit them to examine all the different factors required for a just decision and that they should not automatically minimize the strength of their own public policy, there is more need than ever to attend to the meaning and implications of the English justifiability rule and its American counterpart as applied under the *obligatio* theory.

V. APPLYING THE LAW OF THE FORUM

Few cases better reveal the issues here involved than does *Machado v. Fontes*. There the court of appeal found that the justifiability requirement was satisfied since according to the law of the place of action and injury, Brazil, the defendant's con-

duct was criminal. Not without some logic, the court in effect decided that criminal conduct could hardly be considered as justifiable and hence if the conduct of the defendant was actionable in England, the plaintiff should be permitted to recover damages. The difficulty, however, stemmed from the fact that Brazilian law was not shown to have provided any civil remedy for criminal conduct of the kind committed. Neither logic nor precedent afforded an adequate rationale of the actual decision, and in permitting the plaintiff to proceed in England, the court was compelled to interpret the existing rule in a somewhat creative fashion. For a plaintiff to proceed in England, the foreign conduct had only to be not "innocent" and the justifiability requirement meant not that the conduct was actionable where committed but only that it was not innocent there.

It is submitted that the result reached in *Machado v. Fontes* may have been a proper one, but that from an examination of the opinion this is not determinable. The result could more easily be supported if, for example, both parties had been Englishmen, or still better, domiciled in England, and the defendant had intentionally libeled the plaintiff in Brazil because by that law libel gave rise to no action in tort. There would be further evidence to support such a decision if the defendant fled Brazil so as to escape criminal liability. Moreover, the decision itself could be supported even within the policy confines of the English rules if, although no action for unliquidated damages were allowable in Brazil, the Brazilian criminal court could award compensation to an injured party. Rabel, in fact, states that the Brazilian penal code of 1890 imposed a duty of idemnification "as an effect of every criminal condemnation,"[59] although, incredibily, no mention was made of this duty in *Machado v. Fontes.* That compensation can be awarded in a criminal action is not unheard of in England where specific legislation so permits for certain classes of cases.

In thus suggesting some possible reasons for supporting a conclusion like that reached in *Machado v. Fontes,* it is not claimed that if in fact the only contact with England had been that the action was brought there, the decision of the court of appeal had little merit. This is particularly so since the decision may have been based, as suggested above, on a misreading of *Phillips v.*

[59] 2 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 241 (1945).

Eyre and perhaps even, as Rabel indicates, on a misinterpretation of the law of Brazil. Although because of the full faith requirements it may not be true in the United States, nevertheless where a plaintiff sues in England, it may be extremely questionable whether the choice of forum can properly be said to be entirely "accidental." When a plaintiff incurs the additional expense and possible inconvenience of suing elsewhere than at the place of injury, which is generally likely also to be the place most convenient to his witnesses, he often does so not so much to take advantage of a particularly favorable law as to secure judgment at a place where the defendant has reachable assets. This alone does not generally warrant the application of the forum's public policy to defeat actionability or to create an action for a foreign tort where to do so would be contrary to the laws of the place of injury or action, but added to other contacts with the forum it may be an important element in encouraging it to apply its own law. Since the thrust of the law of torts is to decide whether the burden of loss shall be shifted from the plaintiff to the defendant, may not the forum have some legitimate interest in determining the disposition of assets situated within its jurisdiction especially where the plaintiff may take them elsewhere?

In addition to the factors already mentioned which it is believed a court should consider in attempting to decide a case like *Machado v. Fontes,* all of which strengthen the reasons for applying the *lex fori,* regard must also be paid to the factors which shaped the particular foreign law or laws. Even were the parties English domiciliaries with assets in England and had the defendant fled Brazil in order to escape criminal prosecution, the factors which might lead Brazilian law to deny an action for unliquidated damages, if it would in fact do so, may be sufficiently strong to outweigh the interests of the forum. In the field of defamation, factors which lead to the denial of an action for unliquidated damages may not be readily apparent although this need not always be so. In a jurisdiction which has only recently regained the privileges of a free press, there may be a deliberate prohibition against tort actions for libel in the hope of encouraging free expression of opinion by imposing only relatively moderate penalties for criminal libel.

A tort case not relating to defamation may better illustrate what is involved in the "interests-weighing" approach here advocated. *D* alienates the affections of *P*'s wife in *X* which is the matrimonial domicile. *P* sues for alienation in *Y* which, while it

does not by its internal law make the conduct of *D* actionable in tort, does provide for criminal liability upon proof of seduction of a married woman within its jurisdiction. *P* cannot secure service upon *D* other than in *Y* where *D* is domiciled and has reachable assets. Although it was earlier suggested that the American recognition (*cum* public policy) rule usually operates in effect in a way not very different from the English actionability rule, the above case is conceded as a possible instance where the effect of public policy upon the recognition rule may, and indeed should, produce an effect different from that which would probably be achieved by the English actionability rule. Since the conduct is wrongful (not innocent) by the law of the place of injury and would be criminal by the law of the forum if it had occurred in the forum, the denial of a civil remedy for like conduct at the forum should not therefore require a denial of *P*'s civil action in *Y*. Absent some very substantial interest of *Y* which touches its security or order and which is something more than its interest in preserving special conditions of life, *Y* should not deny *P*'s action for alienation. To paraphrase Cardozo's words, the court should not be so provincial as to say that every solution of a problem is wrong because it deals with it otherwise at home.

The facts and conclusion of a case not entirely dissimilar to that cited above are extremely interesting and illuminating, and indicate that at least some American judges are not blind to the factors and methods, which in the writers' opinion, should determine tort actions involving a conflict of laws. The plaintiff in *Gordon v. Parker*[60] was absent on war service in India when his wife became involved with the defendant. The husband and wife were throughout the relevant period legal domiciliaries of Pennsylvania which was therefore the matrimonial domicile. The wife's involvement and her acts of indiscretion occurred in Massachusetts where the defendant was domiciled. The plaintiff sued in federal court in Massachusetts for damages for alienation of affections. Massachusetts law, but not Pennsylvania law, recognizes a tort of alienation. There was no proof of adultery between the wife and the defendant but, it may be noted, adultery is a crime in both states and gives rise to a civil cause of action in Pennsylvania as well in Massachusetts. The court held that the complaint stated a cause of action. Even if one were to disagree with the conclusion reached by Judge Wyzanski, one should at

[60] (D.C. Mass. 1949) 83 F. Supp. 40.

least commend the manner of reasoning which led him to that conclusion. After stating the defendant's argument that "where the asserted damage has been inflicted on a marital relationship, Massachusetts would recognize that the existence of liability should be determined by the policy not of the forum, or of the place of wrong, but of the state of marital domicil," he felt nonetheless that a Massachusetts court would reject these arguments "as applied to this case." He said:

> "This is not a situation in which the interests of Pennsylvania plainly outweigh those of Massachusetts. The social order of each is implicated. As the place of matrimonial domicil, Pennsylvania has an interest in whether conduct in any part of the world is held to affect adversely the marriage relationship between its domiciliaries. But, as the place where the alleged misconduct occurred and as the place where the alleged wrongdoer lives, Massachusetts also has an interest. She is concerned with conduct within her borders which in her view lowers the standards of the community where they occur. She is also concerned when her citizens intermeddle with other people's marriages. . . ."[61]

The Judge strengthened this conclusion by finding that "Pennsylvania has no general policy that injured spouses should bear their suffering in silence and rely exclusively upon the forces of social ostracism and religious discipline . . ." but has "spoken qua possible forum and qua possible state of defendant's domicil, but not qua state of matrimonial domicil."[62]

The decision has here been quoted somewhat extensively because it comes as a welcome departure from the mechanical application of rigid rules and displays an acute awareness of some of the factors which should be carefully considered by courts in cases of this kind. However difficult it is or may be to locate the place of injury in a case where the injury is not to substance or to locate the jurisdiction where the last event took place which allegedly gave rise to liability, a less imaginative judge, perhaps believing himself to be all the bolder for applying the law of the matrimonial domicile in a case of tort, might have denied the action without adequate consideration of the legitimate interests of the states and the parties. If, in a similar case, another court were to reach a conclusion contrary to that reached by Judge

[61] Id. at 42.
[62] Id. at 43.

Wyzanski, one would not complain provided it were to weigh the interests and merits in the balance and by this method arrive at a determination of no liability. Were the facts of a borderline case like *Gordon v. Parker* to be changed slightly, if, for example, the defendant were domiciled in Pennsylvania, or even in a state whose policy more closely resembled that of Pennsylvania than that of Massachusetts, it would not be difficult to sustain a contrary conclusion, even though Massachusetts would still possess a substantial interest because of conduct within its borders.

In the passages from *Gordon v. Parker* cited above, the court refers to the interest of Massachusetts in the maintenance of its "social order." It may be recalled that this is one of the two general factors, the other being security, to which we have previously given special emphasis. It has been here urged that where either of these is significantly involved in a conflict of laws situation, there may then be stronger reasons for applying the law of that jurisdiction whose security or order is affected by the conduct in question. Where the security or order of more than one jurisdiction is affected, as in *Gordon v. Parker,* then the interests-weighing approach, though more difficult to apply, is nonetheless preferable to the admittedly simpler mechanical rules which unfortunately still govern this area of law. When it is said that interests of another state in maintaining social order or security should be recognized, if not necessarily held decisive, this is not meant to suggest that the forum should enforce the criminal law, as such, of another jurisdiction. Clearly, where the conduct is only criminal by both the law of the forum and the law of the place of wrongdoing, the danger that the wrongdoer will escape all liability is only properly to be met by extradition and not by granting a civil remedy at the forum. Where his conduct is only criminal by the place of wrongdoing and is tortious by neither system of law, then there is all the more reason for denying an action in damages. Rather, it is only where there is some tort element involved either as a result of the *lex fori* (*Machado v. Fontes*) or as a result of the law of another interested jurisdiction, that the existence of interests in security or order becomes relevant for conflict of laws cases. While jurisdictions do not enforce the criminal laws of one another, a forum while giving effect to the tort laws of another may thus effectuate the same policy which underlies its own criminal law. Conversely, by applying its own tort law while the conduct is only criminal by the other law concerned, the forum may be giving effect to the same policy which under-

lies both laws. That this may be so is not unexpected in view of the many connections between the laws of tort and crime. As the court acknowledged in *Gordon v. Parker,* "Tort law, like its younger brother criminal law, was sired by a policy of regulating the social order and substituting legal process for self-help. . . . To be sure, tort law also always has a compensatory element. But that is of secondary consequence . . . in the tort of alienation of affections. . . ."[63] Obviously, this may be equally true for other torts.

