THE LAW COMMISSION
AND
THE SCOTTISH LAW COMMISSION

(LAW COM. No. 193)
(SCOT. LAW COM. No. 129)

PRIVATE INTERNATIONAL LAW

CHOICE OF LAW IN TORT AND DELICT

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CHOICE OF LAW IN TORT AND DELICT

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AND
THE SCOTTISH LAW COMMISSION

(Item 7 of the Fourth Programme of the Law Commission)
(Item 15 of the Third Programme of the Scottish Law Commission)

PRIVATE INTERNATIONAL LAW

CHOICE OF LAW IN TORT AND DELICT

To the Right Honourable the Lord Mackay of Clashfern, Lord High Chancellor of Great Britain and the Right Honourable the Lord Fraser of Carmyllie Q.C., Her Majesty's Advocate

PART I

INTRODUCTION

1.1 This report is submitted in the context of Item 7 of the Law Commission's Fourth Programme: Private International Law, and Item 15 of the Scottish Law Commission's Third Programme, and concerns the "choice of law" rules by which the courts in England and Wales, Scotland and Northern Ireland decide which system of law shall apply in a case involving a tort or delict which contains a foreign element. Examples of torts and delicts in which our choice of law rules operate are: (a) a road accident in England which is the subject of an action in Scotland;[1] (b) a defamatory statement published in Germany which forms the basis of an action in England;[2] (c) an injury at work in Libya for which the claimant seeks compensation in England;[3] and (d) an injury sustained on a Scottish ship in foreign territorial waters and which is later the subject of an action in Scotland.[4] In all these cases, before a court considers the rights and liabilities of the parties to the dispute, it must determine by what law those rights and liabilities are to be determined. This is the "choice of law" process.

The background to this report

1.2 The two Commissions became involved in this field as a result of proposals for an E.E.C. Convention on the law applicable to contractual and non-contractual obligations. In 1978, the Brussels Group of Experts decided to confine the proposed Convention to contractual obligations only.[5]

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1. *McElroy* v. *McAllister* 1949 S.C. 110.
2. *Church of Scientology of California* v. *Commissioner of Metropolitan Police* (1976) 120 S.J. 690 (C.A.).
3. *Coupland* v. *Arabian Gulf Oil Co.* [1983] 1 W.L.R. 1136.
4. *MacKinnon* v. *Iberia Shipping Co. Ltd.* 1955 S.C. 20.
5. The Rome Convention on the Law applicable to Contractual Obligations was concluded on 19 June 1980 and was signed by the United Kingdom on 7 December 1981. The Contracts (Applicable Law) Act 1990 provides for the Rome Convention to have effect in the United Kingdom so enabling the United Kingdom to ratify the Convention.

However, it was agreed that negotiations should be resumed on non-contractual obligations later, with a view to preparing a separate convention on that subject. In 1979 the two Law Commissions set up a Joint Working Party to provide advice to the United Kingdom delegation which would be concerned with the intended negotiations, and also to consider the reform of our choice of law rules in tort and delict in Great Britain.[6] Although the proposed convention on non-contractual obligations did not proceed as planned, the Joint Working Party continued with its deliberations.

Our consultative document and this report

1.3 In 1984 the Law Commissions published a Consultation Paper on Private International Law: Choice of Law in Tort and Delict,[7] which was written[8] by the Joint Working Party under the chairmanship of Professor Aubrey Diamond and which included two Commissioners from each Commission. We received fifty written responses to our Consultation Paper, for which we are most grateful. A list of those who commented is contained in Appendix B to this report.

1.4 The Consultation Paper addressed a wide range of particular issues in the field of our private international law of tort and delict and made detailed recommendations on many of them. Whereas the scope of reform envisaged in the Consultation Paper was considerably wider than the result we have now agreed upon, our comprehensive examination of the whole range of issues has reinforced our conviction that the proposed simpler solution which is embodied in our recommendations is satisfactory. Our reasons for not producing what would, in effect, be an exhaustive code on the subject are explained at the relevant parts of the forthcoming pages. At this stage, it suffices to say that many of the matters discussed in the Consultation Paper were highly technical and theoretical matters which hardly ever occurred in practice. Furthermore, several of the matters involved controversial questions of characterisation.

1.5 The length of time spent on this project has been due, in part, to the fact that, at several stages during its history, work on it has had to give way to more pressing matters. Furthermore, policy issues concerning specific torts and issues proved difficult to resolve owing to the paucity of evidence on how the questions arose in practice. Also, consultation revealed that there were problems concerning the possible impact of the proposals on transnational torts: for instance, involving such matters as acid rain and defamatory statements originating in the United Kingdom. We have had to consider whether it would be desirable to make detailed recommendations on the many matters considered in the Consultation Paper, in spite of the fact that they do not seem to cause significant difficulties in practice. It will be seen that we have sought to remove the worst defect of the present law and replace it with a general framework which will cater for most cases. We have not tried to cater for every conceivable issue which can arise in a tort or delict case. Such matters can be left for the courts.

1.6 In addition, this report makes special provision for torts and delicts occurring within the United Kingdom. This was not envisaged in the Consultation Paper, which provisionally

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6. Later the project was extended to cover the whole of the United Kingdom.
7. Working Paper No. 87, Consultative Memorandum No. 62; Private International Law: Choice of Law in Tort and Delict.
8. Except for Part I which was the introduction.

concluded that the same choice of law rule should apply to actions in respect of torts and delicts occurring in the United Kingdom as to those occurring abroad.[9] The decision to make special provision for United Kingdom torts and delicts arose because of the Commissions' concern as to the possible impact of the proposals for transnational torts, such as those involving defamatory statements published in, but circulated outside, the United Kingdom. The distinguishing feature of the present law is the double actionability rule, viz. that in an action on a foreign tort or delict in the courts of the United Kingdom, there must be liability under the relevant foreign law as well as the law of the relevant part of the United Kingdom. We considered that the Consultation Paper perhaps did not give sufficient attention to the fact that, once double actionability disappears, our courts will for the first time come to apply foreign tort law reflecting radically different views and protecting radically different interests from those recognised by our domestic law.[10]

1.7 The Consultation Paper concluded that reform of our choice of law rules in tort and delict was desirable, the present law being anomalous, unjust and uncertain. Part IV of the Paper canvassed four basic options for reform of our choice of law rules in tort and delict:

(i) The law of the forum.

(ii) Various kinds of rule selecting approach, selecting the applicable law on the basis of the particular issue in question in the light of the interests of the various countries whose laws fell to be considered.

(iii) The law of the place of the wrong, the *lex loci delicti*, with a proper law[11] exception: Model 1.

(iv) The proper law with presumptions in certain types of case: Model 2.

1.8 The Consultation Paper rejected both (i) and (ii). The great majority of consultants also rejected them and we think rightly so. The clear majority of consultants favoured Model 1; only a small minority favoured Model 2. Since consultation there have been several other expressions of support for Model 1.[12] We are of the opinion that the general approach found in Model 1 is preferable to that found in Model 2. The rule is clear and simple, combining the certainty of a general rule that the *lex loci delicti* should apply, with the flexibility of a proper law exception.

The structure of this report

1.9 In Part II of this report we summarise the present law and the problems with it. Part III is divided into three sections, the first dealing with our general proposal for reform, the second dealing with the specific problem of torts and delicts in the United Kingdom, and the third dealing with particular torts, delicts and issues. Our recommendations for reform are summarised in Part IV. A draft Bill to give effect to our recommendations, together with explanatory notes, appears in Appendix A.

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9. Consultation Paper para. 5.92.
10. See in this regard, Briggs, (1989) 105 L.Q.R. 359, 362.
11. i.e. the law of the place of the "closest and the most real connection".
12. *Breavington* v. *Godleman* (1988) 80 A.L.R. 362, 371 *per* Mason C.J.; Castel, *Canadian Conflict of Laws* (2nd ed., 1987), p. 621; Cheshire & North, *Private International Law* (11th ed., 1987), p. 551; Jaffey, *Introduction to the Conflict of Laws* (1988), p. 189; Morse, "Products Liability in the Conflict of Laws", (1989) 42 C.L.P. 167, 186.

Acknowledgments

1.10 We are grateful to all those who commented on our Consultation Paper. They are listed in Appendix B to this report. We are also grateful to Miss Eva Lomnicka and Miss Elizabeth Iyamabo who prepared analyses of the consultation for us. We also derived much assistance from a seminar on choice of law in tort and delict, with particular reference to our Consultation Paper, which was held in March 1985 under the auspices of the British Institute of International and Comparative Law.

1.11 We are particularly grateful to our former colleague, Dr. Peter North, Principal of Jesus College, Oxford, and the co-author of *Cheshire & North's Private International Law*,[13] who initiated work on this topic and who continued to provide valuable assistance and advice after leaving the Law Commission. We are similarly grateful to Professor Lawrence Collins, the general editor of *Dicey & Morris on The Conflict of Laws*[14] and a partner in Herbert Smith & Co., who acted as a consultant in the latter stages of the project. Although we would not wish to attribute to either of them agreement with all the recommendations that we have made, their assistance and advice in the preparation of an agreed policy proved to be invaluable.

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13. (11th ed., 1987).
14. (11th ed., 1987).

PART II

THE PRESENT LAW AND THE NEED FOR REFORM

Outline of the present law

2.1 The choice of law process in the field of tort and delict has been said to raise "one of the most vexed questions in the conflict of laws".[15] The present law is explained in Part II of the Consultation Paper in detail. The following is a short outline of the present law.

