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CHIEF JUSTICE BRAY AND THE CONFLICT OF LAWS

1. Introduction

During his all too brief period on the Supreme Court of South Australia, Bray C.J. was involved in a number of important decisions concerned with aspects of the conflict of laws, particularly at an interstate level. It is hardly surprising that his judgments in those cases demonstrate a facility with the subject which few lawyers possess. Bray C.J. had specialised in the conflict of laws in his days as a student at the University of Adelaide. Having obtained the degree of LL.B in 1932, and that of LL.B (Hons.) in 1933, he enrolled in March 1936 as a candidate for the degree of Doctor of Laws. In September 1936, he submitted a thesis entitled *Bankruptcy and the Winding-up of Companies in Private International Law*. The degree was duly awarded and was conferred on him in June 1937. The thesis gained the Bonython Prize for that year. As it dealt with international rather more than with interstate conflicts, it is, perhaps, understandable that the conflicts judgments delivered by Bray C.J. were based on a firm adherence to concepts and categories derived from the jurisprudence of international conflicts.

Those concepts and categories remain the dominant force in Australian judgments and writings on the conflict of laws. In the United States, on the other hand, there has been a remarkable shift away from them, particularly in the field of interstate conflicts. In this country, the battles lines are only now being drawn up between orthodox and radical approaches, between adherence to broad categories and choice of law rules, on the one hand, and recourse to statutory interpretation and the aims of the legislature, on the other. For this development, the Supreme Court of South Australia, more than any other Australian court, is responsible. The development is concerned with the basis upon which foreign law is applied to events occurring in a sister-state and the basis upon which sister-state law is applied in the forum to events occurring in the sister-state, in the forum or in a third jurisdiction. They are fundamental to the theory and to the practice of the conflict of laws.

2. A Difference of Views

The difference of approach which has emerged in recent Australian cases, particularly in the field of compulsory third party insurance, is simply stated. Under the first approach, the application in the forum of both forum and sister-state law is to be determined by reference to traditional categories and choice of law rules. A claim is to be categorised and the choice of law rule appropriate to that category is then to be applied. If the choice of law rule, *via* the connecting factor, points to the forum, forum law will be applied; if it points to a sister-state, sister-state law will govern. The alternative method places no reliance on choice of law rules as such. Whether forum law applies depends on the interpretation of the relevant domestic provisions of forum law. Similarly, whether sister-state law applies is a question not for forum law but for the law of the sister-

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state. If sister-state law creates a right of action in respect of the relevant circumstances, it is to be applied in the forum in the absence of compelling reasons to the contrary. While the two approaches, the orthodox and the radical, have been stated in unqualified form, it should not be assumed that qualifications are irrelevant.[1] Nor should it be assumed that courts, any more than academics, consistently follow one approach to the exclusion of the other. What this article seeks to do is to find and explain methodological patterns in a series of cases, notwithstanding the fact that some judges have, for a variety of reasons, altered approach from one case or issue to another.[2]

The first case in the series was decided in 1971. It concerned the application of forum law to events which occurred in a sister-state. *Kemp* v. *Piper*[3] was a decision of the Full Court of the Supreme Court of South Australia. It is noteworthy for its acceptance of the decision of the House of Lords in *Chaplin* v. *Boys.*[4] It concerned a motor vehicle accident in Victoria which involved South Australians alone. The plaintiff's action for wrongful death was based on the provisions of the Wrongs Act, 1936-1959 (S.A.) One of the arguments addressed to the court was that the Wrongs Act did not apply to claims arising from an accident in Victoria. While the South Australian legislature could pass a valid enactment applying to certain accidents outside South Australia, it could only do so if it confined that enactment (which it had not done in the case of the Wrongs Act) to cases with some South Australian nexus, such as the domicile or residence of the parties. Bray C.J. rejected the argument on the basis that it revealed a misunderstanding of the way in which the rules of private international law operate:

> "When the *lex fori* is applied in accordance with those rules to a case possessing a foreign element, this is not because the *lex fori* is held to possess some inherent power of extra-territorial operation, but because it is part of the *lex fori* in the wider sense, including the rules of private international law applied by it, that the *lex fori* in the narrower sense, *i.e.* in its purely internal aspect, governs the particular situation notwithstanding the existence of the foreign element. It is not part of the law of South Australia that the *Wrongs Act* applies to accidents in Victoria, but it is part of the law of South Australia that its courts will entertain an action based on an act committed in Victoria if, *inter alia,* that act would have been actionable by South Australian law, including the provisions of the *Wrongs Act,* if it had occurred in South Australia.[5]