That there is this close relationship between the two branches of law is best demonstrated by the fact that in a great many jurisdictions the same conduct may give rise to both tortious and criminal liability as in cases of assault, alienation, conspiracy, defamation, conversion, and even negligence. Particularly in some such instances is it difficult for the forum to perceive the reasons for the foreign characterization as criminal and not tortious as well. But where in a given situation the policy is the same under both characterizations although the labels are different, then the danger of simply enforcing the penal policy of another state is diminished. The same kind of analysis may be necessary in cases where the combination is not one of crime and tort as for example where workmen's compensation is combined with tort. Here there is a strong state interest in security and social order although it is differently expressed.

VI. SIMPLE RULES FOR COMPLEX CASES?

One of the ways of appreciating some of the complications which are generally overlooked when a mechanistic approach is adopted for conflict of laws in cases involving a tort is to consider the diverse combination of factors in a relatively simple case. The minimum requirement for a conflict of laws situation is that the law of two jurisdictions is involved and the simplest issue which can arise is where the jurisdictions differ only as to whether the defendant's conduct is tortious or innocent. Even in this basic case there are four different possible combinations which are considered below. It must be emphasized at this point that throughout the following analyses it is assumed that the American courts do as those courts and most writers say they do, namely, apply public policy only restrictively, so as to suggest that tort actions are not allowed at the forum for conduct which if occurring

[63] Id. at 42, citing MAINE, ANCIENT LAW, Pollock, 12th ed., 391.

there would not be actionable. This, we have suggested, is to overstate the case, but we assume it to be true in order to show that even if it were true, the results would too often be undesirable. Even if this assumption is incorrect, as we believe it to be, the then analogous English-American rules are still far from desirable as should be apparent from considering some of the English conclusions in the following cases.

Hereafter, the following notational conveniences will be employed: "I" for the place of injury or impact (where the last event occurred); "A" for the place where the alleged, wrongful act occurred; "F" for the place of the forum; "T" for tort; "C" for criminal; "S" for the United States; and "E" for England. In the basic case the situation is as follows:

(1)	I, A	T	TS & TE	(3)	I, A	not T	not TS & not TE
	F	T			F	T	
(2)	I, A	T	TS & not TE	(4)	I, A	not T	not TS & not TE
	F	not T			F	not T	

"I" and "A" are connected by a bracket to indicate that they are the same place.

Case (1) therefore means that by the law of the place of action which is also the place of injury the conduct is considered tortious, as it is by the *lex fori*. Where this structure occurs, the mechanical application of both the English and American rules would result in the forum allowing an action. Case (2) is the interesting case, for of the four here considered, it is the only one where the English and American courts may differ, provided, it should be stressed again, public policy only operates, as dicta in American cases seem to suggest.

Even in this simple situation, the results reached in two of the four cases by the application of rigid rules has already been criticized. The English denial of an action in (2) as well as the American and English denial of an action in (3) may under certain circumstances not achieve the most desirable result. It should, therefore, be obvious that whenever the situation is complicated only slightly, where, for example, the conduct may be either, neither, or both tortious and criminal, then the application of inflexible rules is even more likely to produce unsatisfactory results. In

such cases, there are then not four but sixteen possibilities. Recognizing that the result is generally the same by the traditional rules when the place of action is the same as either the place of injury or the forum, the structure of these cases is as follows:

(1)			(9)		
I	C & T		I	not C & T	
A		TS & TE	A		TS & TE
F	C & T		F	C & T	
(2)			(10)		
I	C & T		I	not C & T	
A		TS & not TE	A		TS & not TE
F	C & not T		F	C & not T	
(3)			(11)		
I	C & T		I	not C & T	
A		TS & TE	A		TS & TE
F	not C & T		F	not C & T	
(4)			(12)		
I	C & T		I	not C & T	
A		TS & not TE	A		TS & not TE
F	not C & not T		F	not C & not T	
(5)			(13)		
I	C & not T		I	not C & not T	
A		not TS & TE	A		not TS & not TE
F	C & T		F	C & T	
(6)			(14)		
I	C & not T		I	not C & not T	
A		not TS & not TE	A		not TS & not TE
F	C & not T		F	C & not T	
(7)			(15)		
I	C & not T		I	not C & not T	
A		not TS & TE	A		not TS & not TE
F	not C & T		F	not C & T	
(8)			(16)		
I	C & not T		I	not C & not T	
A		not TS & not TE	A		not TS & not TE
F	not C & not T		F	not C & not T	

Solely for the purposes of argument and in order to put the best possible complexion on the present English and American rules as traditionally stated in the cases, we ignore initially what has throughout been urged as crucial, namely that the types of tort involved and the interests to which they therefore give rise, as well as the domicile and nationality of the parties, are extremely relevant. Conceding this, some of the sixteen cases, numbers (1), (3), (6), (8), (9), (11), (14) and (16) are prima facie likely to

be correctly decided in both England and the United States. Even of these cases, numbers (1), (3), (9), and (11) may, if the American rules are strictly applied, result in a dubious denial of remedy even though the conduct is tortious by the law of all relevant jurisdictions. Thus in *Slater v. Mexican National Railway,* where the remedy available under the *lex loci delicti commissi* apparently could not be administered by the ordinary procedures of the forum, the injured plaintiff was denied relief at the forum. Where this may reasonably mean that he is left remediless because the defendant's assets are situated at the forum, which may also be the only place where the defendant can be served, it is suggested that the *Slater* decision may produce an unfortunate result; particularly is this so where, as in (1), (3), and (9), the conduct is also criminal by the laws of one or both of the jurisdictions, yet the defendant is in fact not amenable to the criminal jurisdiction of either.

It is unfortunate that the proposed *Restatement of the Conflict of Laws, Second* may perpetuate the reasoning in the *Slater* decision since section 117g provides, "A state does not exercise judicial jurisdiction where any judgment rendered by its courts would impose upon the defendant a more onerous, or a substantially different, duty than that which would be imposed upon him by the applicable foreign law."

If the structure of each of the above eight cases is more closely examined, it will be seen that the only variance between them is a variance as to the criminality of the conduct according to one of the relevant laws and that characterization as to tortiousness is therefore the same by both. In all the remaining cases, the probable result on the traditional view of either an English or American court, both classifying the same situation in the same way, can be supported or rejected, dependent on factors which, according to the decided cases, are generally considered to be irrelevant. Interestingly enough, in six of these eight cases, the conclusions which would normally be reached in England and the United States are flatly contradictory despite an identical characterization of the threshold problem. In the remaining two cases, where England and the United States would probably agree in their conclusion, they would merely agree to deny a remedy.

It is worth considering a different illustration for each of the remaining eight situations to see how the traditional rules if they are applied in all cases in accordance with the dicta of the courts will sometimes clearly reach unsatisfactory results.

Case (2): If I and A are the same, the American result would seem at first sight preferable to the English which would deny any action even though the conduct would be wrongful if committed within the jurisdiction. But if A and F are the same, i.e., the forum is also the place of the wrongful act, this is rather more questionable. If a forum can punish the act criminally, as it theoretically can since the conduct occurred there, it may properly consider its own public policy against allowing an action in tort to be strong enough to justify denial of a civil remedy, particularly since it would be able to punish the wrongdoer criminally. But if it cannot do so because he is not within the jurisdiction, it may even in this case feel more entitled to allow an action in tort.

Cases (4) and (12): If I and A are the same, this may be the case referred to above where the law of I makes it slanderous per se to call a white man the friend of a Negro, in which case the English result may seem preferable to the American. But this is an exceptional case. In most cases the American result is likely to be the more desirable.

If F and A are the same, however, the English and American rules may agree in denying an action since, even under the American rule, an exception is made by section 382 of the *Restatement* where a defendant acts in pursuance of a duty or "pursuant to a privilege conferred by the law of the place of acting," and without negligence injures the plaintiff in another jurisdiction.

Cases (5) and (7): If I and A are the same, then this is like *Machado v. Fontes,* although in case (7) a criminal action may not have been permitted in England had all the events occurred there. If a criminal action would have been possible in England, then there may be all the more reason for applying English law. The reason for doing so would be even stronger if A and F are the same. This suggests that either the American or English result may be appropriate dependent upon circumstances, but on balance, especially where A and F are the same and the conduct would there be criminal [as in (5)], the English rule appears more likely to be satisfactory. There is a distinction to be drawn between (5) and (7): where in addition to being tortious, the act is in fact criminal since committed at the forum [case (5)] it may be proper to allow the forum to grant a civil remedy which by its internal law it additionally attaches to such criminal conduct.

Case (10): If I and A are the same, the American rule is prima facie preferable since the application of the English rule results

in denial of any remedy even though the conduct is wrongful by both relevant laws. These are borderline cases however—thus although, if certain consequences ensue, seduction may be a tort by English internal law and may be criminal as well, nonetheless the English conflict of laws rule may deny relief if the seduction, in the given situation, does not have such consequences. It may be that if the English policy in such cases is particularly strong in denying access generally to its civil courts, in view of the sordid and personal nature of the problem and the possibility of blackmail, it should deny such an action; if the policy of the forum is somewhat weaker, then the attitude of the English courts may reflect an unfortunately restrictive conception of the function of private international law, as was the case in the United States in matters of wrongful death prior to the general adoption of statutes modelled on Lord Campbell's Act.

If F and A are the same, and there is criminal jurisdiction in the forum, then the case is stronger for permitting weight to be accorded to the policy of the forum. This does not necessarily mean that it should enforce the foreign tort merely because it considers the act wrongful but rather that, since it deliberately omits to make the conduct tortious by its internal law but makes it criminal, it may be justified in disallowing a civil remedy, particularly if there is a likelihood of criminal proceedings.