2.2 The applicable law in a tort or delict case is determined, under English law according to the rule in *Phillips* v. *Eyre*,[16] and under Scots law according to the rule in *McElroy* v. *McAllister*.[17] The practical effect of these two rules is the same: the claimant must have a cause of action under both the *lex fori*[18] and the law of the place where the tort or delict occurred. Furthermore, the wrongdoer will not be liable if he has a defence under either of those two laws. It follows that no action will lie in this country in respect of a class of tort or delict unknown to our domestic law. The basic rule is therefore favourable to the wrongdoer. To this general rule an exception was created by English law in *Boys* v. *Chaplin*,[19] which may mean that in a particular case a court could apply either English law alone, the law of the place where the tort or delict occurred alone or another law alone.[20]

2.3 The facts of *Boys* v. *Chaplin* were as follows. P was injured in a road accident in Malta caused by the admitted negligence of D. Both parties were normally resident in England, but were stationed in Malta at the time of the accident as part of H.M. Armed Forces. P sued D in England. The question arose whether damages were to be assessed by Maltese law (limited to £53 special damages in respect of financial loss directly suffered and expenditure necessarily incurred) or by English law (under which, in addition, he could recover £2,250 general damages in respect of pain, suffering and loss of amenities). The House of Lords unanimously allowed P to recover damages assessed according to English law. Unfortunately, it has proved exceedingly difficult to extract a *ratio decidendi* from the case.[21]

2.4 Lord Hodson[22] said that the right to damages for pain and suffering was a substantive, not a procedural, issue and applying the rule of double reference in *Phillips*

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15. *Boys* v. *Chaplin* [1968] 2 Q.B. 1 (C.A.), 20 *per* Lord Denning M.R.
16. (1870) L.R. 6 Q.B. 1.
17. 1949 S.C. 110.
18. This, the first limb of the rule in *Phillips* v. *Eyre*, is sometimes referred to as the rule in *The Halley*, the case from which it is derived: (1868) L.R. 2 P.C. 193. There is no other reported case in which it was part of the *ratio decidendi*: Dicey & Morris, op. cit., p. 1367.
19. [1971] A.C. 356.
20. Consultation Paper, paras. 2.23-2.36.
21. Cheshire & North, *Private International Law*, (11th ed., 1987), 519-521; Carter, "Torts in English Private International Law", (1981) 52 B.Y.B.I.L. 9, 24-25; Briggs, "What did *Boys* v. *Chaplin* decide?", (1984) 12 Anglo-Am. L.R. 237.
22. At pp. 379-380.

v. *Eyre*, P would fail in his claim for general damages.[23] However, the interests of justice required some qualification of the general rule. Controlling effect would be given to the law of England which, because of its relationship with the occurrence and the parties, had the greater concern with the specific issue raised in the litigation. Lord Guest[24] took the view that the question in issue related to the quantification of damages, which was a question of procedural law to be decided by the *lex fori*. Lord Donovan,[25] preferring not to make exceptions to the rule in *Phillips* v. *Eyre*, said that once an English court was competent to entertain an action under the rule in *Phillips* v. *Eyre*, it was right that it should award its own remedies. Lord Wilberforce[26] affirmed the basic rule requiring actionability as a tort under the *lex fori* plus the existence of civil liability as between the actual parties under the *lex loci delicti*. However, there were occasions when some qualification to this rule was required. In the present case, the issue whether recovery should be allowed under a particular head of damages required to be segregated from the rest of the case, related to the parties and their circumstances, and tested in relation to the policy of the local rule and of its application to the particular parties. Having done this, he felt that there was no reason why the English court should not apply its own rule of damages. Lord Pearson[27] said that, under the rule in *Phillips* v. *Eyre*, the substantive law of England plays the dominant role, determining the cause of action, whereas the *lex loci delicti* plays a subordinate role, in that it may provide a justification for the act and so defeat the cause of action, but does not itself determine the cause of action. In the present case, there was no justification for D's acts under Maltese law, so English law applied and P recovered in full. However, he also admitted that an exception to the general rule might be required in order to discourage forum shopping.[28]

2.5 Subsequent decisions have done little to clarify the status of the exception in *Boys* v. *Chaplin*. Although Lord Wilberforce's speech has on the whole been the most favourably received,[29] there are a number of unresolved questions.[30] Can the exception apply when the

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23. This conclusion was reached by Diplock L.J., dissenting, in the Court of Appeal: [1968] 2 Q.B. 1.
24. At p. 381.
25. At p. 383.
26. At pp. 389, 392.
27. At pp. 398, 406.
28. He did not elaborate on this statement, although since *Boys* v. *Chaplin* was decided, the doctrine of *forum non conveniens* has become a part of English law. A flagrant example of forum shopping occurred in *Machado* v. *Fontes* [1897] 2 Q.B. 231. P sued D in England in respect of a libel published in Brazil. The libel was not actionable in civil proceedings in Brazil but could be made the subject of criminal proceedings. The Court of Appeal, on an interlocutory appeal, refused permission for D to amend his pleadings so as to argue that the publication was not actionable in Brazil. The result was that P could succeed because the libel was actionable in England and was not justifiable in Brazil, even though P could not have recovered damages in Brazil. However, *Machado* v. *Fontes* was over-ruled by a narrow majority in *Boys* v. *Chaplin*. Lord Hodson (at p. 377), Lord Guest (at p. 381) and Lord Wilberforce (at p. 388), all supported double actionability. In the minority, Lord Donovan (at p. 383), and Lord Pearson (at p. 398), did not equate non-justifiability with actionability, thus supporting the principle in *Machado* v. *Fontes*.
29. *Church of Scientology of California* v. *Commissioner of Metropolitan Police* (1976) 120 Sol. Jo. 690, more fully referred to in *Coupland* v. *Arabian Gulf Oil Ltd.* [1983] 1 W.L.R. 1136; *Armagas Ltd.* v. *Mundogas S.A.* [1986] A.C. 717, 740-741, 752-753 (C.A.), affm'd, without discussion, by the House of Lords. In *The Hannah Blumenthal* [1983] 1 A.C. 854, 873 (C.A.), Lord Denning M.R. suggested that a lower court could choose whichever *ratio* it liked.
30. Cheshire & North, *op. cit.*, p. 536; Fawcett, "Policy Considerations in Tort Choice of Law", (1984) 47 M.L.R. 650, 665-669.

parties are not from the same state? Will the exception, in addition to allowing the sole application of the *lex fori*, allow the application of the *lex loci delicti* alone or the law of a third country alone? Will the exception apply even where it has the effect of giving P less recovery than under the general rule, or no recovery at all? Will the exception apply to issues other than heads of damages, and if so, which issues? Clearly, the exception is uncertain in ambit and it is unclear what circumstances will justify its use. It is also unclear to what extent the existence of the exception would be accepted in Scots law.[31]

Defects of the present law and the need for reform

2.6 Part III of the Consultation Paper put forward the case for reform, criticising the present law on three grounds. First, that the law is anomalous. In every other area of the civil law, apart from certain aspects of family law such as divorce, custody, guardianship and wardship proceedings, the United Kingdom courts are prepared to apply a foreign law in an appropriate case and to allow the exclusive application of this law rather than concurrent application with the *lex fori*. The prominent role given to the *lex fori* in the leading case of *The Halley*,[32] a decision of the Privy Council on appeal from the High Court of Admiralty, may have been understandable in view of the earlier history of actions on foreign torts and delicts. First, owing to strict rules as to venue, the common law courts could not originally entertain an action on a foreign tort, and so by a legal fiction the venue was laid in England.[33] Secondly, the law of tort and delict was formerly seen, much more than it is today, as having a punitive rather than a compensatory function. As such it was more closely allied to criminal law, an area of the law where there is no question of a court in this country applying anything other than the domestic law of England or Scotland.

2.7 The exceptional role given to the substantive domestic law of the forum in the law of tort, apart from being almost unknown in the private international law of any other country, is parochial in appearance and "also begs the question as it presupposes that it is inherently just for the rules of the English domestic law of tort to be indiscriminately applied regardless of the foreign character of the circumstances and the parties".[34] We think that it is correct in principle that the introduction of a foreign element may make it just to apply a foreign law to determine a dispute, even though the substantive provisions of that foreign law might be different from our own. There is no reason why this general principle of the conflict of laws should not apply in cases involving torts and delicts. Apart from matters of procedure, and subject to overriding public policy considerations, there is no reason why the *lex fori* should be applied in all cases involving a tort or delict regardless of the foreign complexion of the factual situation.

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31. Consultation Paper, paras. 2.45-2.46.
32. (1868) L.R. 2 P.C. 193.
33. Consultation Paper, para. 2.9.
34. Carter, "Torts in English Private International Law", (1981) 52 B.Y.B.I.L. 9, 24.

2.8 Secondly, the Consultation Paper argued that the present law leads to injustice. The law is to the advantage of the wrongdoer because the claimant cannot succeed in any claim unless *both* the *lex fori* and the *lex loci delicti* make provision for it, whereas the wrongdoer can escape liability by taking advantage of any defence available under *either* of these laws.[35] Applying the *lex fori* alone might be an advantage if it enabled a court in this country "to give judgment according to its own ideas of justice",[36] but double actionability does not necessarily enable a court in this country to do this. On the contrary, since the claimant can never succeed to a greater extent than is provided by the less generous of the two systems of law concerned, a court will be prevented from applying its own standards depending on the particular divergences between the two systems. Thus, if English domestic law gives a cause of action but the relevant foreign law does not, then under double actionability there is no recovery.

2.9 Thirdly, the Consultation Paper argued that the present law was uncertain. While the general double actionability rule is clear, the nature of the exception in *Boys* v. *Chaplin* is not clear.[37] The exception is almost wholly undefined and the manner of its application in future cases is a matter for speculation.[38] Clearly it can result in the application of the *lex fori* alone, but it is not clear whether it could in appropriate circumstances result in the application of the *lex loci delicti* alone or in the application of some third law alone. Nor is it clear what circumstances will justify the use of the exception.

2.10 Despite these criticisms, it was argued by a number of consultants that the present law is not completely without merit. First, the present law has had the advantageous effect of preventing the courts from attaching conclusive significance to foreign laws having radically different purposes from our own. Secondly, there is only one reported case, *McElroy* v. *McAllister*,[39] where real injustice was done, and it is likely that, at least in England, the case would be decided differently in the light of *Boys* v. *Chaplin*, which may provide the flexibility to avoid results which would offend the conscience. Thirdly, while it may be a feature of uncertain law that it engenders much litigation, the paucity of authority is some indication that legal advisers are advising with some degree of confidence. Finally, in view of the acceptance into English law of the doctrine of *forum non conveniens*,[40] some cases where the application of the *lex fori* is inappropriate can be eliminated at the jurisdiction stage.[41] Furthermore, it was the view of several commentators that legislative intervention in the conflict of laws has on the whole been unsatisfactory and, in the particular case of tort and delict, is unnecessary.

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35. An example of such injustice was the case of *McElroy* v. *McAllister* 1949 S.C. 110.
36. *Boys* v. *Chaplin* [1971] A.C. 356, 400 *per* Lord Pearson.
37. See para. 2.5 above.
38. *Metal und Rohstoff A.G.* v. *Donaldson Lufkin & Jenrette Inc.* [1990] Q.B. 391, 439-440.
39. 1949 S.C. 110. Consultation Paper, paras. 2.41-2.42.
40. *The Spiliada* [1987] A.C. 460.

2.11 Nevertheless, we maintain the view expressed in our Consultation Paper, which was shared by a large majority of those who commented on it, that the law is defective and in need of reform. Furthermore, we do not think that it is satisfactory to await judicial reform. The case which constitutes the major problem with the present law, *The Halley*, having being incorporated into the first arm of the rule in *Phillips* v. *Eyre*, has received an almost unquestioned judicial acceptance.[42] The rule in *The Halley* constitutes an unwarranted anomaly,[43] and should be changed. This is central to our proposed reforms.

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41. Although where jurisdiction is assumed under the Brussels Convention, the doctrine of *forum non conveniens* probably has no application in the United Kingdom: see Dicey & Morris, *op. cit.*, p. 398; Cheshire & North, *op. cit.*, pp. 326-329. See also *S & W Berisford plc* v. *New Hampshire Insurance Co.* [1990] 3 W.L.R. 688; *Arkwright Mutual Insurance Co.* v. *Bryanston Insurance Co. Ltd.* [1990] 3 W.L.R. 705.
42. Carter, *op. cit.*, p. 13.
43. *Ibid.*, p. 12.

