Has the Forum Lost Its Grip?

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A. Introduction

The subject of choice of law rules pertaining to non-contractual obligations arising out of a tort or delict is one which has commanded, some might say, undue attention given the relatively small number of cross-border tort cases which arise, or at least which are litigated and reported.¹ It is a topic which has attracted interest down the years, long before the Scottish case of McElroy v McAllister² in 1949 prompted Morris to review the state of Scottish and English choice of law rules in the area.³ The purpose of this publication, taking place sixty years after McElroy, may be said to be to review anew choice of law rules, existing and proposed, pertaining to non-contractual obligations arising out of tort or delict, and to assess, in particular, the likely impact of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (‘Rome II’).

This paper will examine the role and power of the forum in the context of Rome II, and will investigate whether the forum’s power (and, in turn, its significance) will contract or expand under the new European regime for choice of law in tort and delict. The aim is to scrutinise the scope of the law applicable,⁴

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² 1949 SC 110.


⁴ Rome II, Article 15.
not the scope of the Regulation\(^5\) or the scope of non-contractual obligations.\(^6\) Neither is it the purpose of this paper to examine the availability and extent of the power to choose the forum;\(^7\) rather the goal is to examine the powers of the forum chosen. Consideration will be given, not to the power to choose the *lex causae*,\(^8\) but to the respective roles of the *lex fori* and the *lex causae*.

B. *The Debatable Lands*

One might approach the central theme of this paper by examining briefly whether or not there has been an observable trend in legislative provision in the conflict of laws, and in decided cases, to favour application of the *lex causae* over the *lex fori*.

The domains of the *lex causae* and *lex fori*, respectively, are demarcated by the distinction between substance\(^9\) and procedure,\(^10\) a distinction which is central to conflict of laws methodology.\(^11\) It cannot be determined what law governs a particular issue until, crucially, that issue has been characterised as substantive, on the one hand, or procedural, on the other: “[t]he distinction is the fulcrum, or axis, of the choice of law process”.\(^12\) Characterisation of an issue as substantive or procedural takes the forum a stage closer to identification of the governing law:\(^13\) “All are agreed that the law which regulates substantive issues is the *lex causae* (as identified by the forum’s conflict rules), and that the law which is master of procedure (in its own house) is the *lex fori*.”\(^14\) The task of designating

\(^5\) Ibid., Article 1.
\(^6\) Ibid., Article 2. See, in relation to Arts 1 and 2, Scott, infra.
\(^7\) In respect of which, see generally Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (‘Brussels I’). See also Weintraub, infra.
\(^8\) Rome II, Article 14, in respect of which see Kadner Graziano, infra.
\(^9\) Broadly, matters of right (Cook, ““Substance” and “Procedure” in the Conflict of Laws” (1932–33) 42 Yale L. J. 333, 334).
\(^10\) Broadly, matters of remedy (Cook, *ibid.*, 334).
\(^12\) Carruthers, *ibid.*, 691.
\(^13\) It is not the purpose of this essay to investigate the first question of conflict method, viz. ‘who characterises?’. See, on this point, Falconbridge ‘Characterization in the Conflict of Laws’ (1937) 53 LQR 235; Robertson, *Characterization in the Conflict of Laws* (1940); and Wolff, *Private International Law* (1950), Chapter XIII.
\(^14\) E.B. Crawford, “The Adjective and the Noun: Title and Right to Sue in International Private Law” (2000) JR 347, 349. See also, e.g., *Hamlyn & Co v Talisker Distillery* (1894) 21 R (HL)