Case (13): If I and A are the same, the questionability of both the English and American conclusions has already been illustrated by the case of the Englishman who, shortly before World War II, took too seriously the idea that when in Germany he should do as the Germans do. It may be that in such circumstances the concept of extraterritorial tort liability may, if applied in appropriate situations, not be outrageous. If F and A are the same, this argument would seem to have added force.

Case (15): If I and A are the same, the argument in favor of granting a remedy may still be a strong one in certain circumstances. To adopt in part the previous illustration, if an Englishman in Germany on business between 1933 and 1939 writes to a German firm mistakenly that one of his English competitors is believed to be Jewish, the statement might be privileged by German law but not by English law. The place of publication, which by the latter is decisive, is Germany, even though the effect of the injury may be felt in England. Why should the action be denied where both parties are English, where the loss is felt in England, and where the forum is England which adopts a policy strongly

opposed to that of Germany? It might be thought that American courts today would allow an action because they would consider that the place of injury is, for example, the place of the plaintiff's residence, but even under this more liberal view, they would probably still require publication at the place of residence. If F and A are the same, a like situation may occur where the letters are written and sent from England.

The analysis of the sixteen possibilities for a relatively simple case has been offered in some detail to suggest the many complexities which may develop even here and to show that rules in private international law should operate with a flexibility seldom found in the decided cases. Here, as in other fields of law, courts have developed rules of decision suitable for paradigmatic cases and then applied them unimaginatively to penumbral situations where different or perhaps additional considerations should have prevailed. The more complex the structure of the cases, the more obvious it is that the rules which are generally applied at present are far too limited to deal suitably with many situations which were not envisaged when those rules were originally formulated in a far simpler social context. Thus, for example, workmen's compensation laws which were unheard of when *Phillips v. Eyre* was decided in 1870 now make it impossible to adopt a simple analysis of certain conduct in terms solely of crime and tort or to employ criteria of justifiability. Indeed, because of the multiple ramifications and policy factors touching the interests of social order, some American courts, with the approval of the Supreme Court, have in recent years openly adopted an interest-weighing approach.

VII. CRITIQUE OF SOME RECENT DECISIONS

In light of the discussion thus far it may be interesting to examine some of the more recent cases involving torts in English and American conflict of laws. Unfortuately, for reasons which have already been given, there are so few English cases that it is difficult to make a comparative study of many of the issues which abound in cases decided by American courts. For example, English judges have not yet had occasion to consider properly whether the rules promulgated in *Phillips v. Eyre* and *Machado v. Fontes* can adequately cope with such problems as direct action liability of insurers, infringement of trade-secrets, immunity of charities, survival and revival of actions, family disabilities, and joint tortfeasors; and there is little authority on such basic ques-

tions as damages, limitations, or vicarious responsibility.[64] It may, however, be instructive to attempt some comparative examination of a number of these issues which have been considered in a few recent cases.

Although in *Szalatnay-Stacho v. Fink*[65] the English court of appeal treated the matter as one of municipal law, the case nevertheless raised questions which are of importance for the purposes of private international law. The defendant, when Chief Military Prosecutor for the Czechoslovak army, sent an allegedly defamatory communication to the "Military Office or Chancellery of the President of the Czechoslovak Republic." At this time the Czech government recognized by Great Britain was situated in England. It was found by the trial judge that by the law of Czechoslovakia the communication would have been absolutely privileged since it dealt with some aspect of government business, namely the defendant's suspicions as to the plaintiff's loyalty to the government and that consequently no civil remedy would be available by Czech law. However, even under that law, the plaintiff might have availed himself of a proceeding, "which has no exact parallel in (English) law, but appears to be a formal demand for a prosecution which was, in this case, for misuse of official power."[66] This aspect of the case is not much dealt with in the opinions of the trial or appellate courts and hence it is not shown whether by Czech law the defendant's conduct was not justifiable so as to have brought the case within the purview of *Machado v. Fontes.* The trial court held that as a matter of comity the English court should apply the Czech law and treat the communication as absolutely privileged. On appeal, it was held: "Here everything happened in England. Having due regard to the exceptional position of the Czechoslovak Government, we do not think that the principle of the comity of nations compels or entitles the courts of this country to apply Czechoslovak law to acts done

64 American courts at least have dealt with all of these problems. See, e.g., Watson v. Employers Liability Assur. Corp., 348 U.S. 66 (1954) (direct action); Ferroline Corp. v. General Aniline and Film Corp., (7th Cir. 1953) 207 F. (2d) 912, and Turntable Products Co. v. R.C.A., 155 N.Y.S. (2d) 73 (1956) (trade secrets); Jeffrey v. Whitworth College, (E.D. Wash. 1955) 128 F. Supp. 219 (charitable immunities); Ormsby v. Chase, 290 U.S. 387 (1933) (survival); Ekstrom v. United States, (Ct. Cl. 1937) 21 F. Supp. 338 (revival). See Part X infra (family disabilities), Part IX infra (damages): Canadian Pacific Ry. Co. v. Johnston, (2d Cir. 1894) 61 F. 738 (statute of limitation); Young v. Masci, 289 U.S. 253 (1933) (vicarious liability).

65 [1947] K.B. 1.

66 Id. at 10.

here, in proceedings in tort between Czechoslovak citizens, that law giving a general protection in civil suits to acts done by officials, which is not afforded under our law."[67] However, by finding that the communication enjoyed a qualified privilege under English law, the court of appeal was able to dismiss the appeal.

In a sense, this case is the converse of the hypothetical case discussed above dealing with an Englishman who injures an English Jew in Germany. Particularly in view of the location of the government of Czechoslovakia recognized by Great Britain, was it not at least somewhat misleading to say, as did Somerville, L. J., that "Here everything happened in England"? If all the important contacts had been with England then the case was properly decided by applying only the internal law of the forum. On the other hand, since at the time of the alleged defamation neither the plaintiff nor the defendant was apparently domiciled in England, was there not at least some significant contact with a jurisdiction other than that of the forum and place of action? Here England was the place of action, injury, and forum, but only if "injury" is construed to be limited to the initial damage which a defamed person may suffer upon publication. Where, as here, the alleged defamation was likely to pursue the plaintiff upon his return to Czechoslovakia and permanent damage to his reputation would probably be felt there, and where the alleged defamation would have injured him in his official relationship vis-à-vis the Czechoslovak Government, then clearly important considerations were raised which were liable to be ignored by applying the internal law of the forum. True, all the physical acts occurred in England, but this was only so because the government of Czechoslovakia was then temporarily situated in England.

Where, as in cases of defamation, the wrong is not to substance but to feelings or reputations, then, as suggested by *Gordon v. Parker,* it becomes particularly difficult to decide what is the injury which is to be used for determining the place of injury. Recent American decisions, discussed below, involving defamation or invasion of the right of privacy[68] have revealed a consider-

[67] Id. at 12.

[68] See, e.g., Ettore v. Philco Television Broadcasting Corp., (3d Cir. 1956) 229 F. (2d) 481; Bernstein v. N.B.C., (D.C. D.C. 1955) 129 F. Supp. 817. The former case is particularly interesting in that it develops two quite different and in some ways contrasting "rights of privacy."

ably less mechanical approach to this problem than has been true of the more usual conflict of laws situations involving physical injury. Thus, courts have sometimes been willing to use the plaintiff's domicile as the place of injury in cases involving multi-state publications, recognizing that despite publication elsewhere, it is at the domicile that the plaintiff will probably suffer the greatest humiliation and loss of reputation, etc.[69] No case, however, has yet gone so far as to apply the law of the plaintiff's domicile where, although the damage was suffered there, the publication was made elsewhere. But that it may sometimes be appropriate to apply the *lex domicilii* even then is suggested by the following case: *A*, who is contemplating supplying goods to *P* on credit, engages the services of *D*, a credit-rating company, to investigate *P*'s financial status. *A* and *P* are both domiciled in *X* where they carry on business while *D*'s principal office is in *Y*. *D* sends an incorrect credit rating to *A* in *X*. The letter is not opened in *X* but is sent to *Y* where *A* is vacationing. *A* reads the letter in *Y* and on his return to *X* declines to do business with *P*. By the law of *Y*, the communication is not actionable since it was made honestly. By the law of *X* a higher duty is placed on credit-rating companies and the communication would be actionable. In an action in *Y*, might it not be appropriate to apply the law of *X* where the damage was suffered, where the defendant expected his letter to be read and acted upon, and where the addressee and the plaintiff were both domiciled? This argument would be all the more forcible if the law of *Y* were the same as the law of *X* but the letter were forwarded to *A* in state *Z* which imposes a lesser duty on credit-rating companies. It is worth noting in this connection that the view of the German Reichsgericht was that "torts committed by letter or through the press are deemed to have been committed in every state or country in which any of the operative facts occurred" and that "of the several laws the one that is most favorable to the party injured is to be applied."[70] This view, if applied mechanically, may work unjust hardship on the defendant where the contacts with a state may be so nebulous that it would be obviously unfair to apply its law in favor of the plaintiff. Some writers have been willing to approve this view provided

69 Bernstein v. N.B.C., (D.C. D.C. 1955) 129 F. Supp. 817.

70 Lorenzen, "Tort Liability and the Conflict of Laws," 47 L.Q. REV. 483 at 492 and 493 (1931).

the original act was intentional or the defendant was indifferent to the consequences of his act.[71] With this one can find rather more sympathy, particularly in the latter instance, although it may still impose too heavy a burden on the defendant in cases where the act is bona fide and committed without negligence. In the hypothetical case cited above, however, as perhaps in the *Fink* case, is there not a strong argument for applying the law of a foreign jurisdiction to a situation which the usual rules would require to be governed by the internal law of the forum? Unless the contacts with foreign jurisdictions are more closely and carefully assessed and are not left concealed by the application of rigid rules governing the location of the place of wrong or the place of injury, considerable injustice may ensue. If the court of appeal in the *Fink* case had not found that the communication enjoyed qualified privilege under English law, a communication by a Czech official to a Czech official about a Czech official intended to affect his status as a Czech official and likely to cause him permanent injury in Czechoslovakia, the case would have resulted in a right of damages being granted mainly because the exigencies of war had compelled the temporary dislocation of the Czechoslovak Government.