PART III

REFORM IN DETAIL

GENERAL PROPOSAL

The Consultation Paper

3.1 The Consultation Paper put forward two Models for reform with no preference for either. The Paper then examined the implications for reform, on the basis of either Model, for a range of different torts and delicts, followed by an examination, in the light of the two Models, of a range of particular issues which could arise in any type of claim in tort or delict. In essence, Model 1 was a rule of reference to the law of the place of the wrong, with a definition of that place for most cases coupled with an exception in favour of the law of the "closest and the most real connection"; whereas Model 2 was a more general rule applying the law of the place with the closest and most real connection coupled with presumptions in favour of the place of the wrong.

3.2 As indicated in Part I,[44] we are now of the opinion that Model 1 should be the basis for reform, although subject to some important modifications. It has a number of merits. It is built upon part of our existing law and accords with the law throughout much of the rest of Europe.[45] It would promote uniformity and discourage forum shopping. To the extent that the parties have any expectations at all, a general rule based on the applicability of the *lex loci delicti* probably accords with them. Where, as will often happen, one of the parties is connected with the place of the wrong, as where he is habitually resident there, it is right that he should be able to rely on his local law. As for the person who acts in a country with which he has no lasting connection, he can expect that if he commits a wrong he will be liable to the extent that the law in question stipulates. Similarly if he has a wrong committed against him, he can expect to have no more preferential treatment than if the wrong had been committed against someone habitually resident there.

3.3 While the great majority of cases will be decided by application of the law of the place of the wrong, in some cases this law will be inappropriate. It is a feature of the hardest cases that principles of justice conflict. In *Boys* v. *Chaplin*,[46] two such principles conflicted: the principle that a person should not be held liable to a greater extent than he is liable by the law of the country where he acted, and the principle that justice is done to a person if his own law is applied.[47] The proper law exception which is incorporated into our proposals provides the flexibility to do justice in hard cases.

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44. See para. 1.8 above.
45. See the Appendix to the Consultation Paper. Indeed, in cases governed by the Judgments Convention, Article 5(3) provides, as an additional basis of jurisdiction, "the courts for the place where the harmful event occurred."
46. [1971] A.C. 356.
47. Jaffey, "The Foundations of Rules for the Choice of Law", (1982) 2 O.J.L.S. 368, 386.

3.4 Before examining in more detail our recommended option, some consideration must be given to Model 2. Although we have rejected Model 2 as a basis for our reformed choice of law rules, there is of course a proper law element in the solution we recommend, which is discussed below. The proper law of the tort was criticised by consultants on several grounds. It was said that a rule based on "real and substantial connection" is a non-rule without any definition; that the uncertainty in determining the proper law is capable of giving rise to a lottery of justice, producing inconsistent results and allowing a judge to choose whichever law he likes; that real and substantial connection has to concentrate on personal characteristics which should be irrelevant in determining the law applicable to a tort or delict case; and that it is a rule more appropriate for contract law which involves forward planning of affairs.

3.5 We believe that some of these criticisms have force, but that the case against the proper law of the tort has been over-stated. While the proper law of the tort has been criticised for the uncertainty which has obtained in certain United States juridictions, the problems there have arisen largely because of the radically different domestic tort laws in different states and have been exacerbated by the use of government interest analysis.[48] Although we think that it is unacceptable as a general rule, we do think that the proper law should have a residual role to play in those circumstances where justice between the parties would not be achieved by application of the law of the place of the wrong. The proper law exception to be found in our proposals enables such issues to be addressed directly.

Our preferred solution

3.6 Although most consultants supported Model 1 in principle, the comments we received have led us to recommend modifications to it. The result is that our modified version of Model 1 combines the certainty of a general rule, that the *lex loci delicti* should apply, with the flexibility of a proper law exception. Under Model 1 before modification, the general rule would have involved application of the law of the place of the wrong, with definitions of the applicable law in multi-state cases. However, in a case where elements in the sequence of events occur in different countries, it is necessary to identify which of those countries is to provide the applicable law. Furthermore, in some multi-state cases, for instance an international conspiracy where elements of the conspiracy occur in many countries,[49] there is a fiction in identifying any particular country as the place of the tort or delict when what is meant is that the country in question provides the applicable law. The real question concerns the choice of the most appropriate law to do justice between the parties involved in the litigation. Instead of stating the general rule that the law of the place of the tort or delict applies, and then identifying that place for certain types of tort or delict, we recommend a new formulation of Model 1, under which the applicable law is identified directly and without involving the fictional place of the tort or delict. In cases involving personal injury or property damage, it is identified as that of the place where the person or property was when injured or damaged, and in cases involving death, as that of the place where the deceased was when the fatal injury was inflicted.

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48. Carter, *op. cit.*, pp. 19-21; Symeonides, "Choice of Law in the American Courts in 1988", (1989) 37 Am. J. Comp. Law 457, 461 ff.
49. *Metall und Rohstoff A.G.* v. *Donaldson Lufkin & Jenrette Inc.* [1990] Q.B. 391.

3.7 This formulation has the following advantages. By identifying the applicable law rather than defining the place of the tort or delict, it does not assume the existence of a single place of the tort or delict. Furthermore, it does not require a multi-state case to be defined. On the other hand, in a case not involving personal injury, property or death but where the sequence of events is confined to one country, the applicable law has to be deduced from the residual category proposed in the Consultation Paper, viz. that of the country where the most significant elements in the sequence of events occurred,[50] rather than being stated clearly as the law of the place where the tort or delict occurred. However we believe that the advantages of the proposed alteration outweigh this disadvantage.

3.8 In addition to the above *prima facie* rules, our agreed policy envisages an exception or a rule of displacement. A few examples will be given of cases where such a rule of displacement might be appropriate:[51]

(1) Where the *lex loci delicti* is fortuitous, for example, where a tort or delict is committed wholly aboard a ship in territorial waters. It seems unsatisfactory that the law of the Dominican Republic should be applied to a claim made by a Scottish ship's engineer against Scottish shipowners by reason of an accident in the course of his employment, simply because the ship happened to be anchored in Dominican waters.[52] A similar argument would apply to an air disaster.

(2) Where, for example, a group of friends, all from this country, take a motoring holiday in Europe, the parties' connection with each other prior to the tort or delict committed by one of them against another or others of them may make it appropriate that their mutual rights and liabilities be regulated by our law. This is more closely connected with the parties than the law of the place where they happen to be when the tort or delict occurs.

(3) Similarly, even where there is no pre-existing relationship between the parties but where every factor in the case other than the place of the accident points to a particular system of law, as occurred in *Boys* v. *Chaplin*, it may be inappropriate to apply the law of the place of the tort or delict.

3.9 The rule of displacement as formulated in the Consultation Paper was as follows:

> "The law of the country where the tort or delict occurred may be disapplied, and the law of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection applied instead, but only if the occurrence and the parties had an insignificant connection with the country where the tort or delict occurred and a substantial connection with the other country."[53]

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50. Para. 4.87.
51. Consultation Paper, para. 4.94.
52. *MacKinnon* v. *Iberia Shipping Co.* 1955 S.C. 20. See Dicey & Morris, *op. cit.*, p. 1363.
53. Consultation Paper, para. 7.2.

The comments of consultants have led us to make several modifications to this rule of displacement. First, there is force in the argument that the rule formulated in the Consultation Paper is too narrowly drawn. The reference to the occurrence and the parties could be misleading. The rule of displacement was intended to cater for the situation where the tort or delict, viewed as a whole, had a much closer connection with the law of a country other than the one selected by the general rule. Thus we have decided that the exception should no longer refer only to the occurrence and the parties.

3.10 Secondly, we propose that an additional function be given to the rule of displacement. It will be recalled that one reason for modifying Model 1 was to avoid the fiction that there was always a single country in which the tort or delict could be said to have occurred. Under our modified rules, in cases other than personal injury, damage to property and death, the applicable law is that of the country in which the most significant elements in the sequence of events occurred. In many cases, this country will be easy to identify. But in the most difficult cases, such as where the participants in a tortious conspiracy operate in several different countries, the sequence of events will be sufficiently complicated that it could not realistically be said that the most significant elements occurred in any particular country. In order to save a court from having to look for what is not really there, we have concluded that the rule of displacement should apply where there is no single country in which the most significant elements in the sequence of events occurred. We believe that this extension is justified in principle and also goes some way to meet those who were critical of the Consultation Paper's formulation of Model 1 on the grounds that it was based on the fictional notion of a single place of the tort or delict.

3.11 Thirdly, the Consultation Paper's formulation of Model 1 required an insignificant connection with the *prima facie* applicable law before that law could be displaced. We are of the view that some level of threshold for the operation of the general exception should be maintained in order to avoid the argument, in every case, that the *prima facie* applicable law ought to be displaced. However, the problem with the threshold in the form appearing in the Consultation Paper is that it prevents the displacement of the law selected by the general rules where there is some significant connection with this law even though there is a much stronger connection with another law. Thus our proposal is that the threshold be lowered by concentrating less on the insignificance of the connection of the tort or delict with the system of law indicated by the general rules, and more on how substantial is the connection of the tort or delict with the system of law of another country.

3.12 Finally we have agreed that the treatment of the time at which the real and substantial connection be determined, required modification. The Consultation Paper suggested that one should look for this connection "at the time of the occurrence". This was intended to exclude consideration of events which occurred after the tort or delict, such as a change in the habitual residence of the parties. However, it equally seems to exclude, for instance, the fact that the parties had a pre-existing relationship before the occurrence. This is a valid criticism and it is our view that there should be no reference to "the time of the occurrence".

3.13 The above recommendations can be summarised as follows:

(a) In cases of personal injury and damage to property, the *prima facie* applicable law should be the law of the country or territory where the person was when he was injured or the property was when it was damaged.

(b) In cases of death, the *prima facie* applicable law should be that of the country or territory where the deceased was when he was fatally injured.

(c) In all other cases the *prima facie* applicable law should be that of the country or territory in which the most significant elements in the sequence of events occurred.

(d) If either

(i) in any case referred to in paragraph (c) above there is no single country or territory in which the most significant elements in the sequence of events occurred, or

(ii) in any of the cases referred to above it would be substantially more appropriate that another law should apply, having regard amongst other things to factors relating to the parties and to all of the surrounding circumstances,

the applicable law should be that of the country or territory with which the tort or delict had the most real and substantial connection.

A PROVISO FOR TORTS AND DELICTS OCCURRING WITHIN THE UNITED KINGDOM

3.14 Under the present law, notwithstanding the existence of a foreign element, where a tort or delict is committed in the United Kingdom it appears that in an action in this country the applicable law will be that of the relevant part of the United Kingdom.[54] It is unclear whether our conflicts rules do not apply to torts and delicts committed in the United Kingdom or whether they do apply and result in the application of the *lex fori* because the *lex loci delicti* is the same as the *lex fori*.[55] The matter has only been one of significance since the creation of the exception in *Boys* v. *Chaplin*.[56] If our conflicts rules do apply to torts and delicts occurring within the United Kingdom, and the exception in *Boys* v. *Chaplin* is capable of resulting in the application of a third law which is neither the *lex fori* nor the *lex loci delicti*, then the *lex fori* could in theory be displaced in favour of a third law.