This, the orthodox explanation of the application of forum law to non-forum events,[6] runs into serious trouble when the right in question does

1. The doctrine of the supremacy of Parliament imposes one obvious limitation on the role of choice of law rules.
2. For examples, see *Plozza* v. *South Australian Insurance Co. Ltd.* [1963] S.A.S.R. 122 (Hogarth J., radical approach, forum law; orthodox approach, sister-state law); *Hine* v. *Fire and All Risks Insurance Co. Ltd.* (1972) 7 S.A.S.R. 49 and *Hodge* v. *Club Motor Insurance Agency Pty. Ltd.* (1974) 7 S.A.S.R. 86 (Zelling J., orthodox approach, sister-state law; radical approach, sister-state law).
3. [1971] S.A.S.R. 25.
4. [1971] A.C. 356.
5. [1971] S.A.S.R. 25, 29.
6. The explanation is partly in terms of jurisdiction rather than choice of law simply because of the complications raised by *Phillips* v. *Eyre* (1870) L.R. 6 Q.B.1.

not easily fit into one of the accepted categories for choice of law. This fact had been strikingly illustrated in *Plozza* v. *South Australian Insurance Co. Ltd.*[7] (1963), a decision of Hogarth J. of the Supreme Court of South Australia. In that case the plaintiff had been a passenger in a vehicle which was registered and insured in South Australia. He had been injured when the vehicle collided in Victoria with another vehicle which was registered and insured in that State. He sued the South Australian insurer pursuant to s.113, Motor Vehicles Act, 1959, which provided for direct action against the compulsory third party insurer if the alleged tortfeasor was dead or could not be served with process. The defendant argued that s.113 did not apply to an accident occurring in Victoria. The claim was to be classified as tortious for conflicts purposes. *Phillips* v. *Eyre* required that the act be wrongful according to the *lex loci delicti.* No action lay against the defendant by Victorian law under which an insurer could not be sued directly in the relevant circumstances. Consequently, the action should fail. Hogarth J. rejected this argument. The claim was not to be classified as tortious, but as one *sui generis* for which no choice of law rule was available:

> "In my view, in order that the provisions of s.113 shall apply, it is necessary that the act complained of should be such as would give rise to an action based on negligence in the State or Territory in which the act takes place. If that is established it does not matter whether the particular act would also be regarded as negligent according to the domestic law of South Australia. The South Australian provisions regarding compulsory third party insurance are designed to indemnify owners and drivers of vehicles registered in the State, and to ensure payment of damages to persons injured, and to dependants of persons killed, owing to the use of such motor vehicles, wherever in Australia such an insured vehicle is used negligently, according to the law of the place where it happens to be".[8]

Under this view, it is not a choice of law rule which determines the field of application of s.113, but the interpretation of the legislation itself. Whether, had the occasion arisen, Bray C.J. would have approved of the method adopted by Hogarth J. in *Plozza* is unclear. In the later case of *Hodge* v. *Club Motor Insurance Agency Pty. Ltd.*,[9] Bray C.J. seems to have assented to the proposition that, before a Queensland forum, the Queensland equivalent of the South Australian provision considered in *Plozza* would be applicable to events occurring outside Queensland. Although *Plozza* was not specifically approved, the points referred to by Bray C.J. were ones relating to legislative intent, not principles of choice of law:

> "It is apparent that the obligation to insure and the liability of the insurer under the policy extends to accidents outside Queensland but within the Commonwealth and where the Queensland Parliament intends that any liability under the Motor Vehicles Act should be confined to accidents in Queensland it says so (*cf.* s.4F(2) and 4F(3) with s.4A). The provisions of s.14 imposing on the nominal defendant

7. [1963] S.A.S.R. 122.
8. *Id.*, 128.
9. (1974) 7 S.A.S.R. 86.