In a recent California case,[72] an interesting result was reached in a defamation action where there was publication in several jurisdictions, in all but one of which (the forum) there was apparently no need to satisfy certain formalities in order to recover general damages. However, a statute at the forum required that, before such damages could be recovered, "[p]laintiff shall serve upon the publisher . . . written notice specifying the statements claimed to be libelous and demanding that the same be corrected."[73] Although the plaintiff made a written demand for correction, he failed to specify the libelous passages, and was denied general damages by the court, despite the fact that such specification was apparently not required by the laws of the three other places of publication. The court stated:

> "We hold that Section 48a of the Civil Code of California declares the public policy of the state of California and that recovery will not be permitted in a California court for the

[71] Id. at 494.
[72] Anderson v. Hearst Publishing Co., (S.D. Cal. 1954) 120 F. Supp. 850.
[73] Cal. Civ. Code (Deering, 1949) §48(a).

> tort of libel occurring in a foreign state, when the recovery for such tort, if it had occurred in California, would not be permitted in the California court because of Section 48a Civil Code."[74]

In this case, where the defendant was not a domiciliary of California while the plaintiff apparently was, the court, ignoring what would have been appropriate, namely, the connection of the entire transaction with the forum, instead rested the result upon the considerably more dubious public policy argument which it extracted from the statute. The closeness of the connection with California can further be inferred from the fact that the plaintiff brought the three other places of publication into the action only by amending his complaint after becoming aware of the barrier interposed by section 48a. Although this strengthens the argument for applying California law, that law would better have been applied on the basis that California was the place most concerned with any injuries suffered by the plaintiff, especially since, although the case is silent on this, it is possible that no damage was suffered elsewhere. It is unfortunate that the court should have reached this result by resorting to its own public policy, not because of an interest-weighing approach, but because the California statute merely reflected a strong local policy. This should not be enough: to attach crucial importance to a statute at the forum so as to exclude foreign interests can only be justified after considering the weight which should properly be attached to such interests. Indeed, the court, after noting the multi-state publication cases, concluded, "We find nothing in these authorities to change our decision. By our decision we avoid the problems inherent in at least some of the last cited authorities."[75] Even though the conclusion reached by the court was probably justified, it seems doubtful whether it was entitled to state: "We believe enforcement in California of a cause of action for libel, arising in another state, and where plaintiff runs afoul of Section 48a, Civil Code of California, offends against the public policy of the state of California."[76] Even assuming that the court was following the single publication theory for multi-state publications, its application of California internal law would

[74] Anderson v. Hearst Publishing Co., (S.D. Cal. 1954) 120 F. Supp. 850 at 856.
[75] Id. at 857.
[76] Id. at 856.

be warranted only where there was good reason for treating California as the place of that single publication or where it treated another state as the place of that single publication but its own public policy was so strong as to deny relief on that publication elsewhere. Where, however, the court does not follow that theory, it is questionable to require the plaintiff to have satisfied California internal law, when suing in California on a defamation which occurred elsewhere. While the result in the *Anderson* case appears to be founded on the single publication theory, the court's analysis of the case is not apparently so founded and thus gives rise to the doubts here expressed. The issue at stake is whether there is "a" place of injury whose law therefore applies to all the substantive incidents of recovery, or whether, although as here California may be the place of primary injury, there is nevertheless a defamation wherever there is a publication and hence, even in California, the plaintiff can sue on a foreign tort and not merely on a tort which involves conduct in a foreign jurisdiction. It is worth noting that in the year following the *Anderson* decision, California adopted the Uniform Single Publication Act.[77]

Another recent American case raises a further problem as to the limitations created by the rigid application of the place of injury criterion to determine the applicable law. In *Walton v. Arabian American Oil Company*,[78] the Second Circuit was faced with a situation where the plaintiff, an American, had been injured in Saudi Arabia by an agent of the defendant, an American oil company. Here there could be no argument as to the place of the tort, if that meant only the place of initial physical impact. Rather the question here was whether the law of Saudi Arabia, where the accident took place, would make the defendant liable. The plaintiff argued unsuccessfully that since there was no "law" in the ordinary sense of the term at the place of the tort, the court should assume and apply those basic rules of tort law, recognized by civilized nations, on which the plaintiff's cause of action was founded. Judge Frank, for the court, while favorably impressed by Morris' arguments for applying the proper law of a tort,[79] felt constrained to reject the plaintiff's theory since the

77 Cal. Civ. Code (Deering, 1949; Supp. 1957) §3425.
78 (2d Cir. 1956) 233 F. (2d) 541.
79 Morris, "The Proper Law of a Tort," 64 HARV. L. REV. 881 (1951).

court's jurisdiction was based on diversity of citizenship and the case had to be decided by the conflict of laws rules of New York. Despite the provision in New York for judicial recognition of foreign law, the court sustained the ruling below that the plaintiff had a duty to acquaint the court with the "law" of Saudi Arabia.

It is quite clear that the rulings of both the lower and appellate courts were foregone conclusions so long as those courts were unwilling to abandon the rules crystallized in the *Restatement* and in numerous decisions which treat the place of physical impact as the place of principal injury. Despite the already mentioned departures from these rules reflected in some recent American defamation and invasion of privacy cases, there have not been encouraging signs of a similar reappraisal in cases where it is easy to state with certainty, "it was in *X* that the plaintiff was run over and therefore *X* is the place of injury." All cases continue to follow the rules as though they were based on an undeniable syllogism, that (1) the law of the place of injury is the law to govern a foreign tort; (2) the place of physical impact is the place of injury; and therefore (3) the law of that place governs the tort. What has many times been urged in this paper and what in essence Morris proposes in his theory of a "proper law of a tort,"[80] is that even though the major premise is acceptable, the second may not be and therefore the conclusion may be invalid. Instead, it is urged that in a case like *Walton* the place of "injury" is not the place where the plaintiff is run over but rather, as in cases of defamation or invasion of privacy, the place where the plaintiff is unable to support his family or to continue his work or loses his reputation or may become a public responsibility, that is, his domicile or residence. It has already been recognized by the Supreme Court in workmen's compensation cases involving contract and tort that flexibility is essential and that the mere fact that the accident occurred in state *X* or the plaintiff was engaged in state *Y* is not determinative per se.[81] It is, of course, more difficult to apply such a test and, as many writers have observed, one of the primary, if not the primary advantage of the *Restatement* rule is its relative ease of application. It is the present sub-

[80] Ibid.

[81] Pacific Employers Ins. Co. v. Industrial Accident Commission of California, 306 U.S. 493 (1939); Alaska Packers' Assn. v. Industrial Accident Commission of California, 294 U.S. 532 (1935).

mission, however, that too high a price is sometimes paid for ease of application and predictability of result. Although it is true that in commercial transactions ease and predictability are often as important as securing a just result in a given situation, the argument does not necessarily apply, let alone apply automatically, to cases of personal injury whether to substance or feelings. Is Mr. Walton better off for having known in advance that his injury would probably not be compensable in New York if he could not show that the "law" of Saudi Arabia would sustain the defendant's liability for the tortious conduct of his agent? Even though the law of the place of conduct should regulate that conduct where no foreign contact is involved, why should this be applicable in all instances involving foreign contacts, particularly when the "law" of the place of conduct may be virtually nonexistent or so outrageous that it offends the standards of civilized people. When, as today, English and American citizens are being increasingly employed abroad, whether for business, governmental or philanthropic purposes, in countries whose standards of conduct and criteria of civil liability, or incidents attaching thereto, differ markedly from those enjoyed in the Western world, why should those standards or criteria govern the relations between two Englishmen or two Americans when the effect of those relations will be felt primarily in England and America?

Even as between jurisdictions whose standards of civilization are comparable and whose rules are substantially similar, considerable injustice may arise from treating as crucial the place of physical impact where far more important contacts exist with another state and would warrant application of its law. This is particularly well illustrated by a recent Scottish case which has been strongly criticized by a number of writers.[82] In *M'Elroy v. McAllister*,[83] one Glasgow resident was killed by another Glasgow resident in England. The decedent's widow could have recovered substantial damages in Scotland had the accident occurred there or in England if she had sued within a year. She sued in Scotland after a year and it was held that she could recover only funeral expenses which were the sole item recoverable

82 MORRIS, CASES ON PRIVATE INTERNATIONAL LAW, 2d ed., 228 (1951); CHESHIRE, PRIVATE INTERNATIONAL LAW, 4th ed., 260 (1952); GRAVESON, THE CONFLICT OF LAWS, 3d ed., 433 (1955).