3.15 In the Consultation Paper,[57] the view was taken that as a matter of principle there was no reason for excluding United Kingdom torts and delicts from the operation of our proposed new choice of law rules. Hence, it would be possible for a foreign law to apply in respect of a tort or delict committed in the United Kingdom, although the Consultation Paper accepted that, in practice, where the train of events occurred in this country, and where the action was being brought here, it would be highly unlikely that another country would have a closer and more real connection with the occurrence and the parties.[58]

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54. *Szalatnay-Stacho* v. *Fink* [1947] K.B. 1 is usually cited in support of the proposition that English law applies in respect of wrongs committed in England.
55. See Consultation Paper, para. 2.48.
56. [1971] A.C. 356.
57. See para. 5.92.
58. *Ibid.*

3.16 Only a small number of consultants commented on the view that a reformed choice of law rule should apply to torts and delicts committed in the United Kingdom. However, many of the points raised by consultants on particular torts and delicts involved events occurring in the United Kingdom with transnational implications. One such concern involved statements made in this country which are not defamatory by our law but which are defamatory in the country in which they are published. Another involved the enterprise whose activities are lawful in this country but which cause environmental damage abroad which is actionable under the foreign law. We do not think that it is self-evidently desirable that a person who acts in this country in accordance with our law, for instance relating to defamation or nuisance, should be held liable in this country by the application of a foreign law. The foreign law might reflect substantially different purposes from our own law, on which the person relied assuming that his acts were lawful. We have therefore concluded that the general rules we have proposed should not apply to torts and delicts occurring within the United Kingdom. The effect of this would be that where the act or omission which gives rise to the cause of the action occurs in the United Kingdom, including those cases where loss or damage occurs abroad as a result of conduct which occurs in the United Kingdom, the law of the relevant part of the United Kingdom shall apply. There will exist cases where the wrong in question is only remotely connected with the United Kingdom: for instance, an international tortious conspiracy centred abroad but in certain insignificant respects involving conduct by the participants in the United Kingdom. Implementing legislation is drafted so that there will not be an automatic application of the law of the relevant part of the United Kingdom where only an insignificant part of the relevant conduct occurs in this country. In legislating for this result, special provision has been made for defamatory statements which are published both in this country and abroad. This is dealt with at paragraph 3.33 below.

3.17 In the opinion of some commentators, the present law has several merits. First, in the case of a person living permanently in the United Kingdom, the application of the law of the United Kingdom upholds two principles of the conflicts of laws: that justice is done to a person if his own law is applied, and that a person should not be liable to a greater or lesser extent than he is liable by the law of the place where he acted. As regards the foreign defendant, the principle of *locus regit actum* applies. Most people are familiar with the idea of the territoriality of law, so that, if they commit a wrong abroad they can expect the particular country's law to govern their liability.

3.18 Secondly, some difficult problems which would otherwise arise are avoided. These include the problem of multi-state torts, including those involving acid rain and defamation. For instance, it seems unfair that someone who lives permanently in this country and who makes a statement in this country which is truthful, fair comment or privileged under our domestic law should be liable according to the terms of an otherwise applicable foreign law, simply because the statement was also published abroad. While it could be argued that such problems should be left to public policy, the problem with such an argument is that public policy in the conflict of laws has traditionally only excluded intrinsically repugnant foreign law or foreign law which is contrary to this country's national interest.[59] In the defamation example given above, there might be a natural reluctance to apply the foreign law, although it could be difficult and, in the case of a friendly country, embarrassing for a judge to stigmatise it as contrary to public policy.

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59. Carter, "Rejection of Foreign Law: Some Private International Law Inhibitions", (1984) 55 B.Y.B.I.L. 111, 123ff.

3.19 It could be argued that such a proviso to our general rules would produce curious results, as where two Maltese are involved in a car crash in England and English law is applied. Nevertheless, this represents the present law and would be a straightforward application of the principle of *locus regit actum*. It is hardly surprising that an English court applies English law to a tort committed in England, just as it would have been hardly surprising if a Maltese court had applied Maltese law in the circumstances of *Boys* v. *Chaplin*. In a case where a court in the United Kingdom assumed jurisdiction under our common law rules,[60] it would be open for the court to stay the action at the behest of the defendant under the doctrine of *forum non conveniens* if it could be shown that the case could be most suitably tried elsewhere in the interest of all the parties and for the ends of justice.[61] Where, however, jurisdiction is covered by the Judgments Convention, the doctrine of *forum non conveniens* probably has no application.[62] Even so, the potential injustice in the application of our law in respect of torts and delicts committed here is not obvious.

PARTICULAR TORTS, DELICTS AND ISSUES

3.20 We now examine in detail the torts, delicts and issues discussed in Parts V and VI of the Consultation Paper, where a number of provisional conclusions were reached on which comments were invited. The question whether any of these matters should be included in legislation gave rise to much debate on consultation. We have decided to recommend that, apart from defamation, no special provision should be made in implementing legislation for any of these particular torts and issues. There are a number of general reasons for this conclusion, not all of which apply to every tort or issue. Where particular reasons apply, these are considered in the forthcoming pages. The general reasons are as follows.

3.21 In some cases, for instance the questions of delictual capacity and vicarious liability, the applicable law will be derived from our general rules. In these cases, there is no need to make special provision for the applicable law. In other cases, the provisional conclusions in the Consultation Paper were uncontroversial and represented the present law, for instance the proposals relating to defences and damages. Some of the particular torts and delicts involved highly technical and largely theoretical matters which appear hardly ever to be litigated, for instance the question of which law governs whether the claimant can sue directly the wrongdoer's insurer rather than the wrongdoer himself. Again, there is no necessity for implementing legislation to deal with these matters. In other cases, we felt

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60. Cheshire & North, *op. cit.*, chs. 10-11.
61. *The Spiliada* [1987] A.C. 460.
62. Cheshire & North, *op. cit.*, pp. 326-329; Dicey & Morris, *op. cit.*, p. 398; cf. Hartley, *Civil Jurisdiction and Judgments* (1984), pp. 78-80. See also *S & W Berisford plc* v. *New Hampshire Insurance Co.* [1990] 3 W.L.R. 688; *Arkwright Mutual Insurance Co.* v. *Bryanston Insurance Co. Ltd.* [1990] 3 W.L.R. 705. Cf. Collins, (1990) 106 L.Q.R. 535, who questions whether the power to stay should not be available where the natural forum is a non-contracting state.

that it was undesirable to make legislative provision because controversial questions of characterisation were involved, for instance, the question of contractual defences to tortious claims, intra-family immunities and the transmission of claims on death. We do not think it desirable, in legislation dealing with choice of law rules in tort and delict, to include matters which may not properly be characterised as tortious or delictual and which may better be characterised as relating to the law of contract, succession, restitution etc. Having said this, the inflexibility of traditional tort choice of law rules has probably led the courts to characterise particular issues as non-tortious so as to avoid unsatisfactory results.[63] Our more flexible rules should mean that there is less need to avoid classifying particular problems as tortious.

Particular Torts and Delicts

3.22 Part V of the Consultation Paper singled out eight different types of tort and delict, which were familiar and of relatively common occurrence, for which there could possibly be special treatment in choice of law legislation. In the case of three of these, traffic accidents, products liability and interference with goods, it recommended that there need be no special treatment. Consultation produced nothing of significance on any of these matters and we recommend that no special treatment be made for any of them.

Torts and delicts occurring in a single jurisdiction within the United Kingdom

3.23 The Consultation Paper[64] provisionally concluded that whatever form the reformed choice of law rules took, they should also apply to torts and delicts occurring within the United Kingdom. For the reasons given earlier,[65] we are now of the opinion that where proceedings are brought in the United Kingdom, the law of the relevant part of the United Kingdom should apply in respect of wrongs committed in that part.

Economic torts

3.24 The Consultation Paper[66] provisionally concluded that no special treatment should be accorded to economic torts. We recommend that this be confirmed because such cases will be adequately covered by our general rules. Furthermore, if we made special provision for economic torts, there would probably be definitional problems, since the phrase "economic tort" admits of no precise definition.

Nuisance

3.25 The Consultation Paper[67] provisionally concluded that no special provision need be made for nuisance. We recommend confirmation of this. Although we believe that nuisance

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63. Morse, *Torts in Private International Law* (1978), pp. 144-145.
64. See paras. 5.89-5.92.
65. See paras. 3.16-3.19 above.
66. See paras. 5.57-5.66.
67. See paras. 5.69-5.70.

and other potentially transnational torts, such as defamation, cause special problems, we are of the opinion that any such problems will be dealt with satisfactorily by our United Kingdom proviso. An example of such a problem in the law of nuisance would occur if an English court applied a foreign law to render liable an English enterprise's activities in this country, although such activities are regarded as reasonable and may be licensed or even required by English law. For instance, coal-fired power stations are used to generate electricity. By-products of the process include sulphur dioxide and carbon dioxide, which react with water vapour in the air to produce what is commonly referred to as "acid rain". This acid rain may cause environmental damage both in the United Kingdom and abroad. The enterprise in question might not be liable under the English domestic law of nuisance. In the absence of our proviso, it might be liable under our rules of private international law if liability existed under the relevant foreign law, which law, let us say, imposes absolute liability for environmental damage. However, under our proviso, the wrongdoer who commits a tort in the United Kingdom would escape liability greater than under the relevant part of the United Kingdom where he acted.[68] We have considered the argument that this proviso is unduly nationalistic, and that it is "act oriented", thus derogating from our basic rules which are "result oriented". Nevertheless, we believe that a person who regulates his activities in accordance with the law of this country, and who commits a tort or delict in this country, should not be liable to a greater extent than is stipulated under our domestic law.

Torts involving ships or aircraft

(a) On or over territorial waters

3.26 We recommend that implementing legislation should not make special provision for torts and delicts on or over territorial waters involving ships, to which the rule in *Phillips* v. *Eyre* applies,[69] and aircraft, concerning which there is no judicial authority.[70] Although the Consultation Paper considered this matter in some detail,[71] there is only one unsatisfactory aspect of the present law, namely, that where a tort or delict is committed in territorial waters, let us say on a British ship sailing through Bermudan territorial waters, it is necessary to show that liability existed under both Bermudan law and also the *lex fori*. Under our reformed choice of law rules, it would no longer be necessary to show double actionability. Hence, the one outstanding problem in this area is solved by our general rules.

