

# NEW ZEALAND ACCIDENT COMPENSATION AND THE FOREIGN PLAINTIFF: SOME CONFLICT OF LAWS PROBLEMS

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The motor car and the television aerial and our technological revolution in general have led to that extraordinary growth in the social importance of the law of delict which also explains the changed role played by it in the conflict of laws. They have also led to a shift in the social function and legal nature of delictual liability and therefore of the nature of the conflict of laws concerning it.<sup>1</sup>

## I. POLICY AND STRUCTURE OF THE NEW ZEALAND ACCIDENT COMPENSATION ACT 1972

This article examines some conflict of laws implications of comprehensive, no-fault, accident compensation legislation. The purpose is to assess the impact of the new concept on traditional and modern conflicts rules. The particular legislation is the New Zealand Accident Compensation Act 1972<sup>2</sup> but the problems considered may arise in the context of any legislation replacing common law rights by statutory compensation. The term "foreign plaintiff" refers to persons in two categories: non-residents injured while on a visit to New Zealand, and persons injured in some other country who bring action in the New Zealand courts. As we shall see, in both situations adequate recovery may be hindered by the Act. Part of the reason is its policy towards

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<sup>1</sup> Kahn-Freund, *Delictual Liability and the Conflict of Laws*, [1968] II RECUEIL DES COURS 1, at 9 (Académie de Droit International).

<sup>2</sup> Accident Compensation Act 1972, Stat. N.Z. 1975, 2-1409 (reprinted with amendments), as amended by Stat. N.Z. 1977, no. 139, and Stat. N.Z. 1978, no. 36. The principal Act, Accident Compensation Act 1972, Stat. N.Z. 1972, no. 43, came into force on April 1, 1974. Unique and radical, it was the subject of worldwide attention and much literature: see Palmer, *Compensation for Personal Injury. A Requiem for the Common Law in New Zealand*, 21 AM. J. COMP. L. 1 (1973) and the literature cited in note 1; Szakats, *Community Responsibility for Accident Injuries: The New Zealand Accident Compensation Act*, 8 U.B.C.L. REV. 1 (1973); and Harris, *Accident Compensation in New Zealand: A Comprehensive Insurance System*, 37 MODERN L. REV. 361 (1974). The international aspects of the Act were considered in Webb & Auburn, *New Zealand Conflict of Laws — A Bird's Eye View*, 26 INT. & COMP. L.Q. 971, at 983-91 (1977).

foreigners — persons with no durable or work relationship to New Zealand. To that extent the foreign plaintiff's rights are a matter of interpretation of the relevant statutory provisions. More interesting are potential conflict of laws problems likely to arise in a foreign tort case involving tort and no-fault systems. It is not proposed here to discuss fully the statutory provisions relating to, or affecting, foreigners. This would involve a detailed analysis of complex legislation which is, by and large, the product of New Zealand conditions. Rather, it is intended to concentrate on these aspects which are germane to conflict of laws problems. Conflicts of this nature may become more common with the increase in no-fault compensation legislation.<sup>3</sup>

The Pearson Committee,<sup>4</sup> recently reporting in the United Kingdom, recorded a notable spread in many countries of special compensation legislation. The transformation from tort to no-fault compensation is especially evident in the areas of industrial and road accidents.<sup>5</sup> So far New Zealand is the only country which operates a comprehensive compensation scheme, covering all personal injury or death caused by accident regardless of the circumstances. Concomitantly, previous common law rights were entirely abolished.

The architects of the Act viewed the common law tort process as "a fragmented and capricious response to a social problem which cries out for a co-ordinated and comprehensive treatment".<sup>6</sup> The philosophical

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<sup>3</sup> Comprehensive accident compensation legislation was proposed for Australia: COMPENSATION AND REHABILITATION IN AUSTRALIA: REPORT OF THE NATIONAL COMMITTEE OF INQUIRY (A.O. Woodhouse Chairman July 1974). The National Compensation Bill, based on the Report, passed the House of Representatives and went to the Senate. With the change of government in Australia in 1975, it was shelved. The new government set up a steering committee in May 1976 to consider a national compensation programme.

<sup>4</sup> REPORT OF THE ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY (Lord Pearson Chairman 1978) [hereinafter cited as PEARSON REPORT]. Volume Three. OVERSEAS SYSTEMS OF COMPENSATION, is a comprehensive and original comparative study of the subject.

<sup>5</sup> Workmen's compensation acts have been in force throughout the Commonwealth since the turn of the century. All Canadian provinces have enacted special legislation replacing actions in tort for work injuries. Motor accidents in Canada are covered by a variety of no-fault motor insurance schemes administered either by the provincial government or privately. Some of the schemes are compulsory and some are optional; in none of the provinces has the right to take action in tort been abolished.

By 1948 each of the jurisdictions in the United States had a no-fault Workmen's Compensation Act. They vary as to the type of employment covered and some of them are elective rather than compulsory. Employees outside the cover of state laws rely on tort action for compensation but rights under common law have generally been given up by those entitled to statutory compensation. For a comprehensive evaluation of state workmen's compensation laws in the U.S., see REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS (1972).

No-fault legislation for road accidents has been introduced in 28 states. The right to sue in tort has been generally preserved, subject to a threshold. See Henderson, *No-Fault Insurance for Automobile Accidents: Status and Effect in the United States*, 56 ORE. L.R. 287 (1977).

<sup>6</sup> COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND: REPORT OF THE ROYAL

and practical considerations that gave birth to the Act are encapsulated in the following paragraph from the Woodhouse Report:

The moral basis for the application of the fault principle cannot be explained in terms of the legal conception of negligence, because the test of negligence is objective and impersonal. Moreover it becomes quite irrelevant in a system which requires thorough compulsory insurance that the loss be born not by individual defendants but by the whole community. All this might not matter if the principle was justified by the achievement, but it is not. Nobody can credit with any assurance the outcome of a damages action. There are long delays inseparable from the very nature of the process. The investigatory procedure and the trial of the action in Court are costly. And throughout the plaintiff is not only left in some considerable suspense, but he is also left to carry his loss without assistance. Finally, during all this period there is not merely an absence of any encouragement for him to minimise his potential damages by returning to work, in fact the converse applies. Many plaintiffs are reluctant to work until their claim is finalised lest the damages be reduced in proportion to their effort.<sup>7</sup>

The "fault" principle has been further attacked for being unfair to both plaintiff and defendant. If fault is proved, the defendant has to pay damages irrespective of his intention, personal shortcomings and degree of culpability. On the other hand, a plaintiff unable to prove fault recovers nothing regardless of his own innocence. The moral overtones of the fault theory were held to be misplaced: negligence did not reflect personal attitude but merely a deviation from an objective standard of care. Besides, social attitudes have changed:

People have begun to recognize that the accidents regularly betalling large numbers of their fellow citizens are due not so much to human error as to the complicated and uneasy environment which everybody tolerates for its apparent advantages. The risks are the risks of social progress, and if there are instinctive feelings at work today in this general area, they are not concerned with the greater or lesser fault of individuals but with the wider responsibility of the whole community.<sup>8</sup>

Other objections to the common law process were the length, costs and uncertain results of litigation, the clogging of the courts<sup>9</sup> and the hindering effect of delayed lump sum settlement on return to work. The Committee found no compelling proof that civil liability in negligence had a deterrent effect. Other factors, such as penal legislation, enforcement, education and prevention were considered far more effective.<sup>10</sup>

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COMMISSION OF INQUIRY, para. 1 (Woodhouse, J. Chairman Dec 1967) [hereinafter cited as WOODHOUSE REPORT].

<sup>7</sup> *Id.* at para. 82.

<sup>8</sup> *Id.* at para. 89.

<sup>9</sup> In England and Wales, although only one per cent of all tort claims reach the courts, personal injury cases make up over three quarters of the cases set down for hearing in the Queen's Bench Division of the High Court. 1 PEARSON REPORT, *supra* note 4, at para. 79.