83 [1949] S.C. 110.

under both English and Scottish law. As Morris has remarked, "Is the difficulty [of determining the proper law of the tort] any greater than that of determining the proper law of the contract or the place where an interstate tort is committed?"[84]

VIII. THE PLACE OF THE INJURY

We have already mentioned in the context of interstate publication some of the difficulties which may arise in trying to locate the place where a tort is committed. Recent cases show that similar difficulties are likely to arise in many other contexts, such as fraudulent misrepresentation, disclosure of trade secrets, and negligence. Thus, in *George Monro Ltd. v. American Cyanamid and Chemical Corp.*,[85] the defendants manufactured and sold in the United States a product for destroying vermin. One ultimate user, an English farmer, successfully sued the plaintiffs, the English distributors of the product. When they in turn attempted to sue the defendants and serve them in New York with notice of an English writ, their right to obtain service outside the jurisdiction was challenged since, by the rules of the English Supreme Court, relating to tort, this depended on whether the action was founded on a tort committed in England.[86] It was held by the English court of appeal that "as the affidavit filed in support of the application for service of the writ out of the jurisdiction did not disclose facts showing that . . . the tort alleged as a cause of action was committed within the jurisdiction, the service of the writ out of the jurisdiction was not permitted. . . ."[87] In view of the defective state of the pleadings and the possible interference with the "exclusive jurisdiction of the sovereign power" of the State of New York, which was greatly stressed by the court of appeal, the decision is not on its face objectionable. However, some of the language used, particularly by Lord Justice Goddard, implies that in order to invoke rule 11(l)(ee), the act as well as the injury must have occurred in England, i.e., the rule "is aiming at . . . the case where a foreigner comes to this country and

84 MORRIS, CASES ON PRIVATE INTERNATIONAL LAW, 2d ed., 228 (1951).
85 [1944] K.B. 432.
86 See R.S.C. Order xi, rule 1(ee).
87 George Monro, Ltd. v. American Cyanamid and Chemical Corp., [1944] K.B. 432 at 433.

commits a tort in this country, for instance, in driving a motor car and running someone down by negligent driving."[88] This is not exceptionable if the reasoning is confined to the application of the rule but its implications may be rather more sweeping. A line was clearly drawn between the conduct and its consequences—"In an action on the case, the cause of action is the wrongful act or default of the defendant. The right to bring the action depends on the happening of damage to the 'plaintiff.' "[89] Although the American rule locating the wrong where the last event necessary to make an actor liable for an alleged tort takes place may ignore the interest of the place of conduct, this interpretation of rule 11(1)(ee), if employed for the justifiability purposes of *Machado v. Fontes,* is equally likely to ignore the interests of the state where the injury is suffered. Subsequently, in *Bata v. Bata,*[90] this interpretation of the rule was distinguished, as indeed Lord Justice Goddard suggested it might be in such a case, for there the allegedly defamatory letter was published in England, though written in Switzerland, and service of notice of the writ in Switzerland was permitted.

It should be noted, however, that the contract aspect of the *Cyanamid* case undoubtedly influenced the court in its interpretation of the rule even in relation to its tort provisions. Scott, L. J., stated:

> "This is not the kind of case where service ought to be permitted outside the jurisdiction unless quite exceptional circumstances are shown. . . . It is most important that the realities of the case should be considered. So far as I can judge, the agreement made between the plaintiffs and the corporation was one by which the corporation were seeking carefully, with the consent of the plaintiffs, to keep all claims against them within the exclusive jurisdiction of the courts of the United States."[91]

Whereas in the *Cyanamid* case the court apparently considered the contractual relationship as an element in locating the place of injury, and thereby indirectly avoided the imposition of tort liability, in *Levy v. Daniels' U-Drive Auto Renting*

[88] Id. at 439-440.
[89] Id. at 439.
[90] [1948] W.N. 366, 92 Sol. J. 574.
[91] [1944] K.B. 432 at 437-438.

Co.,[92] the contract, in effect, served as the basis for the imposition of tort liability. In the *Daniels* case the result was achieved by characterizing the threshold problem as one of contract rather than tort. In this case the vehicle was rented in Connecticut to Mr. Sack who while driving with Levy, the plaintiff, in Massachusetts was involved in a collision with one Meginn. The plaintiff's injury was due to the concurrent negligence of both Sack and Meginn. A statute of Connecticut provided, "Any person renting or leasing to another any motor vehicle owned by him shall be liable for any damage to any person or property caused by the operation of such motor vehicle while so rented or leased." Plaintiff relying upon this statute sought recovery from the Auto Renting Co. despite the fact that by the law of Massachusetts no such liability was imposed upon persons who rent motor vehicles and here, unlike the *Cyanamid* case, there was no doubt as to the place of the tort. The Connecticut court sustained the argument of the plaintiff. Stumberg correctly points out:

> "[M]easured by the standard ordinarily applied by American courts in tort cases, the decision is unsound. It may, however, be undesirable always to apply the usual standard. In the instant case the State of Connecticut had sufficient interest in the business of renting cars there to warrant application of its own law. If its social policy is in fact one with respect to the business of renting cars, its courts are justified in placing emphasis upon the fact that the car was rented in Connecticut rather than upon the fact that the injury occurred in Massachusetts."[93]

Unfortunately, the court adhered to the *Restatement* rules for torts and said, "A liability *ex delicto* is created by the law of the place of the delict." Therefore in order to grant relief under the Connecticut statute it was necessary for the court to characterize the action as one other than in tort. By stating that the purpose of the statute was primarily "to protect the safety of traffic upon highways . . ." the court would have been giving the statute extraterritorial effect if the basis for imposing liability upon Daniels was the accident in Massachusetts. However, if the basis of liability is the conduct of renting the car *in* Connecticut, irrespective of where the damage occurs (provided it does occur)

92 108 Conn. 333, 143 A. 163 (1928). See note 10 supra.
93 STUMBERG, PRINCIPLES OF CONFLICT OF LAWS, 2d ed., 204 (1951).

then it is not giving the statute extraterritorial effect to impose liability upon a Connecticut car renter, particuliarly if the injury were suffered by one domiciliary of Connecticut and inflicted by another. Here, as in *Gordon v. Parker,* why should the forum which was also the place of action but not injury deny effect to its own law where the forum does have substantial contacts and important interests in regulating conduct within its borders?

A further important problem may arise where the alleged wrong may also constitute, or result from, a breach of contract. In such cases, the influence of the contractual element upon the choice of law which is to govern the tort may vary dependent on the type of tort-contract situation involved. The plaintiff's election to sue on the tort and not on the breach of contract may be crucial because of a different rule relating to measure, remoteness or limitation of damages, or, for example, because of statutes of limitation or difficulties of proof. When, however, the plaintiff elects to sue on the tort, should the influence of the contract be ignored? In some cases, it may be irrelevant that there is a contract in the chain of events which may affect the liability of someone as a result of the acts which gave rise to the plaintiff's cause of action. For example, in *Hunter v. Derby Foods, Inc.,*[94] the defendant sold in New York to a wholesaler in Ohio some canned meat imported from South America. A customer in Ohio purchased a can of the meat from a grocer who had bought from the wholesaler. In a subsequent action in New York based on the death of the customer which allegedly was due to eating the contents of the can, the court rightly applied Ohio law, holding the New York defendant liable, and was not concerned, in choosing the law governing the tort, with the contractual duty owed by the defendant to the wholesaler. Since the Ohio law made the sale of unwholesome food a criminal offense and negligence per se, there could be no question as to the conduct not being negligent, regardless of what the contract provided.

In *Smith v. Piper Aircraft Corp.,*[95] however, a Pennsylvania manufacturer was sued by the widow of a decedent who had purchased a plane in Alabama from a distributor of the defendant. The widow sought to recover in Pennsylvania for her husband's

94 (2d Cir. 1940) 110 F. (2d) 970.
95 (M.D. Pa. 1955) 18 F.R.D. 169.

wrongful death which had occurred in Georgia. Here the plaintiff had to prove negligence and pleaded both breach of warranty and negligence in her action. In a preliminary decision on a procedural point, the court stated, "It is Georgia law which prescribes the standard of care that the defendant must have observed. . . ."[96] Even though there was probably no contractual relationship between the plaintiff and defendant, it would seem that the standard for determining whether or not negligence was present, prescribed by the law governing the contract, or to a lesser extent, by the law of the place of manufacture, may appear sometimes to be more relevant than that of the place of accident, which may be completely fortuitous. As between sister states of the Union, whose standards in regard to non-negligent manufacture are likely to be substantially similar, the application of the law of the place of accident to the exclusion of the law of the place of sale or manufacture probably would not crucially affect the result of the case. Particularly in regard to planes and automobiles, manufacturers must be aware that their products are likely to be used in other parts of the country and should therefore be prepared to satisfy the standards of other American jurisdictions. Where, however, the place of the accident is a jurisdiction whose law is markedly different in imposing a far greater or far lesser standard of care, it may be doubtful whether the determination as to negligent manufacture should be made by that law.

In *Hunter v. Derby Foods* and *Smith v. Piper Aircraft* there was no contractual relationship between the plaintiffs and the defendants although there were other contracts which the court might have considered as significant. Where, however, there exists a contract between the parties so that an election would at first appear to be available, as where the defendant carrier is sued by the plaintiff as representative of the decedent's estate, then even in this case there may not be any election available. The Court of Appeals for the Second Circuit was required to deal with such a case in *Maynard v. Eastern Air Lines, Inc.*,[97] where a passenger purchased in New York a ticket for Boston and was negligently killed in an airplane crash in Connecticut. It was held that although the contract was made in New York, no recovery could

[96] Id. at 171.
[97] (2d Cir. 1949) 178 F. (2d) 139.

be had except under the Connecticut death statute which limited recovery to $20,000. The court said:

> "But plaintiff argues that an action to recover more than $20,000 will lie since the decedent purchased his ticket in New York and there arose an implied contract safely to transport, governed by the law of the place where the contract was made. The difficulty with this argument is that at common law there was no remedy for negligently causing the death of another and recovery of any damages arising from death through negligence depends on the existence of some such statute as was first adopted in Lord Campbell's Act."[98]

In *Conklin v. Canadian-Colonial Airways, Inc.*[99] the defendant attempted to take advantage of a contractual limitation upon recovery. Here, however, the New York Court of Appeals did not rely upon the *lex loci delicti commissi* to strike out the contractual claim made by the defendant but held instead that the limitation upon liability was invalid by the law which properly governed the contract. It was therefore held that the death statute of the *lex loci delicti commissi* alone governed the measure of recovery.