(b) On or over the High Seas

3.27 The Consultation Paper[72] provisionally recommended no change in the law relating to collisions on the high seas, or to any other case to which the general principles of English maritime law extend or to which our existing choice of law rules in tort and delict do not apply.[73] We recommend that this be confirmed, so that implementing legislation should not extend to those torts and delicts occurring on the high seas to which, at present, our choice

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68. See paras. 3.14-3.19 above.
69. Dicey & Morris, *op. cit.*, pp. 1413-1415.
70. *Ibid.*, pp. 1415-1417.
71. Paras. 5.71-5.88.
72. Paras. 5.71-5.74.
73. Consultation Paper, para. 2.109; McNair, *The Law of the Air*, (3rd ed., 1964), pp. 289-290.

of law rules do not apply.[74]

Liability resulting from the making of statements

3.28 The tort of defamation has given rise to some particularly intractable problems, for a number of reasons. The primary difficulty concerns the implication of reform for the right of free speech of those who make statements in the United Kingdom. If a foreign law is to govern the liability of a defendant who makes a statement in the United Kingdom, the defendant could be held liable when, under our domestic law, he may have had available the defences of absolute or qualified privilege, fair comment or justification, or perhaps all of these. Such defences are, in many respects, expressions of United Kingdom public policy, for instance that a person should not be liable for publishing something that is true.

3.29 Furthermore the concept of defamation is not uniform. In this country, it is part of the law of tort and delict and awards for defamation are in principle compensatory. However, in other countries defamation is regarded largely as a criminal matter,[75] and the victim may receive a sum in compensation which would be regarded as trifling in England or Scotland. There may also be torts and delicts, unknown to English or Scots law but which exist elsewhere, which arise from the making of statements, e.g. invasion of privacy or dignity or the right to one's own image.[76] Another problem is that a statement may originate in this country but be disseminated in many countries. The maker of the statement may have little or no control over where it goes. Television and radio broadcasts may be received anywhere in the world, just as the major national newspapers are sold all over the world. Thus the question may be raised whether, say, a television company should be liable in this country for defamation, judged by the law of any country in which the broadcast was picked up, our own domestic law being irrelevant.

3.30 The Consultation Paper provisionally concluded[77] that no special provision need be made in implementing legislation for cases involving torts, other than defamation, arising from the making of statements, such as negligent or fraudulent misrepresentation. We recommend confirmation of this view. We also recommend that there should not be any *prima facie* applicable law in a defamation action, since we believe that it is best dealt with by way of our general rules.

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74. In the case of collisions on the high seas, English maritime law applies, as it does in the case of a tort involving two or more ships where events are not wholly internal to the ship, for instance negligent navigation leading to the fouling of a submarine cable: see generally Consultation Paper, paras. 2.107-2.110. Wherever the acts complained of have all occurred on board a single vessel on the high seas, the law of the flag is applicable. However, where the flag is not English, it appears that, at present though not under our reforms, the plaintiff has to prove actionability both under the law of the flag and under English law: Cheshire & North, *op. cit.*, pp. 544-545; Dicey & Morris, *op. cit.*, p. 1410. The Scottish courts apply the maritime law of Scotland to cases of collisions occurring on the high seas: Anton, *op. cit.*, p. 247.
75. Cf. *Machado* v. *Fontes* [1897] 2 Q.B. 231.
76. Cf. Briggs, (1989) 105 L.Q.R. 359, 362.
77. See para. 5.29.

3.31 The Consultation Paper[78] proposed that no mention should be made of those cases where there is liability under the law of publication but not the country of origin, on the ground that if the applicable law imposed liability that was the end of the matter. We have concluded that this is not satisfactory, at least where the United Kingdom is the place of origin and where the statement is not defamatory by United Kingdom domestic law, but where otherwise the applicable law would be the law of the country of publication under which law there would be liability.[79] The fact that there is no uniform concept of defamation in different regimes of private international law, and the fact that the relevant foreign law would impose liability when English or Scots law would not, are not factors which are unique to defamation. However, we believe that, given the public interest in free speech and in the proper functioning of public institutions, it is not desirable that those who make statements in this country should have their freedom of expression circumscribed by the application of foreign law, especially if they are to be held liable in our courts for torts which we do not recognise, for example invasion of privacy.

3.32 We are of the opinion that the problems connected with defamation which takes place in the United Kingdom are covered by a special provision for United Kingdom torts and delicts.[80] Whenever the tort or delict in substance occurs in the United Kingdom, the law of the relevant part of the United Kingdom applies. However, this does not solve the case of the statement originating in this country which is subsequently published abroad. Since a fresh tort occurs on each publication, a court would be entitled to say that a foreign law applied in respect of each foreign publication. There seem to be several solutions to this problem. First, we could simply exclude defamation from the Act, thus retaining double actionability. Secondly, we could say that in all defamation actions in the U.K., the *lex fori* applies. Thirdly, we could say that, although a foreign law was capable of applying in principle in defamation actions, a defendant would have available to him all the defences under the *lex fori*. Fourthly, we could say that, where the U.K. was the country of origin of the statement in question, U.K. law applies regardless of where the alleged wrong was subsequently published.

3.33 We prefer this fourth option. The first two options would entail the application of English or Scottish law even where there was a totally foreign complexion to the factual scenario. Neither is the third option satisfactory, for the reason that defences under our law are designed to be defences to actions framed according to our law rather than according to unspecified foreign laws. The fourth option, however, is a legitimate extension of our rules for torts and delicts occurring in this country. Whilst it would give protection to those publications which emanate from this country even though they are specifically aimed at a foreign audience, we nevertheless believe that in matters said, printed or broadcast in this country, there is a legitimate public interest in the media and individuals being free to say what they wish within the limits of our domestic law. However, to prevent people from obtaining the automatic application of our law simply by the expedient of repeating the defamatory remark in this country, we have concluded that where a statement is published abroad, it will be treated as published in this country only if the statement was simultaneously or previously published in the United Kingdom. Thus, we recommend that when a statement is published abroad and is simultaneously or previously published in the United Kingdom, the applicable law is that part of the United Kingdom where the proceedings are brought.

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78. Paras. 5.47-5.50.
79. See para. 3.14 ff above.
80. *Ibid.*

Particular issues

Capacity

3.34 The Consultation Paper[81] provisionally concluded that delictual capacity be governed by the applicable law in tort or delict. All consultants who responded on this issue agreed and we recommend that in so far as delictual capacity is properly classified as a delictual question, it should be governed by the applicable law in tort or delict. The existing law so appears to classify delictual capacity[82] and no special provision is made in implementing legislation.

Vicarious Liability

3.35 Under the present law, the question whether it is possible to impose vicarious liability is governed by the applicable law in tort or delict. The Consultation Paper[83] provisionally concluded that this should remain the law. This was unanimously supported on consultation and we recommend that there should be no change in the law in this respect. However, there is a distinction between the question whether there is vicarious liability in respect of a given relationship and the question whether the particular relationship, for instance employer and employee, exists. While the applicable law in tort or delict determines, both under the present law and our proposed reform, whether vicarious liability exists, the law governing the relationship determines whether the particular relationship exists.

3.36 The Consultation Paper[84] also invited comment on whether the law applicable in an action by the claimant against a vicariously liable defendant should always be the same as that which would have applied in an action by the claimant against the actual wrongdoer. There was little support for this amongst consultants, on the ground that an action against the wrongdoer is a logically separate issue from that against a potentially vicariously liable defendant. We recommend that no mention be made of this in implementing legislation. Similarly, there was little support for a special provision, apart from our established rules of public policy, whereby the imposition of vicarious liability could be avoided when it conflicted with our notions of doing justice between the parties.[85] We recommend that there be no such provision in implementing legislation.

Defences and immunities

3.37 The Consultation Paper[86] provisionally recommended that there be no change in the present law concerning defences and immunities. This was supported by all consultants who mentioned the matter. We recommend that there should be no change in the law that substantive defences are governed by the applicable law in tort or delict.

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81. See para. 6.4.
82. Dicey & Morris, *op. cit.*, p. 1396.
83. See para. 6.9.
84. See para. 6.11 ff.
85. Consultation Paper, paras. 6.11-6.14.
86. See para. 6.15.

Damages

3.38 The Consultation Paper[87] provisionally recommended that there should be no change in the present law on the question of damages, which we confirm. Accordingly, the applicable law in tort or delict determines the question of the availability of particular heads of damages whereas the measure or quantification of damages under those heads is governed by the *lex fori*. Furthermore, we do not think that express guidance need be given in any implementing legislation on how damages should be quantified in a case where a court in the United Kingdom is faced with assessing the quantum of damages under a head of damage unknown to our law. We expect the question to arise infrequently and to attempt to solve the problem in advance may be less satisfactory than leaving the court to resolve the question on the particular facts of the dispute before it.

Limitations on recovery

3.39 We agree with the view taken by all consultants who commented on this matter, that a statutory ceiling on damages is a substantive issue for the applicable law in tort or delict rather than a procedural issue for the *lex fori*. We do not think that there is a need for this matter to be included in implementing legislation, since it is connected with the question of damages generally, on which we are making no proposals for a change in the law.

Prescription and limitation of actions

3.40 The Consultation Paper made no proposals in this area, which is governed in England and Wales by the Foreign Limitation Periods Act 1984 and in Scotland by the Prescription and Limitation (Scotland) Act 1973 as amended.[88] Under section 1(1)(a) of the 1984 Act, the general rule is that, in proceedings in England and Wales, where a foreign law is the *lex causae*, the foreign law also governs questions of limitation of actions. However, under section 1(2), where the law of England and Wales and a foreign law fall to be taken into account, then the law of England and Wales relating to limitation remains relevant. Section 1(2) was necessary because, under double actionability, there may be two *leges causae*, whereby the effective limitation period would be either the foreign law or English law, whichever was the shorter.[89] Given that under our proposals, double actionability is to be abolished, section 1(2) becomes superfluous. We recommend that it be repealed. In Scotland, a different statutory formula was adopted and no change in the existing statutory provisions is required.

Transmission of claims on death: the survival of actions

3.41 The Consultation Paper[90] provisionally concluded that whether the claimant's estate could sue the wrongdoer or whether the claimant could sue the wrongdoer's estate were questions to be decided by the applicable law in tort or delict, although it stated that the

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87. See paras. 6.16-6.17.
88. Section 23A of the Act was inserted by section 4 of the Prescription and Limitation (Scotland) Act 1984.
89. See Law Com. No. 114, paras. 4.14-4.17, and para. 2 of the explanatory notes to clause 1 of the draft Bill appended to that report.
90. See paras. 6.24-6.34.

issue of transmissibility of claims on death was not one which logically belonged exclusively to one category or another. Although the matter has never been raised in a reported case in England,[91] the policy behind the Consultation Paper's provisional conclusions is not free from controversy,[92] for it is possible to characterise the issue of transmission of claims on death in several ways. It could be seen as pertaining to the law of succession, governed by the law of the deceased's last domicile. It could be seen as a question pertaining to the administration of the deceased's estate, so that the applicable law is that governing the administration of the estate. It could also be seen as a question of tort law to be governed by the applicable law in tort.