<sup>10</sup> WOODHOUSE REPORT, *supra* note 6, at paras. 90-91. While sharing some of these views, the Pearson Committee decided in favour of a mixed system of statutory

In recommending an alternative system, the Woodhouse Committee was guided by five basic principles: community responsibility, comprehensive entitlement, periodic payments, complete rehabilitation and administrative efficiency. It was claimed that modern society, which benefits from productive work of its citizens, must share the inevitable price in bodily injury which results from community activities. Compensation must be available to all and should provide comfortable living by making up for loss of income and physical incapacity. The scheme should promote physical and vocational recovery. Benefits must be paid promptly and with minimum administrative costs.<sup>11</sup>

Adopting this policy, the Act sets up three schemes which together provide cover in respect of all personal injuries or death caused by accident in New Zealand.<sup>12</sup> No other claims for damages, either at common law or under statute, can be brought in the New Zealand courts<sup>13</sup> for personal injury or death resulting from an accident in New Zealand. Each scheme is financed by a separate fund. The Earners Scheme<sup>14</sup> provides cover to all people who suffer personal injury by accident in New Zealand<sup>15</sup> and are employed or carry on business in New Zealand (irrespective of whether or not the accident has happened in the course of the work or employment). It is funded by a levy payable by employers and based on the amount of leviable earnings paid to employees. Self-employed people pay a prescribed percentage (at present one per cent) of the amount of assessable income derived from the business. Persons who are injured in accidents caused by the use of motor vehicles in New Zealand are covered by the Motor Vehicle Accident Scheme.<sup>16</sup> The related fund is made up from contributions paid by motor vehicle owners and holders of driving licences. The third scheme, the

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compensation and tort. They reasoned that tort remedies were better suited to compensate for damages such as pain and suffering, loss of amenities and loss of promotion prospects. It was also thought that high income earners should be free to pursue full reparation in tort, unrestricted by statutory limits on earning-related compensation: 1 PEARSON REPORT, *supra* note 4, at ch. 11. For views opposing the no-fault concept, see Mackenzie, *Some Reflections on Negligence, Damages and No-Fault Compensation*, 10 U.B.C.L. REV. 27 (1975).

<sup>11</sup> WOODHOUSE REPORT, *supra* note 6, at paras. 55-62.

<sup>12</sup> There is one exception: persons who are not ordinarily resident in New Zealand do not have cover under the Act while on board the ship or aircraft on which they come to New Zealand, or are about to leave, and while embarking and disembarking: Accident Compensation Act 1972, s. 102C, *as amended by* N.Z. 1978, no. 36, s. 7. Right of action in negligence against an air carrier is available under the Carriage by Air Act 1967, Stat. N.Z. 1967, no. 151, s. 22. No similar action is available against a sea carrier.

<sup>13</sup> S. 5(1). The Act does not affect proceedings resulting from an accident that has occurred before April 1, 1974: s. 5(3)(c).

<sup>14</sup> Part III of the Act.

<sup>15</sup> In some cases the cover is extended to injuries by an accident outside New Zealand. Such cover is given to New Zealand residents temporarily abroad for work purposes during the first 12 months of their absence, and to New Zealand seamen and airmen and to members of the Armed Forces of New Zealand: ss. 60, 61 and 63.

<sup>16</sup> Part IV of the Act.

Supplementary Scheme,<sup>17</sup> provides cover to all those persons who are not covered by the other two schemes. It is financed from general taxation.

The administration of the schemes is vested in the Accident Compensation Commission, established by the Act.<sup>18</sup> The Commission is charged with the financial management of the compensation funds, the assessing of claims and the paying of compensation. It is required to promote general safety and rehabilitation of injured persons. Decisions of the Commission may be appealed to an Appeal Authority and from there to the Administrative Division of the Supreme Court.<sup>19</sup>

This brief review of the policy and structure of the Act<sup>20</sup> is material to the understanding of its international aspects which will be discussed in the following parts.

## II. ENTITLEMENT OF VISITORS TO COMPENSATION

Visitors to New Zealand are issued, together with their entry forms, information about accident compensation. They are told that if they suffer personal injury by accident in New Zealand they are entitled to no-fault compensation for certain losses; and that the law now prohibits bringing action in New Zealand courts for personal injury or death by accident occurring in New Zealand. It is doubtful whether most visitors realize that in a case of severe injuries their claim may be seriously compromised. The principal reason is that unless he or she actually works in New Zealand, a visitor is not an "earner"<sup>21</sup> (irrespective of his actual earning outside New Zealand) and thus is not entitled to earning related compensation. It can be safely assumed that most visitors<sup>22</sup> are not in New Zealand for work purposes. The definition of "earning" which entitles a person to earning related compensation<sup>23</sup> expressly excludes income derived from employment or work outside New Zealand.<sup>24</sup> At the same time, a foreign earner has no common law rights to sue in New Zealand for any part of his damages. Though serious injuries leading to permanent incapacity and consequential economic losses are statistically rare, they raise the most tragic human problems. The predicament of an injured visitor left uncompensated for loss of

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<sup>17</sup> Part IV A of the Act.

<sup>18</sup> S. 6.

<sup>19</sup> Ss. 155, 161, 168-69.

<sup>20</sup> For a full discussion, see Harris, *supra* note 2, and ACCIDENT COMPENSATION COMMISSION WELLINGTON, A BRIEF DESCRIPTION OF THE ACCIDENT COMPENSATION SCHEME OPERATING IN NEW ZEALAND (1976).

<sup>21</sup> See the definition of "earner", "employee" and "self-employed person" in s. 2(1), and the definition of "earnings" in s. 103.

<sup>22</sup> 385,000 people visited New Zealand in the year ending 31 March 1976: NEW ZEALAND GOVERNMENT YEARBOOK 834 (1977).

<sup>23</sup> Under Part VI: Compensation, and particularly ss. 109(2), 112-13, 116-18 and 123.

<sup>24</sup> S. 103(3)(j).

actual and future income is aggravated in proportion to the degree of his incapacity and the level of his pre-accident earnings.

The Woodhouse Committee, though aware of the problem, swept it under the carpet. They concluded that a visitor to a country takes it as he finds it,<sup>25</sup> and suggested that visitors should insure against the risk of personal injury. In line with the general policy of the Act, entitlement to loss of earning compensation is in return for the individual's contribution to the New Zealand economy. Earners also pay for the right, either directly or through their employers. For these reasons the right is preserved to non-residents who work, or are employed, in New Zealand. Abolition of common law rights, even in respect of non-compensable losses, is consistent with total rejection of the tort process. It also reflects the practical difficulty of having to reintroduce some forms of liability insurance, the need for which has been practically extinguished by the Act.

Nonetheless it is thought that the half-hearted protection of foreign earners is a blot on the Act. Cases of individual hardship cannot be ignored merely because they do not fit neatly with the general scheme. The problem has obviously been treated as marginal and has escaped serious consideration.<sup>26</sup> The piecemeal manner in which the relevant statutory provisions have evolved helped hide that the Act may constitute a pitfall to certain foreigners injured in New Zealand.<sup>27</sup>

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<sup>25</sup> WOODHOUSE REPORT, *supra* note 6, at para. 112. An opposite view was expressed in judicial dictum: "In personal injury cases it is not necessarily true that by entering a country you submit yourself to the special law of that country." *Chaplin v. Boys*, [1971] A.C. 356, at 380, [1969] 2 All E.R. 1085, at 1094 (H.L.) Even by Woodhouse's view, visitors can hardly be expected to accept stoically a law that deprives them of a universal right to recover for economic losses, providing no alternative.

<sup>26</sup> The Australian Compensation Committee, *supra* note 3, gave the matter a more thorough consideration. The position of visitors in Australia with no employment there was considered under three alternatives: (i) Excluding them from the scheme and leaving them to insure privately; (ii) To require or permit them to obtain protection on defined terms and upon payment of levy; (iii) To include them automatically. The Committee opted for the third alternative as producing the best result, and at acceptable costs. *Id.* at para. 363.

<sup>27</sup> I PEARSON REPORT, *supra* note 4, at para. 1041, recommended that benefits under the proposed no-fault scheme for motor vehicle injuries would be payable to those injured in the United Kingdom while not habitually resident there as long as they stay in the United Kingdom.

<sup>27</sup> As originally enacted the Act did not provide cover to non-residents unless they had employment in New Zealand or were injured in a motor accident. The original s. 5 abolished all other actions only if the injured person had cover under the Act. The Accident Compensation Amendment Act (No. 2) 1973, Stat. N.Z. 1973, no. 113, introduced the Supplementary Scheme, Part IV A, which made cover under the Act comprehensive. At the same time, the amended s. 5 abolished all common law and statutory rights (apart from under the Act) in respect of all injuries or death by accident in New Zealand. The Act is the sole source of compensation, regardless of the *extent* of the benefits provided. Overseas breadwinners are thus the class of persons worst short-changed by the Act for the loss of right of action for damages.

There are other reasons why compensation in lieu of action for damages could cause financial loss to injured visitors. Some of these are shared by New Zealanders suffering similar losses. But foreigners are harder hit. New Zealanders, after all, share in the social benefits provided by the Act to the community as a whole. Some examples are:

1. A non-resident who works in New Zealand and is therefore entitled to earning-related compensation has no claim for loss of income derived in another country. This part of his earning is disregarded in determining the amount of compensation due.<sup>28</sup>

2. Compensation for loss of earnings are paid periodically. Their level may be increased by a specified percentage, reflecting the movement in earnings in New Zealand.<sup>29</sup> A person domiciled outside New Zealand may be better able to cope with the effect of local inflation by a proper investment of a lump sum settlement.