From these ticket cases it should not be concluded that the contract plays no role where the passenger is himself the plaintiff and sues for injury due to the negligence of the carrier. In such cases the basis of recovery is not some statutorily conferred right but results from the breach of the express or implied duty to transport safely. Although later New York decisions appear to diminish its vitality, such a result was reached by the New York Court of Appeals in 1871 in *Dyke v. Erie Ry. Co.*[100] where the plaintiff's contractual right to recovery was not limited by the statutory limitation imposed by the *lex loci delicti commissi.* In a 1911 Kentucky decision,[101] however, the plaintiff purchased at the forum a ticket to New York and was injured in Pennsylvania through the alleged negligence of the defendant. It was held that in such cases "the law is well settled by the great weight of authority, that the *lex loci delicti* governs, and not the *lex*

98 Id. at 140.
99 266 N.Y. 244, 194 N.E. 692 (1935).
100 45 N.Y. 113 (1871).
101 Pittsburg, C.C. & St. L. Ry. Co. & Penn. R. Co. v. Grom, 142 Ky. 51, 133 S.W. 977 (1911).

loci contractus, and the rights given by the *lex loci delicti* can only be defeated by defenses which are given under the *lex loci delicti* . . . the carrier is liable because of the failure of duty with respect to that relationship [which the passenger sustains to the carrier] rather than its failure to comply with an implied condition of the contract of carriage."[102] Although the two cases are contrary on the law, they concur in avoiding a limitation upon the plaintiff's right to recover and this they achieve, in the one instance, by giving effect to an adhesion contract[103] while denying effect to the law of the place of impact and, in the other, by denying effect to such a contract while giving effect to the law of the place of impact. In these cases, therefore, the plaintiffs enjoyed the advantages but did not suffer from the disadvantages of an adhesion contract.

What would be likely to happen if this type of case were to be heard by an English court? If the court decides the threshold question to the effect that the case is one of contract and not tort, then the court would apply the proper law of contract and ignore the *lex loci delicti commissi* as well as its own internal law, subject only to the limitations imposed by its public policy. If, on the other hand, the threshold characterization is to the effect that the case is one of tort, the rules as interpreted in *Machado v. Fontes* would appear to be applicable, and the court would have to determine whether the act is not justifiable abroad and whether it would be actionable had it occurred in England. In the context of a contract-tort situation, the criteria of justifiability may be particularly unsatisfactory and lead to highly questionable results when according to the law of the place where England considered a tort to have been committed, there would be a remedy for breach of contract but no other remedy. It is to be hoped that in such a case the English forum will consider the defendant's act to have been not justifiable, just as in *Machado v. Fontes* conduct which was criminal but not tortious where committed was held to be not justifiable. It is admittedly more difficult to see why conduct should be considered as not justifiable when it gives rise to an action for breach of contract rather than a criminal prosecution, but it would be still more objection-

102 Id. at 56-57.

103 See Ehrenzweig, "Adhesion Contracts in the Conflict of Laws," 53 COL. L. REV. 1072 (1953).

able to describe it as justifiable. It is surely wrong to deny any relief at the forum where its internal law and the law of the place where the conduct occurs concur in granting some civil remedy although they do this under a different type of characterization.[104]

Unfortunately, the Privy Council has held, for the purposes of *Machado v. Fontes,* that where according to the law of the place where the defendant's conduct occurs, relief is available only through workmen's compensation, then such conduct is "justifiable."[105] This admittedly suggests the possibility that unlike conduct which is criminal where it occurs, conduct which there gives rise only to an action for breach of contract may, like workmen's compensation cases, be held to be justifiable, at least in regard to the requirements of *Machado v. Fontes.* That such a parallel should not be draw can be seen from the fact that whereas relief in workmen's compensation cases does not depend on any question of the defendant's culpability, relief for breach of contract will comparatively rarely result from a situation where the defendant is entirely free of fault. In addition, where the Privy Council holds that conduct producing only liability in workmen's compensation cases is justifiable for the purposes of a tort action in England, it means that the plaintiff has available, or even more likely has already secured, some compensation under an appropriate workmen's compensation law. Where, on the other hand, a plaintiff sues on a foreign tort in England, it is most unlikely that he has already been able to secure relief for breach of contract, and if he has, it is not likely that he could secure further recovery in tort for the same conduct which supported his action for breach of contract. The workmen's compensation cases where additional recovery in tort is denied by the Privy Council, because it finds that the conduct is justifiable where committed, deal with a problem quite familiar to American courts, some of which reach the same conclusion on rather different grounds.[106] The decisions of the Privy Council appear somewhat startling when the conduct in question is said to be "justifiable" where committed, but when this unfortunate word is read in the proper context of *Machado v. Fontes* the results are

104 But see note, 3 INT. & COMP. L.Q. 651 at 657 (1954).

105 See Walpole v. Canadian Northern Ry. Co., [1923] A.C. 113, and McMillan v. Canadian Northern Ry. Co., [1923] A.C. 120.

106 See, e.g., Williamson v. Weyerhaeuser Timber Co., (9th Cir. 1955) 221 F. (2d) 5.

rather less objectionable and no more so than those of American courts which deny an injured workman the advantages of tort recovery against a third party where relief is already available to him under the workmen's compensation scheme. It is to be noted, however, that the United States Supreme Court has recently held in *Carroll v. Lanza*[107] that the place of the injury may allow the plaintiff to recover in tort against a third party tortfeasor even though he has already secured workmen's compensation under the statute of another jurisdiction, that statute purporting to grant an exclusive remedy. Whether or not the actual decisions in *Carroll v. Lanza* and the two Privy Council cases[108] are warranted depends on a consideration of a number of factors, including the weight which should be accorded to the competing policies of the various states, the closeness of the plaintiff's contacts with them, the adequacy of the relief which they would grant, and other social and legal factors.

IX. THE MEASURE OF DAMAGES

One of the most important reasons for electing to sue in tort rather than in contract is the possibility of securing greater damages. However, even where no question of election arises, and the only remedy available is in tort, it may clearly be crucial to the outcome of the cases which law should govern the questions of damages. Here again there is relatively little authority in English law. Most of the cases suggest that all questions of damages are determinable by English law,[109] whether because damages are treated as an issue relating to procedure rather than substance, or because even questions of substance are governed by English law once it has been found that the conduct was not justifiable by the foreign law. In *Machado v. Fontes,* the damages had, on the court's interpretation of Brazilian law,[110] necessarily to be assessed by English law, since it was thought that the conduct would give rise only to criminal liability in Brazil without

107 349 U.S. 408 (1955).

108 In both Privy Council cases the (workmen's compensation) law which was applied exclusively was that of the place of injury which was also the place of the decedent's domicile.

109 See, e.g., Kohnke v. Karger, [1951] 2 K.B. 670.

110 See pp. 1089-1090 supra.

a right to compensation. Schmitthoff has deduced from the reasoning of the court of appeal that it

> "regarded the libellous statement as a crime only and not as a tort, in view of the well-known rule of the English conflict of laws that the measure of damages is an incident pertaining to procedural law and is, therefore, governed by the *lex fori*. The reference of Lopes L. J. and Rigby L. J. to the remedial nature of the amount of damages put it beyond doubt that this was the *ratio* of their decision."[111]

On the other hand, Falconbridge has stated that in *Machado v. Fontes*:

> ". . . the court specifically applied the *Phillips v. Eyre* formula, and the reference by the first condition in that formula to the domestic law of England is not in terms limited to the procedural rules of that law, and there seems to be no reason why the reference should not be regarded as including the right to damages and the measure of damages as part of the substantive rules of the domestic law of the forum. In other words, the existence and extent of the obligation are governed by the domestic rules of the law of the forum, and it is therefore immaterial whether the measure of damages is characterized as a matter of procedure, or, as I think it should be, as a matter of the substance of the obligation."[112]

Whichever of these views may seem preferable, the argument is largely academic if, in either event, English law is to be applied. Where, as in the United States, the distinction may entail the application of different rules of assessment, it is clearly essential to decide whether damages should be considered as an issue relating to substance or to procedure.

Sometimes an intermediate position is said to be adopted even in English law: thus the latest edition of Halsbury states that in actions for tort

> ". . . the *lex loci actus* . . . [is] generally decisive as to remoteness of damages, but in certain cases the rules of English law, as the *lex fori*, may permit or require the measure of damages to be calculated in accordance with principles not recognised by the foreign law. Such special rules relating

111 SCHMITTHOFF, THE ENGLISH CONFLICT OF LAWS, 3d ed., 157 (1954).
112 FALCONBRIDGE, ESSAYS ON THE CONFLICT OF LAWS 19 (1947).

to damages are in the nature of rules of procedure and the *lex fori* will in such a case override all other relevant laws."[113]

In another passage, this view is repeated in a rather more qualified manner: ". . . the question of remoteness of damage in an action in respect of a tort committed abroad is (it would seem) to be governed by the *lex loci actus* but the qualification [sic] of damage which is not too remote according to the *lex loci actus* is a matter for the *lex fori.*"[114] Unfortunately, the main authorities for this statement, as given in the footnotes, are (1) a case decided in 1717,[115] (2) a Scottish decision which repudiated *Machado v. Fontes,*[116] and (3) a recent English contract decision which will be shortly considered.[117] Moreover, in the same footnotes there is reference to a recent tort decision of Lynskey, J., in which he stated that "the principles upon which damages are assessed differ in different countries, but in assessing damages I must apply the law and practice of these courts."[118] It is therefore very doubtful whether the English courts would today permit, as they did in 1717, interest to be recovered for a foreign conversion of the plaintiff's goods or money at the rate current in the country where the conversion took place.[119] It seems more probable that they would follow Wolff's interpretation of the English cases to the effect that

> ". . . English municipal law, and not the law of the place of the wrongful act, decides whether reparation must be made for *dommage moral* as well as material damage, whether contributory negligence merely diminishes or entirely destroys the claim, whether lost profits have to be taken into consideration, whether the causal nexus between the act and the damage is to be denied on the ground of remoteness and the like . . . the orbit within which the *lex loci delicti* is operative is very limited; it is restricted to the question: is the act that caused the damage justifiable? All other questions must be answered by the (English) *lex fori.*"[120]

113 7 HALSBURY, THE LAWS OF ENGLAND, 3d ed., 169 (1954).
114 Id. at 86.
115 Ekins v. East-India Co., 1 P. Wms. 395, 24 Eng. Rep. 441 (1717).
116 Naftalin v. London Midland Scotish Ry. Co., [1933] S.C. 259.
117 J. D'Almaeida Araujo Ltd. v. Becker & Co., [1953] 2 Q.B. 329.
118 Kohnke v. Karger, [1951] 2 K.B. 670 at 677.
119 Ekins v. East-India Co., 1 P. Wms. 395, 24 Eng. Rep. 441 (1717).
120 WOLFF, PRIVATE INTERNATIONAL LAW, 2d ed., 493 (1950).