(Queensland) the liability of certain named insurers, presumably in financial difficulties, under certain circumstances up to a certain date clearly contemplate the possible liability of those insurance companies for accidents occurring in Australia, but outside Queensland; see Sub-s.(1)".[10]

One suspects, nonetheless, that Bray C.J. would have been happier if the reasoning in *Plozza* had been based on the application of the choice of law rule relating to quasi-contracts. That was certainly the approach adopted by him in similar cases dealing with the application in the forum of sister-state law. Strangely, it was also the approach adopted by Hogarth J. himself in *Plozza* in respect of the application in the forum of a sister-state equivalent of s.113.[11]

In the second case in the series, *The Nominal Defendant and Another* v. *Bagot's Executor and Trustee Co. Ltd.*,[12] both Bray C.J. and Hogarth J. were members of the Full Court when it was confronted with a case dealing with the application not of the law of the forum, but of sister-state law. In an accident in New South Wales, the owner of a motor vehicle covered by a South Australian compulsory third party insurance policy had been killed and his passenger injured. As there had been no New South Wales policy in force at the time of the accident, the passenger brought an action in the New South Wales Supreme Court against the Nominal Defendant under the relevant local legislation.[13] Having satisfied the judgment which was eventually so obtained, the Nominal Defendant sought to recover the amount of that judgment from the executor of the deceased owner's estate. In doing so, he relied on s.32, Motor Vehicles (Third Party Insurance) Act, 1942 (N.S.W.). As Hogarth and Mitchell JJ. decided the case on a basis which avoided conflicts issues,[14] Bray C.J. was alone in considering the basis on which the New South Wales provision might apply in a South Australian forum. The sister-state statute created a debt in favour of the Nominal Defendant against the owner of the "uninsured" motor vehicle. Though conditional on the commission of a tort by the deceased, it was a statutory right of action analogous to the statutory right of contribution between tortfeasors. This right of action was to be classified for conflicts purposes as one of quasi-contract. The applicable law was the proper law of the quasi-contract, that is, the law of the place with which the circumstances giving rise to the claim had the most real connection. In *Bagot,* that place was New South Wales which was the State where the accident had occurred and where the deceased had died.

Two passages in the judgment of Bray C.J. demonstrate his awareness of the full implications of his orthodox approach to the application in the

10. *Id.*, 89.
11. "I am of opinion that a South Australian court would give effect to the provisions of corresponding legislation in the State under whose laws the policy was issued. Where there are provisions in the law of that State corresponding to s.113 of the Motor Vehicles Act, 1959-1962 (S.A.), I take the view . . . that those provisions are in the nature of a statutory extension to contractual liability. By the rules of private international law relating to contracts, an insurer is bound by the law of the State where the policy was issued, the proper law of the contract of insurance in whatever State he is sued": [1963] S.A.S.R. 122, 128.
12. [1971] S.A.S.R. 346.
13. The "natural" forum may well have been South Australia. Why New South Wales was chosen does not appear from the judgments. It may have been connected with the likelihood of a higher damages award in New South Wales.
14. The majority (Hogarth and Mitchell JJ.) found against the plaintiffs on their interpretation of the New South Wales provision. On this point, Bray C.J. (dissenting) was upheld in the High Court: (1971) 45 A.L.J.R. 46.

forum of sister-state law. The first was concerned with an argument put to the Court that serious anomalies might arise if New South Wales law were applied to the case in hand:

> "I realise that there may appear to be some anomaly when the position is contrasted with that which would have arisen if an action in tort had been brought by the injured Mr. Taylor in a South Australian court against the estate of the deceased. Such an action, of course, could only succeed if it would have lain had the accident occurred in South Australia, and, on the assumption that both the Taylors were domiciled in South Australia, it may be that some parts of the law of South Australia would be applied which had no counterpart in New South Wales provided that the tort would not have been justifiable, or, possibly, that it would not have been actionable, by the law of New South Wales (see *Kemp* v. *Piper*). It might be thought anomalous that in that case the South Australian law should play so important a role while the right of indemnity in the present case, arising out of the satisfaction by the nominal defendant of the damage arising from the tort of the deceased, should be governed entirely by the law of New South Wales and that a liability should be enforced in South Australia which has no South Australian counterpart. *The answer is that the rules of private international law adopted in common law systems lay down one set of choice of law rules in the case of tort, and another in the case of quasi-contract. Once the obligation is appropriately categorised, the choice of law is automatically determined*".[15]

Put simply, the applicability of sister-state law is to be determined exclusively by reference to the choice of law rule appropriate to the claim as categorised.