3. Compensation for loss of potential earning capacity payable to young persons who are training towards future occupation available only to persons who were at the time of the accident ordinarily resident in New Zealand.<sup>30</sup>

4. Benefits payable under the Act are enmeshed with the social security scheme and the structure of the local health services. Under the Social Security Act 1964, the New Zealand Government pays for most medical and hospital treatment in New Zealand. Such free treatment is not available to persons with no ordinary residence in New Zealand.<sup>31</sup> Under the Act, the Commission has discretion to pay medical treatment costs which it considers reasonable by New Zealand standards and which are not covered by the Social Security Act 1964.<sup>32</sup> Costs are limited to medical treatment given in New Zealand. Further medical or institutional care which a visitor may require after returning to his home country is not covered.

5. A person domiciled outside New Zealand has no way of utilising rehabilitation facilities provided by the Commission.<sup>33</sup>

6. Lump sums payable for non-economic loss (which are generally available to injured foreigners under the Act) are subject to a ceiling. The maximum aggregate sum payable for loss of limb or bodily function is 7000 dollars.<sup>34</sup> Compensation for pain, suffering and loss of amenities do not exceed 10,000 dollars.<sup>35</sup> Periodical earning-related compensations

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<sup>28</sup> S. 104.

<sup>29</sup> S. 15(4).

<sup>30</sup> S. 118.

<sup>31</sup> Social Security Act 1964, Stat. N.Z. 1964, no. 136, s. 91

<sup>32</sup> S. 111(1).

<sup>33</sup> S. 48 requires the Commission to take all practical steps to promote a programme for the medical and vocational rehabilitation of incapacitated persons who are for the time being in New Zealand. Such a programme is aimed toward a speedy restoration of the fullest possible physical, mental and social fitness and economic usefulness.

<sup>34</sup> S. 119.

<sup>35</sup> S. 120.

are based on the amount of the actual loss of earnings, subject to a maximum compensation of 240 dollars per week.<sup>36</sup> Promotion prospects and expectation of increased earnings are not taken into account in calculating loss of earnings.

7. Non-residents are not covered while on board the ship or aircraft on which they come to, or about to leave, New Zealand, including the process of embarkation and disembarkation.<sup>37</sup>

8. Some heads of damages recoverable at common law are not recognised by the Act.<sup>38</sup>

The financial losses that may ensue can be deduced from a brief comparison with high damage awards in other common law countries. The total awarded in a recent British Columbia case<sup>39</sup> to surviving members of a family who were injured in the accident which caused the death of the husband and father was \$1,543,000. The widow, a housewife who at the age of 46 was rendered quadraplegic, was awarded \$931,680: \$45,000 for the capital cost of a new home, \$693,620 for the cost of future care, \$85,000 for pain and suffering and \$107,550 for loss of financial support. In a recent Australian case<sup>40</sup> the plaintiff, a 26 year old fitter who was completely paralysed by the accident, was awarded a total of \$409,000. This sum included \$161,000 for future care and medical treatment and \$77,000 for pain and suffering. In the United States, high awards for catastrophic injuries notoriously run into millions (greatly due to astronomic medical costs).

Comparable compensation under the Act would diminish these sums considerably, notably in items of loss of earnings, loss of financial support, cost of long term medical care and damages for pain and suffering. The problem is that, in principle, adequate protection of foreigners is incongruous in a context of a compensation scheme based on community responsibility, financed from its resources and geared to its members' needs.<sup>41</sup> Unless the problem is fully appreciated some injured non-residents stand to lose heavily by absence of common law rights. Consequently they would have strong financial incentive to bring an action in another country. The implications of such litigation are considered later in this article.

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<sup>36</sup> S. 113, as amended by Stat. N.Z. 1978, no. 36, s. 8.

<sup>37</sup> S. 102C, as amended by Stat. N.Z. 1978, no. 36, s. 7.

<sup>38</sup> Certain instances are specifically excluded: s. 121. For a comparison of common law damages and compensation under the Act, see Willy, *The Accident Compensation Act and Recovery for Losses Arising from Personal Injury and Death by Accident*, 6 N.Z. U.L.J. 250 (1975).

<sup>39</sup> *Tonka v. Bjornson*, (S.C.B.C. May 17, 1979). A marked increase in amounts of compensation awarded for personal injury is recorded in recent decisions of the Supreme Court of Canada: *Thornton v. Board of School Trustees of School District No. 57* (Prince George), [1978] 2 S.C.R. 267, 19 N.R. 552 (general damages \$810,000); *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577 (\$740,000); *Arnold v. Teno*, [1978] 2 S.C.R. 287, 19 N.R. 1 (total award \$540,000).

<sup>40</sup> *Hall v. Tarlinton*, 19 A.L.R. 501 (F.C. Aust. 1978). New Zealand and Australian dollars are roughly at par.

<sup>41</sup> "New Zealand is an egalitarian society, with a fairly narrow range of incomes.



### III. STATUTORY COMPENSATION AND THE RULE IN *PHILLIPS V EYRE*

#### A. *Actions in New Zealand in Respect of Accidents Abroad*

In some circumstances a person injured abroad may choose New Zealand as the convenient forum. This would be a logical choice if the defendant wrongdoer resides and has his assets in New Zealand, or if a faulty product is exported from New Zealand causing injury abroad. What is the legal position? Section 5(1) of the Act provides:

[W]here any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered . . . , no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act. . . .

It seems fairly clear that the Act has no direct application to accidents occurring outside New Zealand.<sup>42</sup> The plaintiff has no cover under the Act and, concomitantly, has not lost his common law rights.

Difficulties may be caused by the basic tort choice-of-law rule applying in Anglo-Commonwealth jurisdictions. The well known rule in *Phillips v. Eyre*<sup>43</sup> requires "actionability"<sup>44</sup> under the law both of the forum and of the place of the wrong. In effect the rule dictates the application of the *lex fori*, subject to defences available in the *lex loci delicti*. The requirement that the act complained of constitute a tort if committed in the forum's country raises doubt as to actionability in New

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which has made it easier for Parliament to fix a ceiling for earning-related compensation under the new scheme." Harris, *supra* note 2, at 362.

<sup>42</sup> This is subject to a limited number of specific exceptions, *supra* note 15.

<sup>43</sup> As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . .

Secondly, the act must not have been justifiable by the law of the place where it was done.

L.R. 6 Q.B. 1, at 28-29, 40 L.J. Q.B. 28, at 40 (Exch. Ch. 1870).

*Phillips v. Eyre* is followed in Canada: *O'Connor v. Wray*, [1930] S.C.R. 231, [1930] 2 D.L.R. 899; *Canadian Nat'l. S.S. Co. v. Watson*, [1939] S.C.R. 11, [1939] 1 D.L.R. 273 (1938). See also J. CASTEL, *CONFLICT OF LAWS: CASES, NOTES AND MATERIALS* (4th ed. 1978); in Australia: *Koop v. Bepp*, 84 C.L.R. 629 (H.C. Aust. 1951); *Anderson v. Eric Anderson Radio & T.V. Pty. Ltd.*, 114 C.L.R. 20 (H.C. Aust. 1965); and in New Zealand: *Richards v. McLean*, [1973] 1 N.Z. L.R. 521 (S.C. 1972).

<sup>44</sup> In *Chaplin v. Boys*, *supra* note 25, at 389, [1969] 2 All E.R. at 1102, Lord Wilberforce stated the "double actionability" test:

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

Although the diversity of opinion in the five speeches makes it difficult to pinpoint the ratio of the case, there is a majority support (Lords Wilberforce, Hodson and Guest) for this proposition.

Zealand, where personal injury entitles the victim to claim compensation from the Commission, leaving him no right of action against the wrongdoer. But since section 5(1) expressly defines its geographical ambit, it must be interpreted as restricted to accidents which have actually happened in New Zealand. The hypothesis created by *Phillips v. Eyre* predicated on an accident abroad is thus excluded.<sup>45</sup> This conclusion is supported by the basic policy of the Act. A foreign plaintiff has no cover, therefore his right to action in tort is not affected.