3.42 It has been pointed out that it was the hurdle of requiring the plaintiff to show that the action survived under both the *lex fori* and *lex loci delicti* that led writers to argue that the real question was one of whether a particular chose in action was transmissible on death.[93] The question was then characterised as relating either to succession or administration. The administration characterisation has been supported on the ground that the question whether an asset or liability is acquired by the estate is a question of the collection rather than the distribution of assets, the former being the essence of administration, the latter of succession,[94] although it is of course possible that a wrongdoer's estate may be administered in a country which has little or no connection with his wrongful act.[95]

3.43 An example of the difficult policy questions raised would be the case of the Englishman who is injured on a visit to Switzerland and subsequently dies.[96] Assume that by English law, but not by Swiss law, claims for loss of expectation of life, for pain and suffering and loss of amenity pass to the victim's estate. If Swiss law is the applicable law in tort and if the law governing the survival of actions is characterised as relating to succession or the administration of estates, it could be said to be harsh that the Swiss wrongdoer acting in his own country should be liable to a greater extent than he is under his own law simply because the deceased's estate is administered in a country which permits the survival of a personal action in favour of the deceased's estate.[97] On the other hand "it is equally arguable that the defendant has committed a tort against the plaintiff and that justice requires that the "asset" thereby acquired by the plaintiff should pass to his estate and his heirs, if it would do so under the law which determines which assets should be so transmitted".[98] In the light of these matters, we recommend that no view should be taken on the provisional conclusions expressed in the Consultation Paper. If the problem were to arise in practice, we believe that it would be better to leave the matter to the courts rather than for us to recommend a definitive characterisation of an issue about which there is much controversy, albeit mostly theoretical.

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91. Though the matter was raised in the Scottish case of *McElroy* v. *McAllister* 1949 S.C. 110, and in the Australian case of *Kerr* v. *Palfrey* [1970] V.R. 825.
92. Morse, *Torts in Private International Law* (1978), p. 144 ff.
93. Morse, *op. cit.*, p. 145; Dicey & Morris, *op. cit.*, p. 1394; Webb & Brownlie, (1965) I.C.L.Q. 1.
94. Dicey & Morris, *op. cit.*, p. 1395; Morse, *op. cit.*, pp. 145-146.
95. Morse, *op. cit.*, p. 163.
96. Cf. Jaffey, "Choice of law in tort: a justice-based approach" [1982] L.S. 98, 113.
97. *Ibid.*
98. Morse, *op. cit.*, p. 146.

Wrongful death

3.44 The Consultation Paper[99] provisionally concluded that the existence and content of an action for wrongful death, such as is found in England under the Fatal Accidents Act 1976, should be matters for the applicable law in tort or delict. This appears to represent the present law,[100] and we make no recommendation for a change in the law in this respect. The Consultation Paper[101] also provisionally concluded that the applicable law in a wrongful death action should be that which would have applied in an action by the deceased or his estate against the wrongdoer. We do not recommend that implementing legislation need deal with this matter nor with the question of grants of representation.[102]

Intra-family immunities

3.45 There are several ways of characterising the question whether spouses can sue one another in tort or delict, or whether children can sue their parents. The matter has been classified as procedural and thus for the *lex fori*, as substantive and for the applicable law in tort or delict and also as a matter of status governed by the domiciliary law of the parties.[103] The Consultation Paper[104] provisionally concluded that whether or not there is inter-spousal immunity, or immunity between parent and child, should be governed by the applicable law in tort or delict. Nevertheless, there is a strong argument for not applying the applicable law in tort or delict in the case of rights based on family relationships, special duties arising from them, or immunities established within them, where the relationship is not governed by the applicable law in tort or delict. It has been said that "the right of spouses to make one another liable in tort ... is intimately connected with the effect of marriage on the property relations between the spouses and, for this reason, it should be governed by the law of their domicile at the time of the alleged tort".[105] As for the application of the *lex domicilii*, apart from those criticisms mentioned in the Consultation Paper,[106] it may not reflect the law of the place where the family relationship is based. Yet even if the *lex domicilii* is not likely to be more suitable than the applicable law in tort or delict, the fact that neither has overwhelming credentials is an argument in favour of staying silent on this matter in the legislation.

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99. See para. 6.35.
100. See Consultation Paper, paras. 2.67-2.76.
101. *Ibid.*, paras. 6.36-6.37.
102. *Ibid.*, paras. 6.38-6.39.
103. See Dicey & Morris, *op. cit.*, pp. 210-211, 1398-1399; Morse, *op. cit.*, pp. 155-158.
104. *Ibid.*, paras. 6.40-6.45.
105. Dicey & Morris, *op. cit.*, p. 1398.
106. See paras. 6.41-6.43.

3.46 Furthermore, if the problem does arise, it rarely does so in this country since there are no reported cases. The main problems existed in early American cases where husband and wife, domiciled in one state, visited another state where an accident occurred. The state laws differed on the question whether spouses could be liable in tort to one another, and the conflict was resolved sometimes by applying one law, sometimes another.[107] We do not feel that implementing legislation should deal with this issue, involving as it does a controversial question of characterisation.

Contribution and indemnity

3.47 The question of which law should govern a right of contribution or indemnity is a separate question from the question of the applicable law in tort or delict, and various approaches to its characterisation are possible.[108] While it remains possible to characterise the right to contribution as either tortious or *sui generis*, we would regard the right to contribution as, in essence, a restitutionary right designed to prevent the person from whom the contribution is sought from being unjustly enriched at the expense of the person seeking contribution.[109]

3.48 Given that the matter of contribution is restitutionary in character, not delictual, we are of the opinion that nothing should be included in the legislation on this issue.[110] Similarly, we do not recommend that rights of indemnity should be governed by our choice of law rules for torts and delicts;[111] nor do we recommend that the matter should be mentioned in implementing legislation.

Contractual defences to claims in tort and delict

3.49 This issue has caused us considerable difficulty. After much consideration, we recommend that this matter should not be expressed in implementing legislation. A difference of opinion exists on the policy questions involved. Some of us support the provisional conclusion in the Consultation Paper,[112] to the effect that: (a) the interpretation and validity of a contractual term purporting to provide a defence in tort should be decided by the proper law of the contract, as determined by the forum's choice of law rules; (b) the effect of such a term, if valid under its proper law, as a defence to a claim in tort or delict should be decided by the applicable law in tort or delict. Those taking this view would have included an appropriate provision in legislation on the ground that the present law on contractual defences to claims in tort and delict is unclear and unsatisfactory. Others take the view that the effect of a contractual defence, valid under its proper law, should be governed by the proper law of the contract rather than the applicable law in tort or delict. Whilst one approach emphasises freedom of contract, the other approach preserves the liberty of the governing law in tort or delict to regard such a term as ineffective.

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107. Morse, *op. cit.*, p. 155 ff.
108. See, for example, Scot. Law Com. No. 115, *Report on Civil Liability - Contribution* (1988) paras. 3.100-3.104 and recommendation 17. Paragraph (b) of recommendation 17 would not be necessary if double actionability were abolished.
109. See Dicey & Morris, *op. cit.*, pp. 1407-1408. This was the approach taken by the Scottish Law Commission in Scot. Law Com. No. 115: see para. 3.101.
110. The Scottish Law Commission has made recommendations on choice of law in contribution, in all cases and not merely where the related primary obligation was delictual: see Scot. Law Com. No. 115.
111. Consultation Paper, para. 6.50.
112. See para. 6.51.

3.50 We have concluded that it is unnecessary to resolve this difference of opinion. The relation of contractual defences to claims in tort clearly poses a difficult question of characterisation. The matter could be seen as exclusively contractual, exclusively tortious, as an issue *sui generis*, or as an issue where choice of law rules in contract and tort have roles to play, but different ones.[113] The question of characterisation may depend on the particular factual context as well as on policy considerations. To legislate in relation to this issue would require a close factual analysis of the extent to which it is a practical problem and of what the practical solution would be. In our opinion, it is not sensible to deal with the abstract conflict of laws problem in such a difficult area, without research into and knowledge of the likely substantive rules in foreign countries which may require application under the proposed recommendations. In view of this, and because of the disagreement on the different roles of contract and tort in this area, we are unable to recommend legislative intervention. The legislature should have more practical material on which to base its proposals than the largely theoretical discussion which surrounds the question. Indeed, the one case in which it has caused problems in England, *Sayers* v. *International Drilling Co.*,[114] would, in view of the Unfair Contract Terms Act 1977, be decided differently today.[115] The only relevant Scottish case, *Brodin* v. *A/R Seljan*,[116] concerned a mandatory rule of the *lex fori*. Such mandatory rules will always override express contractual provisions.

Direct action by third party against insurer

3.51 In some jurisdictions, it is possible for the injured party to bring a direct action against the wrongdoer's insurer rather than the wrongdoer himself. There are a number of ways in which the courts of other jurisdictions have characterised this issue. It has been seen as a tortious question, governed by the applicable law in tort; as a contractual question governed by the proper law of the insurance contract; and as a procedural question governed by the *lex fori*.[117] The Consultation Paper[118] tentatively concluded that the question whether the claimant can sue the wrongdoer's insurer rather than the wrongdoer himself was a matter for the proper law of the wrongdoer's insurance contract rather than a question to be decided by the applicable law in tort or delict, although it also said that there did not appear to be an unanswerable argument in favour of any approach. In the light of the views expressed by consultants, we are not convinced that the tentative conclusion adopted in the Consultation Paper is necessarily the ideal one. The direct action is not in any real sense contractual, since the claimant is not suing a party with whom he is in privity of contract. It is true that neither has a wrong been perpetrated by the insurer on the claimant. However, the action against the wrongdoer's insurer may be more akin to a claim in tort than contract, since what would normally be the claimant's primary remedy would be a tortious action against the wrongdoer. If the claimant's action against the actual wrongdoer would be tortious, an action against the insurer may be better seen as an extension of this tortious action. Although the direct action cannot exist in the absence of the contract of insurance, neither would the direct action exist in the absence of any wrongdoing. While

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113. North, "Contract as a Tort Defence in the Conflict of Laws", (1977) I.C.L.Q. 914, 920.
114. [1971] 1 W.L.R. 1176.
115. Dicey & Morris, *op. cit.*, p. 1404.
116. 1973 S.L.T. 198; Consultation Paper, paras. 2.94-2.96.
117. Morse, *op. cit.*, pp. 163-166.
118. See paras. 6.61-6.72.

to apply a law other than the law of the insurance contract would expose the insurer to a liability greater than he contemplated, nevertheless, depending on where the insurer carries on his activities, his expectations might reasonably be expected to include not only the potential liability of the insured under the law of that jurisdiction to which cover extends, but also any potential direct liability. We have recommended that the matter should not be included in implementing legislation. The issue is of hardly any practical importance, there being no reported case in England or Scotland. We feel that the matter can be left to the courts to decide if called upon to do so.