One would expect a rather different attitude toward the question of damages to be displayed by American courts in view of the general emphasis placed on recognizing obligations created by foreign law. The extent to which the *obligatio* theory has influenced judges in the United States in regard to damages is particularly suggested by the numerous wrongful death actions in which it has been almost uniformly held that the amount, measure and limitation of damages are questions of substantive law and consequently governed by the *lex loci delicti commissi.* Indeed American courts have gone so far as to hold that the plaintiff may recover compensatory damages allowed by the foreign law instead of nominal or vindictive damages allowable by the *lex fori* and measurable by the defendant's degree of culpability; that the *lex loci delicti commissi* may be applied to deny an award of funeral expenses which would be permitted by the *lex fori;* that the plaintiff may recover damages for the decedent's mental anguish or suffering where such damages would not be recoverable by the *lex fori;* that the *lex loci delicti commissi* may limit the quantum of damages which the *lex fori* would have awarded or may exceed the limitation which the *lex fori* would have imposed; and that the amount of damages recoverable because of the decedent's contributory negligence may be reduced instead of barring the right to recovery as would the *lex fori.*[121]

In one recent case, in which an American court applied the line of reasoning indicated by these decisions, a particularly interesting result ensued. Judge Frank, for the Second Circuit, in *Komlos v. Compagnie Nationale Air France*[122] was confronted with a situation in which the decedent had been killed in an airplane crash in Portugal according to whose law "moral damages" were recoverable. The decedent's mother secured an award under the workmen's compensation law of New York where her son had been resident and employed, but she failed to institute proceedings against the wrongful party within six months as required by the New York statute. A failure to comply with this requirement automatically makes the insurance carrier of the workmen's policy the statutory assignee under section 29(2) of the New

121 In the four jurisdictions in which damages were at one time not treated as governed by the *lex loci delicti commissi,* there have since been decisions to the contrary. See 15 A.L.R. (2d) 762 at 767 (1951).

122 (2d Cir. 1953) 209 F. (2d) 436.

York Workmen's Compensation Law of the cause of action for the decedent's wrongful death. However, it was held by the court that there could be no assignment under section 29(2) of the right to moral damages: ". . . Since a claim for moral damages is not recoverable in New York or elsewhere in this country, we think it was not in the contemplation of the legislature and therefore does not pass under Section 29(2)."[123] The court assumed that the cause of action for the decedent's wrongful death could not be split and consequently the claim for moral damages would "evaporate" if the insurance carrier were assigned the cause of action. Despite the mother's failure to institute proceedings within the statutory period, the court reached a conclusion which typified Holmes' submission that the law is what the courts say it is, a submission to which Frank was not unsympathetic before his elevation to the bench. The mother was allowed to sue for her son's wrongful death although the interest of the insurance company was protected. Even more startling is the fact that the court expressly stated, on petition for rehearing, that the question remained open as to whether she was entitled to recover moral damages under Portuguese law!

Even allowing for the fact that the *obligatio* theory holds such sway in American courts, it is perhaps surprising that they have been willing to allow it to govern the question of damages when the parties are domiciliaries of the forum. Even though these courts are willing to concede that the fortuitous place of injury should determine whether a tort exists, it appears excessively mechanical to conclude in all cases that the *lex loci delicti* should necessarily determine the extent of the plaintiff's recovery. Although in many cases, the measure of recovery may be comparable as between sister states of the Union, nevertheless radical differences do exist, especially where limitations may by statute be imposed by one jurisdiction and not by another. Thus a workman may be injured by a fellow workman while working outside his home state and the state of his employment, and may forfeit a substantial part of the damages he would have recovered at his domicile because of the policy of the neighboring state which was primarily intended to be applicable to its own domiciliaries. Conversely, is it not questionable that a workman should recover more when injured by his fellow workman

[123] Id. at 439.

while working in a neighboring state than he would have recovered in the state where both are domiciled and were employed? In attempting to deal with this type of problem, article 12 of the Introductory Act to the *German Civil Code* perhaps goes too far in restricting the damages recoverable in a German court against a German citizen to those which would be recoverable in Germany.[124] Thus, "If the defendant has no capacity to commit the tort by German law, or if delictual liabilty under German law does not exist in the absence of negligence or willful conduct or if his conduct would be justified under the rules of German law, for example on the grounds of self-defence, no action could be maintained."[125] Hence, in regard to defendants who are German citizens, German law applies something like the actionability provision of *Phillips v. Eyre*! Although neither the English nor American damages rules are desirable, this German provision is defective, perhaps to a somewhat lesser degree, since, although it recognizes some contact of the parties with the forum, it does so at the expense of all contacts other than that of the defendant's nationality.

It is worth noting, in concluding this discussion as to damages, an encouraging English decision recently rendered by Pilcher, J., in the Queen's Bench Division of the High Court.[126] The question was admittedly one involving a contract but the reasoning employed may be applicable to issues of tort. In breach of his contract, of which Portuguese law was the proper law, the English defendant failed to open a credit account in escudos at Lisbon in favor of the Portuguese plaintiff, his supplier, as a result of which the plaintiff in turn was unable to open a Lisbon credit account in favor of his own supplier to whom he was therefore obliged to pay damages. These he sought to recover from the defendant who pleaded that they were too remote and that questions of remoteness were procedural and therefore determinable by the *lex fori*. Pilcher, J., followed the suggestion of Cheshire which was fortified by a decision of the Supreme Court

[124] This is of course the very opposite of the conclusion which would be reached in an American court. See, e.g., Reilly v. Antonio Pepe Co., 108 Conn. 436, 143 A. 568 (1928).

[125] Lorenzen, "Tort Liability and the Conflict of Laws," 47 L.Q. REV. 483 at 499-500 (1931).

[126] J. D'Almaeida Araujo Ltd. v. Becker & Co., [1953] 2 Q.B. 329.

of Canada[127] that questions of remoteness and measure of damages are separable, the former being governable by the proper law of the contract, and only the latter by the *lex fori*. Cheshire's reasoning is directed to questions of tort as well as contract and upholds the principles stated in the *Ekin's* case in 1717:

> "There can be no doubt, at least on principle, that remoteness of liability must be governed by the proper law of the obligation that rests upon the defendant. Not only the existence, but also the extent, of an obligation, whether it springs from a breach of contract or the commission of a wrong, must be determined by the system of law from which it derives its source."[128]

Unfortunately, though this may represent a welcome departure in tort cases from applying the *lex fori* automatically, Cheshire sees "the proper law of the obligation" as being different in principle in contract and in tort. In the former, he rightly stresses the law of the place with the most intimate connection; in the latter, he treats the proper law of the obligation in all cases as the *lex loci delicti commissi,* and thus goes to the same extreme as the American courts.

In disapproving of Cheshire's reasoning and supporting the conventional English rules relating to torts in the conflict of laws, Thomas cites the traditional defense of the English rules in a most unfortunate manner:

> ". . . if it appear that the defendant has a defence under the *lex loci delicti* (and a fortiori if the matter be not cognisable by the courts of the *locus delicti*), that determines that the court had no jurisdiction in fact. The explanation permits the recognition of the action as wholly English—which is, in fact, the position; and thus also justifies the determination of remoteness of damage as well as the measure of damages by English law—for English law is the proper law of the tort."[129]

To say that English courts treat actions on foreign torts as English actions is one thing; to state that they all give rise to wholly English actions and that English law is therefore the proper law is a most unfortunate choice of terms.

127 Lively v. Horst, [1924] S.C.R. 605.
128 CHESHIRE, PRIVATE INTERNATIONAL LAW, 4th ed., 660 (1952).
129 Note, 3 INT. & COMP. L.Q. 651 at 659 (1954).

X. THE EFFECT OF THE RELATION BETWEEN THE PARTIES

A further question which has received substantial attention in recent American decisions is as to the effect on actionability of the fact that the parties are related.[130] Where they are husband and wife, the usual American view appears to require the application of the law of the place of impact since the matter is treated as one of substance. This view has now been applied, as in *Gray v. Gray*,[131] even where the forum is the domicile of the parties and its law differs markedly from that of the *lex loci delicti commissi*. In maintaining that the latter law governs, American courts have not conceded that this should be the whole law of the place of impact and consequently uniformly apply only its internal law. There is, unfortunately, no American case in which a court has applied the renvoi doctrine to husband and wife situations in tort, although clearly it might sometimes play a useful role in avoiding unfortunate conclusions or rules of law. If in *Gray v. Gray*, and more recently in *Hansen v. Hansen*,[132] the forum had applied the classification which an English court would have applied in such a case, a remedy would have been available. On the other hand, to classify it as procedural in all cases may have an unfortunate result if the internal law of the forum would not grant a remedy. This suggests that deciding the issue, in effect, solely by the method of classification is dependent solely on the forum's past attitude toward such problems and may ignore the strength of the policy of other jurisdictions and the closeness of the parties' contacts with those jurisdictions. It seems fairly widely agreed, in principle at least, that interspousal disability in tort cases is an unfortunate anomaly whose justification rests on primarily historical grounds. The common law unity of husband and wife is substantially a fiction and has been recognized as such in many other branches of law. Thus, as was said recently, "the wife may sue her husband for dishonesty, for unlawful taking of her property, for debts he refuses to pay, or for any other such matters, even though such

130 See McCurdy, "Torts Between Persons in Domestic Relation," 43 HARV. L. REV. 1030 (1930).

131 87 N.H. 82, 174 A. 508 (1934).

132 274 Wis. 262, 80 N.W. (2d) 230 (1956).

actions would produce 'public scandal of the family discord' as effectually as would the bringing of a tort action. . . . [A]ctions in tort can hardly be said to be any more immoral or violative of justice than are actions for fraud or breach of property rights."[133] Yet, with still worse effects, the unity doctrine is carried still further in the United States,[134] and probably would be in England as well,[135] by denying a remedy to a person who, after the date that the alleged cause of action arose, married the wrongdoer.