Though the Act has no direct application, the New Zealand court would still face a formidable problem. Provided that civil liability exists in the place of the accident, New Zealand law governs issues such as standard of liability, contributory negligence, status to sue, measure of damages and available defences. Such incidents are governed by rules which, in respect of domestic accidents, have been abolished. To appreciate the problem one must briefly recall the rationale for the application of the *lex fori* in foreign tort cases. Historically it is explained by the proximity that once existed between tortious and criminal liability.<sup>46</sup> Systematic displacement of the forum's own law in cases involving foreign elements faces a sterner opposition, based on the concept of territorial sovereignty, in cases involving "wrongs". In the simplest terms, application of the *lex fori* in such cases (subject to threshold requirements arising from the *lex loci delicti*) enables the court "to give judgment according to its own ideas of justice".<sup>47</sup> The role of the *lex fori* in conflict cases was explained in America by Professor Cook in the following terms:

[T]he forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision identical, or at least highly similar though not identical in scope with a rule of decision found in another state or country with which some or all of the foreign elements are connected. . . . The forum thus enforces not a foreign right but a right created by its own law.<sup>48</sup>

Strictly speaking, New Zealand law has exempted personal injuries suffered abroad from the change brought about domestically by the Act. But since a major area of tort law has been radically excised and replaced, it is difficult to see how a New Zealand court will be implementing its own concept of justice by employing rejected rules to similar issues arising out of an accident abroad. Such a course may produce absurd results. Assume, for example, that an accident happens in country X in which a local resident is negligently killed by a visitor from New Zealand. Country X has a wrongful death recoveries statute. The action, brought by the deceased's legal representatives in New

<sup>45</sup> But see *Zussino v. Zussino*, 71 N.S.W. St. R. 24 (C.A. 1969).

<sup>46</sup> See Kahn-Freund, *supra* note 1, at 20-22.

<sup>47</sup> *Chaplin v. Boys*, *supra* note 25, at 400, [1969] 2 All E.R. at 1111 (Lord Pearson).

<sup>48</sup> W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 20-21 (1942).

Zealand, raises the question of the plaintiffs' right to sue as dependents. New Zealand's wrongful death statute<sup>49</sup> has survived the Act mainly because it still applies in proceedings arising out of accidents which happened prior to the Act coming into force.<sup>50</sup> Presumably, it will be repealed once the limitation period for such proceedings has expired. In this situation the New Zealand court would have to resort to old common law principles, long discarded everywhere, which gave no right of action for damages in respect of a person's death.

The fundamental differences in the theories underlying the Act and conventional tort systems make it impossible to harmonize New Zealand law with material foreign tort rules. Application of "exiled" *lex fori*, contrasting with current ordinary norms, may help to preserve the doctrinal validity of *Phillips v. Eyre* but would go against its intrinsic logic. This process is backward looking, drawing on frozen rules no longer subject to statutory reform and common law development.

The problem, if realized, can largely be alleviated by proper jurisdiction rules. New Zealand courts should be given power to decline to exercise jurisdiction in foreign accident cases unless they are satisfied that such refusal would work injustice. New Zealand, having no comparable domestic rules which may be extended to the case, should be presumed *forum non conveniens*. If the case may be brought within the jurisdiction of a foreign court, the plaintiff should be referred there.

The odd case may still raise a choice-of-law problem. If jurisdiction by inertia is to be avoided it should be realized that the metamorphosis of New Zealand tort law justifies a new approach to foreign torts problems. The opportunity may be grasped to shake off the shackles of *Phillips v. Eyre* in favour of a more flexible rule, better suited to new conditions.<sup>51</sup> The "proper law of the tort" theory,<sup>52</sup> now prevailing in the United States, is the obvious alternative.

#### B. *Actions Abroad in Respect of Accidents in New Zealand*

A person injured while on a visit to New Zealand may prefer to sue in another country, where he stands a chance to recover a higher damages

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<sup>49</sup> Deaths by Accident Compensation Act 1952, Stat. N.Z. 1952, no. 35. According to the Accident Compensation Act 1972, Stat. N.Z. 1975, 2-1409, s. 184, right of action is now subject to s. 5 of this Act.

<sup>50</sup> S. 5(1).

<sup>51</sup> New Zealand courts are bound by Privy Council decisions. There is sufficient such authority to support the application of *Phillips v. Eyre* (e.g., *Walpole v. Canadian N. Ry.*, [1923] A.C. 113, 70 D.L.R. 201 (P.C. 1922), *C.P.R. v. Parent*, [1917] A.C. 195, 33 D.L.R. 12 (P.C.)). Substantial change in local conditions, however, would justify a departure from an established rule.

<sup>52</sup> On the "proper law" theory, see p. 427 *infra*. "State interest analysis" may of course indicate that New Zealand law should apply. A most obvious case would be one where both parties are resident in New Zealand and the accidents happened while they were on a trip abroad. In such case there seems to be no escape from applying defunct New Zealand rules despite the criticism made in the text.

award. As explained above, the incentive would be particularly strong in a case of fatal or severe injuries suffered by a non-resident who had not been employed in New Zealand. In practice the action would usually be instigated in the country of the plaintiff's domicile if the defendant could be brought within the territorial jurisdiction of the local court: for example, a multinational corporate defendant conducting business there. If *Phillips v. Eyre* is followed, such action would face a defence based on the second part of the rule. Can the cause of an accident permitting the plaintiff to claim statutory compensation as sole remedy be characterized as "non justifiable" by New Zealand law? The main authorities are the twin cases *Walpole v. Canadian Northern Railway*<sup>53</sup> and *McMillan v. Canadian Northern Railway*.<sup>54</sup> In *Walpole* the Saskatchewan courts dismissed an action for damages following a fatal work accident in British Columbia on the ground that the Workmen's Compensation Act of British Columbia permitted the plaintiffs to recover compensation, barring further action in tort. The Privy Council affirmed the decision, holding that the negligence of the defendant company was not actionable in British Columbia, therefore not "non justifiable" in the terms of *Phillips v. Eyre*.<sup>55</sup> The decision is undoubtedly correct since the deceased was employed, and resided with his family in British Columbia. Only after the accident did the widow move to Saskatchewan where the action was brought. But nothing in the decision turned on these facts. Under *Phillips v. Eyre* the only relevant consideration was "justifiability" by the law of the place of the accident.<sup>56</sup> Two questions arise: Is it logical to say that a negligent act is not unjustifiable because it only gives right to statutory compensation? And, is it always right to allow a compensation statute barring a tort action to have control regardless of the foreign elements? To illustrate the problem, let us consider two examples.

*Case A.* Two English seamen, while their vessel is unloading at a New Zealand port, decide to take a ride in town in a hired car. The plaintiff is injured through the negligent driving of the defendant. An action in negligence is consequently brought in England.

New Zealand law gives the plaintiff compensation as sole remedy. Following *Walpole* and *McMillan* the negligent driving is not "unjustifiable"; it does not create civil liability<sup>57</sup> in New Zealand. But these decisions must now be considered in the light of the House of Lords

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<sup>53</sup> *Supra* note 51.

<sup>54</sup> [1923] A.C. 120, 70 D.L.R. 229 (P.C. 1922).

<sup>55</sup> *Supra* note 43.

<sup>56</sup> In different circumstances this reasoning may lead to questionable results. For example, in *Ward v. British Am. Oil Co.*, [1923] 1 W.W.R. 1240, 16 Sask. L.R. 526 (K.B.), the Saskatchewan court, following *McMillan*, *supra* note 54, held that the Alberta compensation statute which made compensation in Alberta an exclusive remedy barred a tort action in Saskatchewan, although the injured workman resided in Saskatchewan, was employed there, and the accident occurred on an occasional work trip to Alberta.

<sup>57</sup> In *Machado v. Fontes*, [1897] 2 Q.B. 231, 66 L.J.Q.B. 542 (C.A.), a controversial decision, it was held that the act committed abroad had to be merely

decision in *Chaplin v. Boys*<sup>58</sup> where the facts were practically similar to those in our case. The House of Lords, while affirming *Phillips v. Eyre* in principle, allowed an exception based on the special circumstances. Since both parties were English and their stay in Malta, the place of the accident, was temporary, the English Court awarded damages for pain and suffering recoverable in English law but denied by Maltese law. Would this flexibility be extended to our case? In other words, would an English court be influenced by the domicile of the parties, their antecedent relationship and the fleeting connection with New Zealand so as to depart from the *Walpole* decision? This is by no means certain. Two of the Lords in *Chaplin v. Boys* (Lords Donovan and Guest) applied English law because they considered the damages issue procedural or remedial, therefore subject to the *lex fori*. Lord Hodson was prepared to qualify the general rule in the interests of justice "in such a case where civil liability exists [or existed] in the foreign country though not exactly corresponding to the civil liability in this country . . .".<sup>59</sup> In the absence of such liability, the question seems to have remained open.