Depecage

3.52 The Consultation Paper[119] provisionally concluded that our reformed choice of law rules should not provide for the choice of the applicable law to be made separately for different substantive issues in tort and delict: in other words, we would not make provision for depecage. We believe that this is correct. Hence, all tortious issues should be governed by the same choice of law rule. Although depecage may appear attractive, and was envisaged by Lord Wilberforce in *Boys* v. *Chaplin*,[120] the criticisms made of it in the Consultation Paper,[121] in particular uncertainty in application, remained unanswered on consultation. The flexibility that depecage would provide will, in any event, be a feature of our reformed choice of law rules. Furthermore, once the most appropriate law has been ascertained in respect of a wrong it is desirable that it should govern all the substantive issues. This is in accordance with the parties' expectations, and it also prevents a party from accepting certain consequences but not others of the applicable law.

Multiple parties

3.53 The Consultation Paper[122] provisionally concluded that where there are three or more parties to a single action, the choice of the applicable law should be made separately for each pair of opponents. We recommend confirmation of this proposal which almost certainly represents the present law.

Compensation Schemes

3.54 The Consultation Paper[123] provisionally concluded that no provision need be made for cases where the applicable law has a compensation scheme which does not depend on establishing civil liability. We recommend that this be confirmed and that nothing need be said about this in implementing legislation.

Public policy, over-riding statutes of the forum and procedure

3.55 There is a general principle of the conflict of laws that our courts do not apply

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119. See paras. 6.73-6.81.
120. [1971] A.C. 356.
121. See paras. 6.76-6.79.
122. See paras. 6.82-6.85.
123. See paras. 6.86-6.96.

foreign law when to do so would be inconsistent with the fundamental public policy of our law.[124] This principle has traditionally been used sparingly,[125] and rightly so. Over-enthusiastic resort to public policy so as to avoid the application of foreign law would thwart the whole purpose of the conflict of laws, which is to do justice between the parties to a dispute, if necessary by the application of a foreign law to the resolution of the dispute. In the English and Scottish private international law of tort and delict, the existence of double actionability, in particular the requirement of actionability under the *lex fori*, has meant that resort to public policy has hitherto been unnecessary. Under our reforms, however, cases will be decided by sole reference to a foreign law. As a result, in the draft Bill appended to this Report we have preserved the principle that foreign law may be disapplied where it is inconsistent with the fundamental public policy of our law, even if the cases where this principle applies will undoubtedly be rare. We have also preserved in the draft Bill the principle preventing the application of a foreign penal, revenue or other public law.[126] Likewise, our draft Bill also makes clear that the application of a particular foreign law is subject to the application of mandatory statutes of a United Kingdom forum.[127] Finally, the draft Bill ensures that our new choice of law rules do not apply to matters which are characterised as procedural.

Renvoi

3.56 The Consultation Paper[128] provisionally concluded that, under either model of reform canvassed therein, renvoi should be excluded. In other words, a reference to a foreign law would be to its internal law and not its rules of private international law. It has been argued that, in the field of choice of law rules in tort and delict, renvoi would create uncertainty and would not accord with the reasonable expectations of the parties.[129] We agree with this. Furthermore, were renvoi not excluded, there could be circumstances where our proposed rules would not achieve the desired result. By way of example, assume that D, domiciled in England, injures P in Ruritania. Under our reformed rules, the *prima facie* applicable law is the law of Ruritania. Let us also assume that the court finds that Ruritanian law is in fact the applicable law. Under Ruritanian private international law, let us assume that personal injury actions are governed by the law of D's domicile, which in our example would be English law. If the reference to Ruritanian law includes Ruritanian private international law, then English law would be the applicable law. Yet it is the application of this law which our choice of law rules are specifically designed to avoid. Hence, the draft Bill makes it clear that references to the law of a country are references to its internal law, not its private international law.

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124. See Dicey & Morris, *op. cit.*, ch. 6, rule 2; Morse, *op. cit.*, pp. 96-100.
125. See Carter, "Rejection of Foreign Law: Some Private International Law Inhibitions", (1984) 55 B.Y.B.I.L. 111; Carter, "The Foreign Limitation Periods Act 1984", (1985) 101 L.Q.R. 68, 71.
126. See Dicey & Morris, *op. cit.*, ch. 6, rule 3.
127. See, generally, Fawcett, "Evasion of Law and Mandatory Rules in Private International Law", (1990) 49 C.L.J. 44. See also Morse, "Products Liability in the Conflict of Laws" (1989) 42 C.L.P. 167, 180, for the arguments concerning whether the Consumer Protection Act 1987 would apply to all proceedings brought in this country.
128. See para. 4.23.
129. Morse, *Torts in Private International Law* (1978), p. 297.

Crown application

3.57 The necessary consultation on whether, and the extent to which, our proposals should bind the Crown has not yet taken place. Hence, the draft Bill attached to this report makes no provision with respect to Crown liability. Although this consultation will clearly have to take place before the Bill is introduced, it is something which may appropriately be undertaken after the submission of this report.

Torts and delicts occurring before commencement

3.58 It would be possible for implementing legislation to apply to any proceedings instituted after commencement. However, this would mean that in respect of two torts or delicts committed at the same time, P1 who institutes proceedings without delay might be faced with double actionability, whereas P2 who temporises would have the benefit of the new rules were commencement to occur between the time of the tort or delict and the time the proceedings were started. Likewise, if implementing legislation were to apply to all torts and delicts occurring after commencement, there is the problem of deciding whether the new rules apply where conduct occurs, followed by the Act's commencement, followed in turn by damage resulting from the original conduct. Since we do not intend implementing legislation to have any retrospective effect, we recommend that it should not apply in respect of anything occurring before it comes into force.

Extent

3.59 The Consultation Paper examined our choice of law rules on tort and delict from a United Kingdom perspective, and we regard it as desirable that any reform of the rules of private international law should be uniform throughout the United Kingdom. We have maintained close contact with the Law Reform Advisory Committee for Northern Ireland, which has expressed approval for our recommendations and for the desirability of their implementation in Northern Ireland. The Bill appended to this report is drafted so as to extend to Northern Ireland.

Conclusion

3.60 Of all the torts, delicts and issues dealt with in Parts V and VI of the Consultation Paper, we have not, apart from defamation, recommended legislation in respect of any. Most of the provisional conclusions either expressed the present law, dealt with subjects which are of little or no practical importance or involved controversial questions of characterisation which are best not considered in legislation relating to choice of law rules in tort and delict.

PART IV

SUMMARY

4.1 In this Part of the report we summarise our principal conclusions and recommendations for reform.

(1) In tort and delict cases containing a foreign element, the claimant should no longer be required to show actionability both under the *lex fori* and the *lex loci delicti.*
[Para. 2.11; clause 1]

(2) In cases of personal injury and damage to property, the *prima facie* applicable law should be the law of the country or territory where the person was when he was injured or the property was when it was damaged.
[Para. 3.6; clauses 2(1) & 2(2)]

(3) In cases of death, the *prima facie* applicable law should be that of the country or territory where the deceased was when he was fatally injured.
[Para. 3.6; clause 2(1)]

(4) In all other cases the *prima facie* applicable law should be that of the country or territory in which the most significant elements in the sequence of events occurred.
[Para. 3.10; clause 2(3)]

(5) If either (i) in any case referred to in paragraph (4) above there is no single country or territory in which the most significant elements in the sequence of events took place, or (ii) in any of the cases referred to above it would be substantially more appropriate that another law should apply, having regard amongst other things to factors relating to the parties and to all of the surrounding circumstances, the applicable law should be that of the country or territory with which the tort or delict had the most real and substantial connection.
[Paras. 3.9-3.12; clauses 2(3) - 2(5)]

(6) In respect of torts and delicts committed in the United Kingdom, the law of the relevant part of the United Kingdom applies.
[Para. 3.16; clause 3(1)]

(7) Where a statement is published abroad and is simultaneously or previously published in the United Kingdom, the applicable law is that of the relevant part of the United Kingdom.
[Para. 3.33; clause 3(2)]

(8) Our reformed rules will not apply to those torts and delicts occurring on the high seas to which, at present, our choice of law rules do not apply.
[Para. 3.27; clause 3(3)]

(9) A foreign law will not apply: (a) to the extent that it conflicts with public policy; (b) if it is a penal, revenue or other public law; (c) to the extent that it conflicts with a mandatory statutory rule of the forum; (d) to matters of procedure.
[Para. 3.55; clause 4]

(10) These points apart, no legislative provision should be made for other torts, delicts and issues.
[Para. 3.60.]

(Signed) PETER GIBSON, *Chairman, Law Commission*
TREVOR M ALDRIDGE
JACK BEATSON
RICHARD BUXTON
BRENDA HOGGETT

MICHAEL COLLON, *Secretary*

C K DAVIDSON, *Chairman, Scottish Law Commission*
E M CLIVE
PHILIP N LOVE
I D MACPHAIL
W A NIMMO SMITH

KENNETH F BARCLAY, *Secretary*

12 November 1990

APPENDIX A

Draft

Tort and Delict (Applicable Law) Bill

ARRANGEMENT OF CLAUSES

Clause

DRAFT

OF A

B I L L

TO

Modify the rules of private international law applied in the United Kingdom for determining questions classified as relating to tort or delict.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Questions determined according to the applicable law.

1.—(1) This Act applies to proceedings in any part of the United Kingdom in so far as they give rise, in relation to any matter, to questions which—

(a) are relevant to whether it is possible for the proceedings to be brought or to how they are to be disposed of; and

(b) are such as to be classified, for the purposes of the rules of private international law applicable by the courts of that part of the United Kingdom, as questions relating to tort or delict.

(2) Subject to sections 3 and 4 below, the questions to which any such proceedings give rise shall be determined according to the law which under section 2 below is the applicable law.

(3) The courts of each part of the United Kingdom shall cease to apply the rules under which a question which is classified, for the purposes of the rules of private international law applied by those courts, as relating to tort or delict must be determined by reference to whether there is actionability under both the law of that part of the United Kingdom and the law of another country or territory.

(4) Accordingly, the principles of classification applied for the purposes of subsection (1)(b) above by the courts of any part of the United Kingdom shall be taken to allow a question whether a right of action exists in relation to any matter to be treated as relating to tort or delict notwithstanding that the matter is one which is not actionable in tort or delict under the law which (apart from this Act and any rules of private international law) would be applied by the courts of that part of the United Kingdom.

EXPLANATORY NOTES

References to "Recommendations" are to the Summary of Recommendations in Part IV of this report.

GENERAL

The Bill reforms our rules which apply to cases of torts and delicts containing a foreign element involving a choice between the laws of different countries.

Clause 1

This clause implements Recommendation (1). It provides that the Act shall apply instead of the existing law where any matter is classified, in accordance with our rules of private international law, as relating to tort or delict.

Subsection (1)
This subsection determines the type of proceedings to which the Act applies.

Subsection (2)
This subsection makes provision for the applicable law, as elaborated in clause 2.

Subsection (3)
This subsection confirms the abolition of the common law rules, most notably the rules in *Phillips* v. *Eyre* (1870) L.R. 6 Q.B. 1.