The second passage dealt with a suggestion that the consequence of holding in favour of the Nominal Defendant on the basis of New South Wales law might be disastrous, since South Australian law relating to compulsory third party insurance might exclude cover for the deceased's estate against the special form of liability created by the New South Wales provision:

> "I am far from thinking that that is a probable construction of the South Australian Road Traffic Act, but I do not think that the question is a relevant one. I cannot think that the question of the applicability of New South Wales law in a South Australian court can be affected by the construction of the provisions of the South Australian Road Traffic Act relating to compulsory third party insurance".[16]

The rules of private international law alone determine the application in the forum of sister-state law. The policy which lies behind substantive laws of the forum is apparently irrelevant to that process.

The orthodox approach to the application of sister-state law in the forum was again followed by Bray C.J. in the third case in the series, *Hodge*

15. [1971] S.A.S.R. 346, 367 [emphasis supplied].
16. *Ibid.*

v. *Club Motor Insurance Agency Pty. Ltd.*[17] The plaintiff had suffered injury while a passenger in a motor vehicle which had been involved in an accident in South Australia in which the driver had been killed. The vehicle was registered and insured in Queensland. The passenger sued the Queensland insurer on the basis of the Motor Vehicles Insurance Act, 1936-1968 (Qld.). Section 4A of that Act allowed an action to be brought direct against the third party insurer if the driver of an insured motor vehicle was dead or could not be served with process. One issue was whether that provision could be enforced in South Australia. Bray C.J. classified the claim as quasi-contractual. As the proper law of the quasi-contract was Queensland law, the claim was enforceable in South Australia:

> "I think that it is immaterial that the law of South Australia in the limited municipal sense does not create any obligation on the defendant in this case. The Queensland law does and that is sufficient according to the rules of private international law in force in this State, provided that the law of Queensland is the proper law applicable to the obligation and that there is no reason of public policy to the contrary. It might, although it was not, have been argued that that is not the case here, because the plaintiff had no connection with Queensland and the accident happened out of Queensland and hence there is nothing under our rules of private international law to attract the law of Queensland to the situation. I think there is. Under regulation 38 of the South Australian Motor Vehicle Regulations Riley was permitted to drive his car in South Australia if it was insured and registered in compliance with the law of Queensland. The terms of the policy contemplate that the car might be driven by him in South Australia and the defendant undertook to be responsible for damages for bodily injuries caused in South Australia by his negligence. The permission to drive in South Australia can be regarded as conditional on the acceptance of the obligation imposed under the Queensland insurance policy by the Queensland law with regard to South Australian accidents and the defendant, by the contract of insurance, impliedly undertook so to accept them".[18]

But Bray C.J.'s orthodoxy in *Hodge* did not find favour with either of the other two members of the Full Court, Bright and Zelling JJ. Indeed, *Hodge* is the clearest example of the differences of approach which have emerged in the South Australian Supreme Court in relation to fundamental issues in the conflict of laws. Bright J. dismissed the basic question "can the injured person bring her cause of action to the South Australian courts" in a few short sentences:

> "If there is a cause of action vested in an injured person against the insurer I can see no reason why it should not be justiciable in South Australia if the insurer can be found and served in South Australia. Indeed, counsel for the defendants in the present case conceded as much. No doubt the Court in South Australia would examine and construe the Queensland legislation to ascertain the existence and the particulars of the right which is an essential feature of the action. But that is merely the normal judicial process and

17. (1974) 7 S.A.S.R. 86.
18. *Id.*, 91.

> creates no insuperable problems. I would answer this question, "Yes" "[19]

The contrast with the approach of Bray C.J. could not be more marked. For the Chief Justice, a justification (in the form of a choice of law rule) had to be found for applying a sister-state statute in the South Australian forum. For Bright J., a justification had to be found for *not* applying that statute in the South Australian proceedings. This approach was firmly grounded on the scope and construction of the sister-state statute, not the forum's choice of law rules.