If both parties were domiciled in a Canadian province and the action was brought in that province, the plaintiff might have been assisted by relying on *Machado v. Fontes*,<sup>60</sup> if it could be proved that the defendant had committed a punishable offence in New Zealand. In a series of cases leading to the Supreme Court of Canada decision in *McLean v. Pettigrew*,<sup>61</sup> Canadian courts have utilised the extension provided by the case of *Machado v. Fontes* to overcome an immunity granted by the law of the accident's place. In *Story v. Stratford Mill Building Co.*,<sup>62</sup> the Ontario Court of Appeal entertained an action in tort by an Ontario workman against his employer, an Ontario company. The accident happened in Quebec where no damages could be recovered from the employer, the only remedy being compensations given by the Quebec statute. The court relied, *inter alia*, on *Machado v. Fontes*<sup>63</sup> even though there was no evidence that the negligence was criminal in Quebec. It was, apparently, sufficient that the act was considered not "innocent".

*Machado v. Fontes* has been widely criticized. It is indeed highly illogical to hinge a tort choice on the incidence of criminal liability.

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wrongful, creating criminal liability, and not necessarily actionable in civil proceedings to satisfy the *Phillips v. Eyre* rule. In *Chaplin v. Boys*, *supra* note 44, three of the five Lords (Wilberforce, Hodson and Guest) overruled *Machado v. Fontes*, restating *Phillips v. Eyre* as a double actionability test.

<sup>58</sup> *Supra* note 25.

<sup>59</sup> *Id.* at 379. [1969] 2 All E.R. at 1093. Lord Wilberforce, on the other hand, was of the opinion that the rule must be made flexible enough to take account of varying interests and policy considerations with respect to the particular issue.

<sup>60</sup> *Supra* note 57.

<sup>61</sup> [1945] S.C.R. 62, [1945] 2 D.L.R. 65 (1944). See Hancock, *Canadian-American Torts in the Conflict of Laws: The Revival of Policy-Determined Construction Analysis*, 46 CAN. B. REV. 226, at 239-44 (1968).

<sup>62</sup> 30 O.L.R. 271, 18 D.L.R. 309 (C.A. 1913). This case should be contrasted with *Ward v. British Am. Oil Co.*, *supra* note 56.

<sup>63</sup> *Id.* at 286, 18 D.L.R. at 320.

Moreover, an indiscriminate application may lead to absurd results, diverting attention from the real issue — the substantive connection of the competing rules with the parties and the event. Yet in our case, application of *Machado v. Fontes* may be necessary to reach a just result, just as it was in *McLean v. Pettigrew*. It would be unfair to allow, for example, an Alberta resident to escape liability for wrongful injury inflicted on another Alberta resident in New Zealand merely because New Zealand law has eliminated civil liability for personal injuries.<sup>64</sup> Finally, in view of *Chaplin v. Boys* there is doubt as to the fate of *Machado v. Fontes* in Canada when the matter comes next for serious consideration.<sup>65</sup>

*Case B.* The facts are as in *Case A*, only this time the cause of the accident is the negligence of the car rental firm, a New Zealand company. The injured English seaman has not hired the car but was merely a passenger.<sup>66</sup>

In this situation it is very probable that the absence of civil liability in New Zealand would be crucial in proceedings in England. Dicta in *Chaplin v. Boys*<sup>67</sup> suggest that the requirement of actionability in the *lex loci* would not be qualified where the defendant is domiciled there. Canadian courts (assuming that the plaintiff is domiciled in Canada) may again resort to *Machado v. Fontes* — this time with less functional justification than in the previous case. Professor Hancock<sup>68</sup> argued that in cases like *Howells v. Wilson*<sup>69</sup> and *McLean v. Pettigrew* the courts, while nominally adhering to the traditional rules, in fact proceeded by an interpretation of the material rules in light of their respective policies and the relationship to the parties. If this is indeed the basis of the judgments, then the different domiciles of the plaintiff and the defendant must have a major influence on the choice-of-law considerations.

The discussion above is designed to show that the traditional Anglo-Canadian rules are inadequate as a choice formula in conflicts of this type. Consideration of the parties' domicile, their antecedent

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<sup>64</sup> See the criticism of *Machado v. Fontes* in *Lieff v. Palmer*, 63 Que. B.R. 278 (1937) in which both parties were domiciled in Ontario, where the accident occurred. The action was brought in Quebec, apparently to avoid the effect of the Ontario guest statute. In the *Walpole* case, *supra* note 51, at 119, 70 D.L.R. at 205, it was noted that no criminal negligence was proved at trial. What would have been the result had such evidence been furnished?

<sup>65</sup> In two recent Australian cases, *Machado v. Fontes* was held to be no longer good law: *Warren v. Warren*, [1972] St. R. Qd. (S.C.); *Corcoran v. Corcoran*, [1974] V.R. 164 (S.C. 1973).

<sup>66</sup> The last fact was added to eliminate a possibility of a contractual action. It should be noticed, however, that a contractual action based on similar facts would probably fail since New Zealand law is likely to be the proper law of the contract. S. 5(1) of the Act prohibits damages in respect of personal injuries, irrespective of the cause of action.

<sup>67</sup> *Supra* note 25, at 379 (Lord Hodson), 392 (Lord Wilberforce), [1969] 2 All E.R. at 1093, 1104.

<sup>68</sup> *Supra* note 61.

<sup>69</sup> 69 Que. B.R. 32 (1936).

relationship and the respective policies of the *lex fori* and the *lex loci* should make the result in *Case A* beyond doubt, while *Case B* would present a dilemma. Not only does the traditional rule turn a blind eye to these considerations (which is ground for a well known broader criticism), but it is analytically unsuitable to deal with the problem. The centrepiece of the *Phillips v. Eyre* rule is the concept of "fault": the act must be wrongful in both the *lex fori* and the *lex loci* to allow the forum to proceed. This demand is meaningless in the context of a compensation system which has replaced delictual liability by community responsibility. The no-fault theory disaligns the double-barrelled test. To ask whether the act is actionable in New Zealand is to ask the wrong question. A similar point was made in the *McMillan* case:

The liability thus created is not to pay damages for a wrongful act, but compensation for an accident. The right to compensation is founded on accident simply, not on negligence or any other actionable wrong. The mere fact that the employer is liable to pay compensation for such an accident does not, in my opinion, attach any character of wrongfulness or unjustifiableness or guilt (as opposed to innocence) to the *act* upon which an action in this Province, founded entirely on tort, can be supported. The gist of the action is negligence, the ground for compensation is the accident.<sup>70</sup>

The passage explains why compensations *ex legis* do not, *per se* affect the "innocent" nature of the act. But it may well support the broader conclusion that the whole question of civil liability is made irrelevant.

If, indeed, a tort/compensation conflict is one of a special nature, how should it be treated? An alternative method to be considered is the one adopted in the United States, discussed in the following part.

#### IV. THE UNITED STATES EXPERIENCE — THE WORKMEN'S COMPENSATION ANALOGY

What law would an American court apply in a personal injury action of a non-resident injured in New Zealand? Current rules in the United States are collectively referred to as "the proper law of the tort" doctrine.<sup>71</sup> They are summarized in the Restatement of the Conflict of Laws (Second)<sup>72</sup> as follows:

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<sup>70</sup> *Supra* note 54, at 124-25, 70 D.L.R. at 232, citing the Saskatchewan Court of Appeal.

<sup>71</sup> The doctrine came into prominence with the New York Court of Appeals' decisions in *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y. 2d 34, 211 N.Y.S. 2d 133 (1961); *Babcock v. Jackson*, 12 N.Y. 2d 473, 240 N.Y.S. 2d 743 (1963). Perforce, it is dealt with here briefly and selectively. For a fuller discussion and a current evaluation, see Nygh, *Some Thoughts on the Proper Law of a Tort*, 26 INT. & COMP. L.Q. 932 (1977); Couch, *In Search of Justice: Torts Conflicts of Law*, 61 MARQ. L. REV. 545 (1978); and Lown, *A Proper Law of Torts in the Conflict of Laws*, 12 ALTA. L. REV. 101 (1974).

<sup>72</sup> AMERICAN LAW INSTITUTE, 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS 414 (1971).

## S.145 The General Principle

- (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties. . . .
- (2) Contacts to be taken into account in applying the principles of S.6 to determine the law applicable to an issue include:
  - (a) the place where the injury occurred,
  - (b) the place where the conduct causing the injury occurred,
  - (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
  - (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Where the territorial base of *Phillips v. Eyre* leads to a choice of jurisdiction, the proper law approach seeks, through a variety of contacts, to establish the legal *rule* applicable to each tort issue. The forum, as such, plays a neutral part unless the applicable foreign rule conflicts with its public policy. At the present stage the doctrine has evolved beyond the mere counting of factual contacts towards "state interest analysis". This process evaluates each rule by reference to its underlying policy in relation to the particular issue before the court. The applicable law is that of the state with the most interest in the outcome.<sup>73</sup>

In some circumstances the proper law approach provides a relatively easy solution to the problems presented by an accident in New Zealand and litigation abroad. If, for example, both plaintiff and defendant are non-residents in New Zealand, New Zealand has no interest in applying its law. It is not concerned with either the welfare of the plaintiff or the immunity of the defendant. Thus, if a New York resident is injured by a fellow New Yorker while both are on a short visit to New Zealand, the New York court would be justified in applying New York law, though no similar action in negligence lies in New Zealand.<sup>74</sup> The policy of the Act is not frustrated, while New York has a vital interest in distributing the loss between persons whose home is in New York. In "state interest analysis" parlance, such a situation raises a "false" conflict. This means that an analysis of the policies behind the competing laws indicates that only one state has an interest that its law should apply while the application of other states' law would not further these policies.