Subsection (4)
This subsection makes it clear that the courts can characterise questions as tortious or delictual regardless of whether actionability exists under the domestic law of the relevant part of the United Kingdom. For example, where there has been an invasion of privacy abroad, a court in this country could apply our reformed choice of law rules to the matter, regardless of whether invasion of privacy is actionable under our domestic law.

Subsection (5)
This subsection defines the ambit of "delict" for the purposes of Scots law.

(5) In this section "delict" includes quasi-delict.

Choice of the applicable law.

2.—(1) Subject to subsection (4) below, the applicable law in relation to any proceedings to which this Act applies shall, in so far as they are brought in respect of—

(a) personal injury caused to an individual; or

(b) the death of an individual resulting from personal injury,

be the law of the country or territory where that individual was when he sustained the injury.

(2) Subject to subsection (4) below, the applicable law in relation to any proceedings to which this Act applies shall, in so far as they are brought in respect of any damage to property, be the law of the country or territory where that property was when it was damaged.

(3) Subject to subsection (4) below, the applicable law in relation to any proceedings to which this Act applies shall, in so far as they are brought in respect of anything not mentioned in subsection (1) or (2) above, be—

(a) the law of the country or territory where the most significant elements of the events constituting the subject-matter of the proceedings took place; or

(b) if such a country or territory is not identifiable, the law of the country or territory with which the subject-matter of the proceedings has the most real and substantial connection.

(4) Where apart from this subsection the law of a particular country or territory would, by virtue of subsection (1), (2) or (3)(a) above, be the applicable law in relation to any proceedings to which this Act applies but it appears from a comparison of—

(a) the significance, in all the circumstances, of the factors which connect the subject-matter of the proceedings with that country or territory (including any not mentioned in subsections (1) to (3) above); and

(b) the significance, in those circumstances, of any factors constituting a real and substantial connection between the subject-matter of the proceedings and another country or territory,

that it would be substantially more appropriate for the questions to which those proceedings give rise to be determined according to the law of that other country or territory, then the law of that other country or territory shall be the applicable law in relation to those proceedings.

(5) For the purposes of subsections (3)(b) and (4) above the factors that may be taken into account as connecting the subject-matter of any proceedings with a country or territory shall include, in particular, factors relating to the parties to the proceedings, to any of the events constituting, or connected with, the subject-matter of the proceedings or to any of the circumstances or consequences of those events.

(6) References in this section to the law of a country or territory shall not include references to the rules of private international law applicable by the courts of that country or territory.

Clause 2

This clause implements our main recommendations, (2)-(5), governing the choice of the applicable law in a tort or delict action.

Subsection (1)
This subsection provides for the prima facie applicable law in cases of personal injury and fatal accidents.

Subsection (2)
This subsection provides for the prima facie applicable law in cases of damage to property.

Subsection (3)
This subsection provides for the prima facie applicable law in all other cases.

Subsections (4) and (5)
These subsections allow the prima facie applicable law to be displaced where it would be substantially more appropriate for another law to apply.

Subsection (6)
This subsection makes it clear that any reference to the law of a foreign country is a reference to its domestic law. In other words, the doctrine of renvoi has no application under our proposals.

Subsection (7)
The definition of personal injury is self explanatory.

(7) In this section "personal injury" includes disease or any impairment of physical or mental condition.

Exception for conduct in the United Kingdom or on the high seas.

3.—(1) In so far as any proceedings to which this Act applies relate to, or to the consequences of, any conduct the most significant elements of which took place in a part of the United Kingdom, the questions to which those proceedings give rise shall be determined according to the law of that part of the United Kingdom, instead of according to the law which would be the applicable law under section 2 above.

(2) If, in the case of any defamation proceedings relating to a statement published outside the United Kingdom, the publication of the statement—

(a) took such a form that the places of publication also included a place in a part of the United Kingdom; or

(b) occurred at the same time as, or after, the separate publication in a part of the United Kingdom of anything containing the substance of the matter contained in that statement,

then subsection (1) above shall have effect in relation to the proceedings as if all the significant elements of the conduct to which the proceedings relate had taken place in the part of the United Kingdom where the proceedings are brought.

(3) The proceedings to which this Act applies shall not include proceedings in any part of the United Kingdom in so far as they—

(a) relate to, or to the consequences of, any conduct any of the elements of which took place in an area of the high seas; and

(b) give rise to questions which would, before the coming into force of this Act, have fallen to be determined otherwise than in accordance with the rules that cease to have effect by virtue of section 1(3) above.

(4) In determining for the purposes of this section whether anything took place in a part of the United Kingdom or elsewhere or whether it took place in an area of the high seas—

(a) the territorial sea adjacent to a part of the United Kingdom shall be treated as included in that part of the United Kingdom;

(b) references to anything taking place in any area of territorial sea or of the high seas shall include references to anything taking place beneath the seabed in that area, on board any vessel in that area or in the airspace above that area; and

(c) references to anything taking place in any airspace shall include references to anything taking place in an aircraft which is travelling through that airspace.

(5) In this section—

"defamation proceedings" includes proceedings for slander of title, slander of goods or other malicious falsehood, proceedings for verbal injury and any proceedings which are in the nature of defamation proceedings and, but for subsection (2) above, could be brought by virtue of section 1 above;

Clause 3

This clause implements Recommendations (6)-(8), making special provision for torts and delicts occurring in the United Kingdom or on the high seas.

Subsection (1)
This subsection provides the basic rule that, in respect of torts and delicts committed in the United Kingdom, the law of the relevant part of the United Kingdom applies.

Subsection (2)
This subsection makes special provision for defamation cases involving publication both in the United Kingdom and abroad. Where a statement is published abroad and is simultaneously or previously published in any part of the United Kingdom, the applicable law is the law of the forum.

Subsection (3)
This excludes from the ambit of the Act those torts and delicts occurring on the high seas to which, at present, our choice of law rules do not apply.

Subsection (4)
This subsection provides an elaboration of what is meant by conduct in the United Kingdom and conduct at sea.

Subsection (5)
This subsection contains three definitions and also provides that, in defamation proceedings under section 3, the question whether there has been a publication is a matter for the law of the relevant part of the United Kingdom.

"conduct" includes acts, omissions and statements, any proposal to act or to make a statement and anything amounting to a refusal to act;

"statement" includes anything, whether or not it is or is treated as in permanent form, in so far as it consists of words, pictures, visual images, gestures or any other methods of conveying meaning;

and references in this section, in relation to any proceedings in a part of the United Kingdom, to the publication of a statement are references to the doing of anything which would constitute the publication of that statement for the purposes of the law of defamation in that part of the United Kingdom.

Savings for rules limiting the application of foreign law.

4.—(1) Nothing in this Act shall authorise the courts of any part of the United Kingdom to give effect to the law of any country or territory outside the United Kingdom, in so far as to do so would conflict with the principles of public policy which are taken into account by those courts in applying rules of private international law.

(2) Nothing in this Act shall authorise the courts of any part of the United Kingdom to give effect to the law of any country or territory outside the United Kingdom in so far as that law consists in such a penal, revenue or other public law as, under the rules of private international law applied by those courts, would not otherwise be enforceable by those courts.

(3) This Act shall be without prejudice to the application, in relation to any question to which any proceedings give rise, of any provision which-

(a) is made by or under any enactment and has effect in the part of the United Kingdom where the proceedings are brought for requiring that question to be determined in accordance with that provision; and

(b) falls to be construed in relation to that question either as having effect notwithstanding the rules of private international law applied by the courts of that part of the United Kingdom or as modifying those rules in relation to that question.

(4) Nothing in this Act shall authorise questions of procedure with respect to proceedings in any part of the United Kingdom to be determined otherwise than according to the law of that part of the United Kingdom.

Consequential repeal and revocation.

1984 c. 16.

5.—(1) In section 1 of the Foreign Limitation Periods Act 1984, subsection (2) and, in subsection (1), the words "except where that matter falls within subsection (2) below" (which relate to the application of foreign limitation periods to cases where the rules of private international law require double actionability) shall cease to have effect.

S.I 1985/754 (NI 5).

(2) In Article 3 of the Foreign Limitation Periods (Northern Ireland) Order 1985, paragraph (2) and, in paragraph (1), the words "except where that matter falls within paragraph (2) below" (which

Clause 4

This clause implements recommendation (9), preserving the application of our own domestic law in respect of certain matters.

Subsection (1)
This subsection limits the application of a foreign *lex causae* where this is inconsistent with the public policy of the forum.

Subsection (2)
This subsection prevents the application of a foreign penal, revenue or other public law.

Subsection (3)
This subsection preserves the application of mandatory statutory rules of a United Kingdom forum.

Subsection (4)
This subsection provides that the Act does not apply to questions which are characterised as procedural.

Clause 5

This clause provides for consequential repeals.

make corresponding provision for Northern Ireland) shall cease to have effect.

Short title, commencement and extent.

6.—(1) This Act may be cited as the Tort and Delict (Applicable Law) Act 1990.

(2) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.

(3) This Act shall not apply to so much of any proceedings as relates to anything occurring before this Act comes into force.

(4) This Act extends to Northern Ireland.

Clause 6

This clause contains the short title, commencement and extent provisions.

Subsection (3)
This provision ensures that the Act has no retrospective effect.

APPENDIX B

LIST OF INDIVIDUALS AND ORGANISATIONS WHO COMMENTED ON THE CONSULTATION PAPER

The Rt Hon Sir John Arnold
Association of Independent Radio Contractors Ltd
British Broadcasting Corporation
British Insurance Association
British Insurance Brokers' Association
Mr Hugh Caldin
Professor J G Castel, QC
Professor David F Cavers
Church of Scotland Woman's Guild
Confederation of British Industry
Council of the Sheriffs' Association
Elizabeth B Crawford
Department of Trade and Industry
Educational Institute of Scotland
Faculty of Advocates
Dr J J Fawcett
Foreign and Commonwealth Office
Messrs Freshfields
Professor William M Gordon
Professor R H Graveson, QC
Guild of British Newspaper Editors
Holborn Law Society Law Reform Committee
Imperial Chemical Industries plc
Indepenedent Broadcasting Authority
Institute of Legal Executives
Mr A J E Jaffey
Professor Friedrich K Juenger
"Justice"
The Law Society
Law Society of Scotland
Professor K Lipstein
Dr F A Mann, CBE
Mr J R Merrett
Messrs Norton Rose
Professor A E von Overbeck
The Rt Hon Lord Justice Parker
Mr M L Parry
Professor Allan Philip
Professor Michael Pryles
Professor Willis Reese
Messrs Robin Thompson and Partners
Scottish Consumer Council
Scottish Women's Rural Institutes
Senate of the Inns of Court and the Bar
The Hon Mr Justice Staughton
The Sheriffs Principal
Mr Raymond Smith
Mr P A Stone
University of Aberdeen Faculty of Law
Professor P R H Webb
Mr J R Young

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