Although the courts have not as yet sufficiently adopted an interests-weighing approach to questions of interspousal or interfamily disabilities or as to whether a wife can sue in her own name, there are some recent cases which are more encouraging. In *Emery v. Emery,* involving a parent-child action, the court stated:

> "We think that disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile. That state has the primary responsibility for establishing and regulating the incidents of the family relationship. . . . Moreover, it is undesirable that the rights, duties, disabilities, and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home."[136]

If a husband and wife problem occurs in the context of vicarious responsibility, as where the husband injures the wife during the course of his employment, most American courts would probably apply the law of the place of impact, although some continue to follow the theory that interspousal disabilities are matters of procedure governed by the *lex fori.* Hence, in *Baker v. Gaffney,*[137] although the accident occurred in New York, the

133 Franklin v. Wills, (6th Cir. 1954) 217 F. (2d) 899 at 900.

134 Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931); Coster v. Coster, 289 N.Y. 438, 46 N.E. (2d) 509 (1943).

135 Gottliffe v. Edelston, [1930] 2 K.B. 378.

136 45 Cal. (2d) 421 at 428, 289 P. (2d) 218 (1955). Also see Grant v. McAuliffe, 41 Cal. (2d) 859, 264 P. (2d) 944 (1953), although it does not deal with the husband-wife relation.

137 (D.C. D.C. 1956) 141 F. Supp. 602. In Matney v. Blue Ribbon, Inc., 202 La. 505, 12 S. (2d) 253 (1942), the wife of a Texas domiciliary was injured by her husband in

District of Columbia court applied its own common law, which it had borrowed from Maryland, holding the defendant not liable since the plaintiff could not sue her husband who had been lent the car by the defendant. By the New York law the wife could sue her husband. It should be noted that under New York law, even if the accident had occurred before the husband-wife disability had been removed by statute because of the decision in *Mertz v. Mertz,*[138] it has been recognized at least since 1928[139] that the employer cannot take shelter behind a disability which is that of one of the spouses. This would be "to pervert the meaning and effect of the disability that had its origin in marital identity." Because of the recent English decision in *Broom v. Morgan,*[140] it seems that a similar result would today be reached in the English courts, even though they would classify the interspousal disability as a matter of procedure and therefore generally deny an action between spouses. If, however, an English action involved a foreign tort relating to the wife's separate property, as defined by English law, then there would be no disability even by English internal law. What constitutes separate property may sometimes be difficult to decide, as in *Ralston v. Ralston,* in which, disallowing a female garage-owner's action for libel committed by her husband, the court stated ". . . It cannot be said that chastity is a necessary qualification for the management or ownership of a garage."[141]

Where the interspousal relationship is relevant, not because one spouse proceeds against the other, but because the tort of one spouse results in action against the other by a third party, the problem then is not one of procedural incapacities but rather goes to different considerations. In such cases the law of the matrimonial domicile may be more relevant than that of the place

Louisiana in the course of his employment. In Texas, because of community of property, the cause of action would have been community property and the husband alone could have sued. This would have resulted in the husband suing the employer for his own negligence. In an action in Louisiana it was held that the law of the place of impact and form applied and the wife was allowed to sue. In the earlier case of Williams v. Pope Mfg. Co., 52 La. 1417, 27 S. 851 (1900), which is often cited, the same court applied the law of the wife's domicile so as to allow her to sue, since at that time the law of Louisiana, which was also the place of impact and forum, denied her such a right.

138 Mertz v. Mertz, 271 N.Y. 466, 3 N.E. (2d) 597 (1936).
139 Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928).
140 [1953] 1 All E.R. 849.
141 [1930] 2 K.B. 238 at 245.

of impact. In *Siegmann v. Meyer*[142] the wife assaulted the plaintiff in Florida while there without her husband, who was joined as defendant in the instant action in New York. Both the husband and wife were throughout citizens of New York and the husband had never been in Florida. New York law does not make a husband liable for the torts of his wife whereas Florida preserves the old common law rule. The district court dismissed the complaint as to the husband and Judge Learned Hand for the Second Circuit affirmed the dismissal reserving the question "as to what should be the result, if the husband had been in Florida when the tort was committed, and whether his subjection to judgment ought to read as a liability, or as a mere procedural requirement."[143]

As to this decision and the dictum of Judge Hand at least two points are worth noting. First, on the facts of this case it may cogently be argued that even though the Florida provision was substantive, New York courts might question the basis of legislative jurisdiction for the imposition of such vicarious liability. The Supreme Court has sanctioned as to automobiles a departure from the established principles of jurisdiction laid down in *Pennoyer v. Neff*[144] holding in *Olberding v. Illinois Central R. Co.*[145] that the theory of implied consent for vicarious liability is not the proper basis for decision. Justice Frankfurter has stated:

> "In point of fact, however, jurisdiction in these cases does not rest on consent at all. . . . The liability rests on the inroad which the automobile has made on the decision of *Pennoyer v. Neff*. . . . The potentialities of damage by a motorist, in a population as mobile as ours, are such that those whom he injures must have opportunities of redress against him provided only that he is afforded an opportunity to defend himself."[146]

But to conclude that the reasoning applied to wandering wagons should apply to wandering wives is unjustified. Similar considerations would appear to apply to parental liability for the torts of minor children. But a case closer to the automobile situation

142 (2d Cir. 1938) 100 F. (2d) 367.
143 Id. at 368.
144 95 U.S. 714 (1877).
145 346 U.S. 338 (1953).
146 Id. at 341.

is suggested by the case of a dog who wanders across a state-line where he feels entitled to his first bite.[147]

The second question raised by Judge Hand's opinion in *Siegmann v. Meyer* is that specifically left unanswered by the court, namely, whether New York could deny effect to the Florida law making the husband liable for the tort of his wife if at the time of the tort he too was in Florida. Particularly in the light of the recent decision of *Hughes v. Fetter* this latter question would become most acute if by statute Florida provided for such liability, since if the husband were present there would be little doubt as to Florida possessing legislative jurisdiction. Were there such a statute, and were the husband present in Florida at the time of the tort and were the case to now be presented for decision it would be a question whether the public policy of New York, the domicile of the parties, was sufficiently strong to bring the case within the exception provided for even in the majority opinion in *Hughes v. Fetter.*

XI. CONCLUSION

The main defect of these decisions, whether they are concerned with damages or with interspousal disabilities or, for example, with the liability of joint tortfeasors or partnerships or employers, is that they employ fixed and inflexible rules to determine issues which, because of their variety and complexity, may demand the careful weighing and balancing of competing interests. In the United States, in cases in which the courts are not concerned with the "tortiousness" of the conduct as such but rather with its incidents, the tendency has been strongly against applying the law of the forum. In a federal system, in which conflict of laws cases are more likely to touch the interests of a number of states of the Union than those of member states and foreign countries, it is understandable and commendable that the need for mutual recognition has been acknowledged. However, the law of the place of impact has been treated as the panacea for all conflict of laws problems involving torts, subject only to preserving certain administrative conveniences

147 Le Forest v. Tolman, 117 Mass. 109 (1875).

at the forum. In England, on the other hand, the same basic attitude is adopted toward the incidents of conduct as to the question of its tortiousness, and the *lex fori* is applied to determine virtually all questions which may arise. The approach of both countries is unfortunate—that of the United States because, although it recognizes the existence of some foreign interests, makes little effort to investigate which of these should be determinative or whether its own would be more appropriate; that of England, because it tends to ignore the existence of any interests other than its own. From the few examples which have been given it should be obvious that no single formula can fairly answer the multitude of questions which may arise in even simple situations of torts which touch the interests of more than one jurisdiction. Problems of torts and conflict of laws when arising in combination are too pregnant with competing interests to justify the application of a few rigid rules which are likely in many instances to overlook important and relevant considerations. Although the need for certainty and predictability of result is undoubtedly an important factor in the law-making process, the exclusion of flexibility should not be the required condition. The argument for a proper law of tort, which could meet both English and American policy requirements however diverse, is not a new one—it has been admirably put by Morris,[148] and it is hoped that the present paper offers some further support for the adoption of such an approach and that it indicates some of the relevant considerations in determining what law or laws should govern tort situations in the conflict of laws. It is encouraging to note that the provision dealing with foreign torts in the recently promulgated Benelux Convention adopts a view by no means unsympathetic to that here advocated. Article 18 of the Convention provides that the law of a country where an act takes place determines whether that act is illegal as well as the obligations which result therefrom. If the consequences of the illegal act belong to the juridical sphere of a country[149] other

148 Morris, "The Proper Law of a Tort," 64 HARV. L. REV. 881 (1951).

149 "Appartiennent à la sphère juridique" as used in other places in the convention as well as here strongly indicates that what is intended is that the proper law is determinative, or perhaps, more properly, that the law which by comity is the proper law is to be determinative. However, it is widely admitted that "sphère juridique" was intentionally used so as to verbalize out of the difficulty of carefully stating what was specifically intended.

than that where the act took place, the resulting obligations are determined by the law of that other country.[150]

150 Perhaps because of the relatively new idea advanced by the second paragraph of this article, the translations from the official French have generally been defective. Translations appear in 3 UNIFICATION OF LAW—A GENERAL SURVEY OF WORK FOR THE UNIFICATION OF PRIVATE LAW 1947-1952 (1954), and in "Uniform Law on the Conflict of Laws," 1 INT. & COMP. L.Q. 426 at 430 (1952). As Nadelmann has pointed out, both speak of effects of an unlawful act which " 'are produced within' the legal system of some country other than the country where the act has taken place," whereas "[t]he original text does not speak of effects which 'are produced within' but of effects which 'pertain to' the legal system of another country—which is a different thing." Nadelmann, "Unification of Private Law," 29 TULANE L. REV. 328 at 330, n. 8 (1955). The official French provides: "La loi du pays où un fait a lieu détermine si ce fait constitue un acte illicite, ainsi que les obligations que en résultent. Toutefois, si les conséquences de l'acte illicite appartiennent à la sphère jurisdique d'un pays autre que celui où le fait a eu lieu, les obligations qui en résultent sont déterminées par la loi de cet autre pays." See "Loi Uniforme Relative Au Droit International Privé," 40 REV. CRITIQUE DE DROIT INT. PRIVÉ 710 at 713 (1951).