By contrast, a "true" conflict<sup>75</sup> situation demands a tough choice. Consider, for example, a case where the defendant is a New Zealand

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<sup>73</sup> For a good illustration of state interest analysis, see *Reich v. Purcell*, 63 Cal. Rptr. 31, 432 P. 2d 727 (1967). The case is a subject of a symposium in 15 U.C.L.A. L. REV. 551 (1968).

<sup>74</sup> Compare with *Babcock v. Jackson*, *supra* note 71.

<sup>75</sup> The dichotomy false-true conflicts was criticized in *Hunker v. Royal Indemnity Co.*, 57 Wis. 2d 588, 204 N.W. 2d 897 (1973). It was pointed out that even if State A's interests far outweigh those of State B, the latter still has *some* concern which forces a methodical choice.



corporation and the plaintiff is a New Yorker, employed by a head-office in New York. While on a short inspection trip in New Zealand he is injured by the alleged negligence of the local corporation. New York has a primary interest in the proper recovery of the plaintiff on a common law basis. New Zealand law has an interest in seeing that its resident does not incur financial liability in respect of personal injury suffered in New Zealand. It is with this situation, which is the one more likely to occur, that we are mostly concerned.

A ready analogy is provided by conflicts involving application of foreign workmen's compensation statutes. Legislation replacing, in essence, common law rights with compensation for industrial injuries now exists in all of the United States. Though restricted to employment relationships, it shares the general philosophy of the Act: to substitute the doubtful common law process with a remedy which is both expeditious and independent of proof of fault, and at the same time to provide for the employer a liability which is limited and determinable. The statutes differ in coverage and scope of protection. Some, but not others, make compensation the sole means of recovery against parties other than the immediate employer, such as a general contractor or a common employee. An injured workman, entitled to compensation as an exclusive remedy in State *A*, may attempt to sue for additional damages in State *B* whose local law does not bar his action. Choice of law problems in such cases are dealt with in the Restatement<sup>76</sup> by a separate rule:

S. 184 Abolition of Right of Action for Tort or Wrongful Death

Recovery for tort or wrongful death will not be permitted in any state if the defendant is declared immune from such liability by the workmen's compensation statute of a state under which the defendant is required to provide insurance against the particular risk and under which

- (a) the plaintiff has obtained an award for injury, or
- (b) the plaintiff could obtain an award for the injury, if this is the state (1) where the injury occurred, or (2) where employment is principally located, or (3) where the employer supervised the employee's activities from a place of business in the state, or (4) whose local law governs the contract of employment. . . .

The cases cited in the Restatement show a preference for a compensation statute barring a tort action whenever its benefits are available to the injured workman, regardless of material multi-state contacts. Thus in *Utica Mutual Insurance Co. v. Potomac Iron Works, Inc.*<sup>77</sup> the plaintiff, a sub-contractor's employee, brought action in tort in the District of Columbia against the general contractor and a fellow employee. The plaintiff was a resident of Maryland who was employed in D.C. by a local corporation. Both defendants were Virginia corporations and the

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The terminological difficulty may perhaps be resolved by substituting "avoidable" and "inevitable" for "false" and "true" conflicts, respectively. The distinction is useful as it helps to concentrate on the problems arising when the interests behind the conflicting rules are evenly balanced.

<sup>76</sup> *Supra* note 72, at 546.

<sup>77</sup> 300 F. 2d 733 (D.C. Cir. 1962).

accident happened while the plaintiff was working on a construction site in Virginia. The plaintiff collected compensation in D.C. and his tort action against the defendants was permitted by the D.C. statute. By the law of Virginia the plaintiff's sole and exclusive remedy against a general contractor and a fellow employee were compensations provided by the Virginia statute. Ignoring all other contacts, the United States Court of Appeal in the District of Columbia affirmed a pre-trial order to dismiss the action on the ground that a tort action brought in respect of an accident in Virginia was governed by the law of Virginia.

*Williamson v. Weyerhaeuser Timber Co.*<sup>78</sup> involved a tort action in Oregon. The plaintiff deceased resided in Oregon and was employed there by an Oregon firm. He was sent to do repair work for a Washington customer in Washington where the fatal accident happened. The Oregon Compensation Statute permitted an election of a tort action against a third party whereas the Washington statute entitled the plaintiff to claim compensation in Washington, exempting the defendant from any further liability. It was held that the law of Washington, being the law of the state of the accident, prevailed, and that the plaintiff could not sue for common law damages in Oregon.

These cases, and many others,<sup>79</sup> can be explained as a straightforward application of the law of the place of the wrong;<sup>80</sup> the choice rule which prevailed in the United States at that time. But in the leading case of *Wilson v. Faull*,<sup>81</sup> the rule was explained as based on broad policy considerations:

Choice of law in the situation presented here should not be governed by wholly fortuitous circumstances such as where the injury occurred, or where the contract of employment was executed, or where the parties resided or maintained their places of business, or any combination of these "contacts". Rather, it should be founded on broader considerations of basic compensation policy which the conflicting laws call into play, with a view toward achieving a certainty of result and effecting fairness between the parties within the framework of that policy. The injured workman has a prompt and practical compensation remedy in any state having a legitimate interest in his welfare. The person who provides that compensation in an interested state has a definitive liability which is predictable with some degree of accuracy and is granted an immunity from an employee's suit for damages which does not disappear whenever his enterprise chances to cross state lines and the suit is brought in another state.<sup>82</sup>

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<sup>78</sup> 221 F. 2d 5 (9th Cir. 1955).

<sup>79</sup> *E.g.*, *Tucker v. Texas Co.*, 203 F. 2d 918 (5th Cir. 1953); *Knott v. Red Star Transit, Inc.*, 200 F. Supp. 203 (E.D. Mich. 1961). For a collection of the older cases, see Dwan, *Workmen's Compensation and the Conflict of Laws*, 11 MINN. L. REV. 329 (1927), and Dwan, *Workmen's Compensation and the Conflict of Laws—the Restatement and other Recent Developments*, 20 MINN. L. REV. 19 (1935).

<sup>80</sup> Language to that effect is indeed common in the judgments. See, *e.g.*, *Utica Mutual Ins. Co. v. Potomac Iron Works, Inc.*, *supra* note 77, at 734, and *Williamson v. Weyerhaeuser Timber Co.*, *supra* note 78, at 11.

<sup>81</sup> 27 N.J. 105, 141 A. 2d 768 (1958).

<sup>82</sup> *Id.* at 114, 141 A. 2d at 778-79.

*Wilson v. Faull* itself is a striking illustration. The defendant general contractor, the subcontractor (employer) and the employee plaintiff all lived in New Jersey. While the injury occurred on a project in Pennsylvania, the contracts between the general contractor and subcontractor, and the latter and the plaintiff, were executed in New Jersey. Under the Pennsylvania statute a suit against the general contractor could not be maintained, but such a suit was permitted by New Jersey law. The Superior Court of New Jersey, Appellate Division, held that the employment relationships were the most important element and allowed an action in tort for damages.<sup>83</sup> The decision was reversed by the New Jersey Supreme Court for the reasons just quoted.

United States courts are clearly sympathetic to compensation legislation of sister states. They feel that a uniform application of this legislation maintains the *quid pro quo* policy of workmen's compensation. But the foregoing analysis misses an important point: compensation provided by one state may not constitute adequate recovery for an injured workman domiciled in another state.<sup>84</sup> It is interesting that by 1971, the year of the Restatement Second, the impact of the proper law doctrine had not yet reached the workmen's compensation area. This approach would define two distinct issues: the plaintiff's right to bring a tort action, and the immunity granted to the defendant. Each issue must be related to the law having the greatest policy interest in the result. Thus the law of the plaintiff's domicile and the law of the place of employment should be considered, as well as the law of the defendant's domicile and that of the place of the accident. If, on this basis, it is found that the issues are subject to conflicting rules, the forum may apply its own law, on public policy grounds, to resolve the impasse. By this method, *Wilson v. Faull* was wrongly decided. The common residence of the parties as well as the place of employment were all in New Jersey. New Jersey had an interest in settling the claims on a full tort basis while Pennsylvania, with only a minimal interest, was not affected. It was, therefore, a false conflict in which New Jersey law should have prevailed.