The third member of the court, Zelling J., commenced on the basis that:

> "in general, there is no doubt that a transitory cause of action, which this is, is justiciable wherever one can serve the defendant".[20]

But Zelling J. felt that some difficulty might have arisen in applying the Queensland provision had the question of the defendant insurer's rights against third parties also been in issue in the case before him. Because the Queensland provision created third party rights irrespective of third party procedures in the Supreme Court of South Australia, a third party recovery claim might not be justiciable in South Australia even though the direct recourse claim was itself justiciable there. Not entirely content with this anomaly, Zelling J. advanced two other reasons for applying the Queensland provision. In the first place, the doctrine of full faith and credit in s.118, Constitution, and s.18, State and Territorial Laws and Records Recognition Act, 1901 (Cth.), required the court to apply the Queensland provision:

> "[P]rovided there is no conflict between the law in South Australia and the law in Queensland, and here there is not, the combined effect of ss.118 and 51 (xxv) of the Constitution and s.18 of the State and Territorial Laws and Records Recognition Act is to provide a substantive right in the cases to which it applies and . . . this is one such case. If there was such a conflict, one would have to go on and consider the effect of s.118 on conflicting "sister-State" statutes, a matter which has caused much judicial debate in the United States. But it is fortunately not necessary to do so here. To give s.18 merely an evidential effect is in my view to say that that section goes no further than s.3 of the same Act and is in fact otiose at least as far as statutes are concerned. I do not think that was the intention of Parliament and whilst there is no doubt that s.18 is an evidence section, in my opinion it is that and more, and that in a case such as this, the plaintiff can if necessary rely on the full faith and credit provisions to which I have referred to ground her cause of action".[21]

The other method of reaching the desired result was simple and straightforward:

> "A third way of dealing with the matter is to use the robust but common-sense approach of Lucas J. in *Edmonds* v. *James (No. 2)* where the position was reversed and the accident took place in Queensland but the vehicle was insured under a policy issued under Part IV of our Motor Vehicles Act. His Honour's view, paraphrasing it, was that because the schemes of the two Acts were complementary,

19. *Id.,* 95.
20. *Id.,* 101.
21. *Id.,* 102.

that the policy of what were in effect interlocking insurance laws of the two States should not be defeated by technicalities".[22]

The crucial point about the reasons offered by Zelling J. for applying the Queensland statute in South Australia is that none of them was in any way dependent upon the operation of common law choice of law rules. If the Queensland statute claimed to cover the circumstances in question, that was sufficient. If, as a result of procedural difficulties in respect of third party claims, justification had to be sought for applying sister-state law, that justification was to be found in the Constitution and legislation enacted by the Australian Parliament. Finally, the application of the Queensland provision was demanded in order to avoid frustrating the aims of the legislatures of Queensland and South Australia in passing complementary and interlocking legislation. Like Bright J., Zelling J. started from the premise that a sister-state provision which covered the case in hand should generally be applied in the forum. Neither accepted the view of Bray C.J. that the application in the forum of a sister-state provision required a special justification which was only to be found in a choice of law rule of the forum.

3. The Significance of the Difference

Since Bray C.J. and Bright and Zelling JJ. were able to reach identical conclusions in *Hodge*, one might reasonably have asked whether conflicts theory was of any practical significance at all. That question was shortly to be answered. In March 1974, Menhennitt J. of the Victorian Supreme Court delivered judgement in *Gould* v. *Incorporated Nominal Defendant & Ors.*[23] *Hodge's* case had not been reported and appears not to have been cited to the judge. Even if it had been, it is doubtful if the decision would have been different. The plaintiff had been injured in an accident which occurred in Victoria. The accident involved a motor cycle ridden by the plaintiff and a motor vehicle which was driven by a person who could not be found for service of process. The latter vehicle was owned by the second and third defendants and was registered and insured in New South Wales. The action was brought against the Victorian Nominal Defendant and the registered owners of the vehicle. The claim against the Nominal Defendant was made pursuant to s.51, Motor Car Act, 1958 (Vic.). The claim against the registered owners appears to have been based on a combination of Victorian law relating to negligence and s.16(1), Motor Vehicles (Third Party Insurance) Act, 1942 (N.S.W.), under which a driver is deemed to be the agent of the registered owner for the purposes of proceedings against the owner in respect of death or bodily injury caused by or arising out of the use of his vehicle.[24]