Some recent multi-state compensation cases did apply governmental interest analysis.<sup>85</sup> Of these, the most important is the 1978 United States Court of Appeals (Second Circuit) decision in *O'Connor v. Lee-Hy*

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<sup>83</sup> *Wilson v. Faull*, 45 N.J. Super. 555, 133 A. 2d 695 (Super. Ct. App. Div. 1957).

<sup>84</sup> Presumably it is thought that differences in compensations recoverable in sister states of the same federation cannot be that significant. But the fact that the plaintiff resorted to the lengthy and costly common law process rather than be satisfied with compensation indicates the financial advantage of the former course. It would also be noted that U.S. courts proceeded along similar lines when dealing with compensation laws of foreign countries: *Beyer v. Hamburg-American S.S. Co.*, 171 F. 582 (C.C. S.D. N.Y. 1909); *Schweitzer v. Hamburg-Amerikanische Packetfahrt Actien Gesellschaft*, 78 Misc. Rep. 448, 138 N.Y.S. 944 (Sup. Ct. 1912); *The Falco*, 15 F. 2d 604 (E.D. N.Y. 1926).

<sup>85</sup> *Davis v. Morrison-Knudsen Co.*, 289 F. Supp. 835 (D. Or. 1968), *Hunker v. Royal Indemnity Co.*, *supra* note 75.

*Paving Corp.*<sup>86</sup> This was an action in New York, following the wrongful death of D. O'Connor, brought by his estate. O'Connor was a New York resident employed by a New York firm. His duties included occasional trips to a construction project in Virginia, during one of which he was killed. The defendants were a Virginia corporation and its employee, both with no contacts with New York. The choice of law question pitted the Virginia statute, with compensation as sole remedy, against New York's Workmen's Compensation Law by which the plaintiff was not barred from suing the defendants for wrongful death caused by their negligence.

The defendants asserted that the Virginia contacts far outweighed New York's. Relying on the Restatement they argued that New York's interests in seeing that O'Connor's representatives received adequate compensations for his death had to be harmonized with the policy of limiting the costs imposed on employers by industrial accidents, which would dictate following Virginia law. The plaintiff based his case on the New York contacts. The court<sup>87</sup> referred to a line of decisions of the New York Court of Appeals which has established that court's "determination to afford New York tort plaintiffs the benefit of New York law more favourable than the law of the *lex loci delictus* whenever there [was] a fair basis for doing so".<sup>88</sup> It then concluded:

Here the basis for applying the more favourable New York law rather than the law of the *lex loci* to *O'Connor* is at least as great as in the cases cited. Appellants have failed to furnish us with persuasive reasons to believe

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<sup>86</sup> 579 F. 2d 194 (2d Cir. 1978).

<sup>87</sup> A federal court in New York faced with a choice problem must determine what law a New York court seized of the action would apply: *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 85 L. Ed. 1477 (1941).

<sup>88</sup> *O'Connor v. Lee-Hy Paving Corp.*, *supra* note 86, at 205. The line of cases includes:

*Kilberg v. Northeast Airlines*, 9 N.Y. 2d 34, 211 N.Y.S. 2d 133, 172 N.E. 2d 526 (1961) (refusing to give effect to Massachusetts ceiling on recovery for wrongful death of New York resident in Massachusetts airplane crash); *Babcock v. Jackson*, . . . 12 N.Y. 2d 473, 240 N.Y.S. 2d 743, 191 N.E. 2d 279 (refusing to apply guest statute of Ontario, where accident occurred, to defeat claim of New York passenger); *Macey v. Rozbicki*, 18 N.Y. 2d 289, 274 N.Y.S. 2d 591, 221 N.E. 2d 380 (1966) (refusing to apply Ontario guest statute against New York plaintiff even though she was staying at her relatives' home in Canada and trip began and was to end there); *Miller v. Miller*, 22 N.Y. 2d 12, 290 N.Y.S. 2d 734, 237 N.E. 2d 877 (1968) (refusing to apply Maine limitation on recovery in wrongful death action where a New York resident was killed while in a motor vehicle operated by his brother and owned by his sister-in-law who were Maine residents); *Tooker v. Lopez*, 24 N.Y. 2d 569, 301 N.Y.S. 2d 519, 249 N.E. 2d 394 (1969) (refusing to apply Michigan guest statute to accident in Michigan involving New York passenger).

*Id.* (footnotes omitted) Another was *Rosenthal v. Warren*, 475 F. 2d 438 (2d Cir. 1973), (refusing to apply Massachusetts death recovery limitations although the alleged malpractice was committed in a Massachusetts hospital, by a local surgeon, causing the death of a New York resident).

that, if confronted with the problem here presented, the New York Court of Appeals would turn away from the path it has consistently followed since *Kilberg* and subject a New York resident, employed in New York by a New York employer and based in New York, to Virginia law which prevents him or his estate from suing for negligence a non-employer alleged to have negligently injured or killed him at the worksite.<sup>89</sup>

The reasoning does little more than call the shots and has yet to be tested in other states' courts.<sup>90</sup> But the principle thus gleaned from the authorities is an important innovation in the workmen's compensation area. As a departure from the Restatement's rule, the jurisdiction that has spawned the proper law doctrine had brought compensation conflicts into the doctrine's fold.

Let us return now to the problems created by an accidental injury in New Zealand. Assume that the plaintiff, a tourist domiciled in State X, is injured in a road accident through the negligent driving of the defendant, an unrelated New Zealand citizen. There are two choices of law options in an action brought in State X.

1. Apply New Zealand law whereby a tort action is barred by section 5(1) of the Act. The New Zealand connections are the residence of the defendant and the place of the accident. They therefore outnumber the interest of State X, the plaintiff's domicile. The defendant has contributed to the compensation scheme and has acquired an immunity in return for the plaintiff's rights to no-fault compensations. New Zealand has a vital interest in seeing that the defendant is not subjected to a tort liability. Upholding this concern would further basic conflicts objectives: certainty, predictability of results, amicable international relationships and promotion of the international order.

Such a choice is buttressed by the "principled preference approach" formulated by Professor Cavers<sup>91</sup> which points out the unfairness of exposing a New Zealand resident to a greater liability created by foreign law. Cavers places great weight, in this respect, on the territorial factor:

A basis for preference that I submit would not only be rational as a principle of allocation but also be fair to visitors to the state would be a principle enabling a state to protect people within its bounds from exposure to greater financial hazards than those to which their own laws would subject them when that exposure was created by the claims of (unrelated) out-of-state visitors that are predicated on the claimants' own laws.<sup>92</sup>

Support for this view is found in *Cipolla v. Shaposka*.<sup>93</sup> The parties were schoolmates at a Delaware school. The defendant was driving the plaintiff to the latter's home in Pennsylvania when a collision occurred in

<sup>89</sup> *Supra* note 86, at 205-06.

<sup>90</sup> The *O'Connor* court in fact sounded a skeptical note, saying that "in the light of fifteen years of experience under *Babcock*, the departure from the certainty of the *lex loci delictus* rule was not such a famous victory as it first appeared to be . . .". *Id.*

<sup>91</sup> D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 139 (1965).

<sup>92</sup> Cavers, *Cipolla and Conflicts Justice*, 9 DUQ. L. REV. 362 (1971).

<sup>93</sup> 439 Pa. 563, 267 A. 2d 854 (1970). This case is the subject of a symposium in 9 DUQ. L. REV. 347 (1971).

Delaware in which the plaintiff was injured. The defendant was a Delaware resident and the car was insured and registered in that State. The issue was whether the legal effect of the guest-host relationship should be determined by Delaware or Pennsylvania law. Delaware had a guest statute barring a claim while Pennsylvania allowed an action of a guest passenger against a negligent host driver. Recognizing a real conflict, the Pennsylvania court proceeded to analyse the policies behind the competing laws. The Delaware contacts which established that State's concern were the residence of the plaintiff and the place of registration and insurance of the car.<sup>94</sup> The majority found that Delaware's connection outweighed Pennsylvania's and that Delaware had the greater interest in having its law applied.<sup>95</sup>

The majority approved Cavers' view that it would be unfair to require the State of injury to step up its standard of behaviour or financial protection for the benefit of the visitor whose domestic law provides a higher standard of care or better financial protection: "By entering the state or nation, the visitor has exposed himself to the risk of the territory and should not subject persons living there to a financial hazard that their law had not created."<sup>96</sup>

Cavers' preference can also be said to be giving effect to the parties' expectations — a classical consideration in favour of the *lex loci delicti*. Vindicating parties' expectations as a choice influence factor have been discounted as a myth<sup>97</sup> — people do not plan their relationships in anticipation of unintentional torts. But attention must be paid to the defendant's opportunity to insure against a likely risk. The Act has removed the necessity of private personal liability insurance in New Zealand. Subjecting the defendant to liability arising from foreign law, against which he had no practical chance to insure would be, in Cavers' words, "not merely deplorable, but shocking".<sup>98</sup>

2. The opposite result is reached if the law of State X is applied. This choice may be reached through one of two methods.

*The "better" or "emerging" law approach.* The leading case, *Clark v. Clark*,<sup>99</sup> explained this consideration as reflecting a judicial preference for what is regarded as the sounder rule of law as between the competing ones. The law of State A is preferred to that of State B because, in the forum's view, the law of B is outmoded, anachronistic or leads to absurd results. Much of this has been said of statutes that provide

<sup>94</sup> The fact that the accident occurred in Delaware was not considered a relevant contact because the Delaware statute did not set out a rule of the road.

<sup>95</sup> Roberts J., dissenting, preferred to apply Pennsylvania law as being "the better law".

<sup>96</sup> *Supra* note 93, at 567, 267 A. 2d at 856, citing D. CAVERS, *supra* note 91, at 147.

<sup>97</sup> The notion that the parties have relied on a particular law to govern their relationship has been rejected in the *Macey*, *Miller*, *Tooker* and *Rosenthal* cases, *supra* note 88.

<sup>98</sup> *Supra* note 92, at 365.

<sup>99</sup> 107 N.H. 351, 222 A. 2d 205 (1966).

host driver immunity<sup>100</sup> or impose limitation on recovery for wrongful death.<sup>101</sup> The Act, a progressive piece of social legislation, is certainly not in this category. But it is open to challenge for other reasons. It discriminates against the foreign plaintiff, expressly, by depriving him of certain important benefits, or inherently, by setting unrealistic limits considering the foreign plaintiff's needs, level of income and medical costs. It may therefore be labelled "unreasonable". It is significant that the authorities cited in *O'Connor* included decisions influenced by the better law consideration. It did not escape the court's attention that those cases involved anachronistic statutes. If necessary, it was prepared to declare "unreasonable" the relevant provision of the New Jersey compensation statute barring a tort action.<sup>102</sup>

This thinking can be extended to the Act. While its motives are salutary, its method may be questioned. Depending on the forum's policy, it may be argued that spreading the costs of all personal injuries throughout the community and restricting the right to recover entirely are unreasonable interferences with personal rights.

*The Forum centered approach.*<sup>103</sup> The better law approach can be criticized as indicative of concealed forum bias. This would be most evident where the relevant foreign law to which the forum refuses to give effect can in no way be described as anachronistic or harsh. The forum centered approach, by contrast, openly prefers the forum's own rule pursuant to the forum's policy. The theory<sup>104</sup> is that the basic choice of law principle (subject to some traditional exceptions) is always derived from the *lex fori*: the forum interprets and applies its own rule in the light of its own policy, recognizing the foreign elements of the case. In *O'Connor* a forum centered approach was discerned as underlying a line of cases in which the plaintiff, a domiciliary of the forum, was better protected by the forum's law.<sup>105</sup>

It is doubtful whether an indiscriminate application of cases

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<sup>100</sup> E.g., *Clark v. Clark, id.*; *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N.W. 2d 664 (1967); *Cipolla v. Shaposka*, *supra* note 93 (Roberts J., dissenting).

<sup>101</sup> E.g., *Miller v. Miller*, *supra* note 88; *Rosenthal v. Warren*, *supra* note 88. See also, Hancock, *Policy Controlled State Interest Analysis in choice of Law, Measure of Damages, Torts Cases*, 26 INT. & COMP. L.Q. 799 (1977).

<sup>102</sup> *O'Connor v. Lee-Hy Paving Corp.*, *supra* note 86, at 206 n. 17.

<sup>103</sup> See Nygh, *supra* note 71, at 937-39.

<sup>104</sup> For a general discussion, see Ehrenzweig, *Specific Principles of Private Transnational Law*, [1968] II RECUEIL DES COURS 167 (Académie de Droit International). The universal application of the *lex fori* must be, according to Ehrenzweig, accompanied by a concentrated effort to establish a scheme of international and interstate jurisdiction which would secure a substantial contact of the court with the parties and facts.

<sup>105</sup> *O'Connor* quoted with approval a New York decision where it was said: "Clearly, the public policy of our courts is to protect New York domiciliaries, wherever possible, from denial of a recovery in another jurisdiction. . . . Both logic and precedent mandate a construction consistent, whenever possible, with the State allowing a just recovery." *MacKendrick v. Newport News Shipbuilding & Dry Dock Co.*, 59 Misc. 2d 994, at 1011, 302 N.Y. Supp. 2d 124, at 140 (Sup. Ct. 1969).

involving foreign guest and limitation on death recoveries statutes is justified in a case involving immunity arising from a compensation statute. The analogy of immunity and limited recovery should not hide the fact that as a matter of policy evaluation, these types of statutes are worlds apart. To say, in our hypothetical case, that New Zealand law is less sound or is unreasonable compared to a common law damages system appears rather fickle.

Yet, it is submitted, the *O'Connor* decision provides the right answer to our problem. State X has a vital interest in seeing that its domiciliary is given sufficient damages enabling him, as much as possible, to rehabilitate himself and to return to normal life. By its public policy such damages are awarded at common law, recoverable from the wrongdoer. The interest of the forum in advancing this policy should prevail over New Zealand's interest in protecting the defendant. Since this is a true conflict, the unfairness of exposing the New Zealand resident to higher risk is unavoidable.<sup>106</sup>

## V. CONCLUSIONS

A comprehensive accident compensation scheme is a major achievement of the welfare state. Its highly localized nature, however, creates potential risks for the unaware non-resident. The crux of the problem is securing proper remedy for an injured non-resident and at the same time maintaining protection of local residents against tort liability. Should a person who enters New Zealand on a temporary visit be subjected to that country's compensation law as an exclusive remedy? On the other hand, should a New Zealander be subjected to higher risk created by foreign law? Most of the legal debate so far has turned on conflicting rules peripheral to delictual liability: questions of special defences, status to sue and heads and measure of damages. These have often enabled courts to reach the result through "interpretation and reconciliation" of the conflicting rules. A tort/compensation conflict involves systems which widely differ in their policies towards the legal nature and implications of delictual liability. It thus requires a critical choice subjecting one set of interests to another.

The blanket approach of the rule in *Phillips v. Eyre* is inadequate to deal with the problem. This choice formula predetermines the result by hinging it on the absence of liability in the accident's place, paying little, if any, consideration to the personal circumstances of the foreign plaintiff. If *Phillips v. Eyre* is adhered to, a conflict of the type described must be treated as a special category.

State interest analysis addresses itself to the right issues. Current

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<sup>106</sup> Preference for the forum policy in a true conflict situation was recommended by Professor Currie in *Notes on Methods and Objectives in the Conflict of Laws*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 184 (1963).



judicial practice appears to uphold better protection of the domiciliary plaintiff afforded by the forum's law, thus refusing to give effect to the policy interests of the accident's country in protecting its own domiciliary. The moral rightness of this choice is far from obvious. Logically, the dilemma is no easier to resolve than to say whether a glass is half empty or half full. The choice is a matter of judicial policy, the type of discretion often exercised in conflict cases.

In an ideal world in which each political community provides for its injured and for families of accidents' fatalities, each claimant should be made to recover from his own home country compensation scheme, allowing the constituent to recover for injuries suffered abroad provided that the respective schemes apply on a personal, rather than on a merely territorial basis. Such arrangement would, of course, require an international convention.

At present, conflict methodology highlights the difficulty but is incapable of producing wholly equitable results. The answer, if one is sought, can only be provided by substantive domestic law. Protection of non-residents' interests by extending to them full benefits under the Act is primarily a matter of costs. Even so, there remains the problem of ceilings: relatively low ceilings on loss of earnings; very low ceilings for pain and suffering; and no compensation for loss of promotion prospects, long term medical costs and capital expenses abroad. A non-costly yet helpful middle ground solution may be reached if the New Zealand scheme (and any similar scheme) were extended to provide indemnity coverage to a New Zealand resident found liable in damages in a foreign court of competent jurisdiction in an action by a non-resident for personal injury suffered in New Zealand. This seems a bold suggestion considering the spirit and form of the Act. But a pragmatic, farsighted response to the foreign plaintiff's problem would have considerable advantages. It would alleviate individual difficulties which may be devastating, contribute to the international order and facilitate the judicial task of doing conflicts justice.