22. *Id.*, 102-103. In *Hine* v. *Fire and All Risks Insurance* (1972) 7 S.A.S.R. 49, Zelling J. applied sister-state law on the orthodox basis indicated by Hogarth J. in *Plozza* v. *South Australian Insurance Co. Ltd.* [1963] S.A.S.R. 122. No trace of this orthodox reasoning is found in the judgment of Zelling J. in *Hodge*.
23. [1974] V.R. 488.
24. For discussion of the ambit of s.16, see Britts, *Third Party Insurance in Australia* (1973), 131ff.; *Gould* v. *Incorporated Nominal Defendant & Ors.* [1974] V.R. 488, 490. Why suit was not brought direct against the New South Wales insurer under s.15 of the New South Wales Act is not clear. The judgment contains the statement that there was no New South Wales section equivalent to s.48, Motor Car Act, 1958 (Vic.), granting a right of direct recourse where the driver could not be found. *Id.*, 491. But *cf.* Motor Vehicles (Third Party Insurance) Act, 1942 (N.S.W.), s.15(2)(a).

This claim found no favour with Menhennitt J. One reason appears to have been that s.16 of the New South Wales Act did no more than enact a rule to form part of the general body of the law of New South Wales relating to civil liability for wrongful acts, neglects and defaults.[25] As a result, the provision was to be understood as part of New South Wales law applicable to claims for personal injury caused by or arising out of the use of a motor vehicle *in that State.*[26] Its application to any other claim would depend on the operation of conflicts principles.[27] This reasoning clearly rests on the assumption that the appropriate category for the claim is that of tort, in which case the applicable choice of law rule points to the application of the *lex fori.* The fact that s.16 formed part of a scheme of compulsory third party insurance against liability wherever in Australia it occurred was irrelevant to its proper classification for conflictual purposes.[28] In this respect, Menhennitt J. followed the orthodox approach to the question of the basis on which sister-state law applies in the forum.

The New South Wales provision was concerned with a question of vicarious liability. Its classification as tortious has, therefore, some claim to plausibility. The same cannot be said for a similar classification of a direct recourse provision in *Ryder* v. *Hartford Insurance.*[29] In that case, the plaintiff was injured while a passenger in a motor vehicle which ran off the road in Victoria. The driver was killed in the accident. An action was brought against the insurer in the Supreme Court of Victoria. It was based on s.113, Motor Vehicles Act, 1959 (S.A.). Despite the enforcement of a similar sister-state provision in *Hodge,* Jenkinson J. held that the action could not proceed. Relying on the judgment of Menhennitt J. in *Gould,* Jenkinson J. decided that the right given by s.113 was to be classified as a right of action in tort. The classification of quasi-contract adopted by Bray C.J. in *Hodge* was rejected. Had the accident occurred outside Victoria, *Phillips* v. *Eyre*[30] would have been applicable and Victorian law would have applied. As that law gave no right of direct recourse in the case of death, and as such right as it gave was only in respect of policies of insurance issued pursuant to the Motor Car Act, 1958 (Vic.), the action would have failed. The fact that the accident had occurred within Victoria made no difference to the result. *Phillips* v. *Eyre* required limited reference to be made to the *lex loci delicti* when the accident occurred outside the forum. When the accident occurred within the forum, sister-state law was quite irrelevant

Between the judgment of Bray C.J. in *Hodge* and Jenkinson J. in *Ryder* there was little difference in conflicts methodology. Between the results reached there was all the difference in the world. The categories of traditional conflicts law are wide and reasonably flexible ones. A claim based on a statutory right against the tortfeasor's insurer might properly be classified as quasi-contractual; it might equally be classified as tortious. The

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25. *Cf. Koop* v. *Bebb* (1951) 84 C.L.R. 629, 640-641.
26. Emphasis supplied.
27. Even had these pointed to New South Wales law, the strange decision in *Joss* v. *Snowball* [1970] 1 N.S.W.R. 426 (*cf. Schmidt* v. *G.I.O. (N.S.W.)* [1973] 1 N.S.W.L.R. 59) might well have prevented recovery.
28. This is hardly a satisfactory conclusion, even if it is in accordance with precedent and established principle. *Cf.* Sykes and Pryles, *Australian Private International Law* (1979), 330.
29. [1977] V.R. 257.
30. (1870) L.R. Q.B.1. It is only for the sake of brevity that the term "choice of law rule" is applied in this article to the requirements laid down in that case.

claim has contractual, quasi-contractual and tortious aspects. For its success, the plaintiff must prove a tort *and* a contract *and* a relevant statutory right parasitic upon them. Given the flexibility of the categories one might have expected a choice to be made between them on the basis of the results to which adoption of the possible classifications would lead in this and in other cases. On that basis, the quasi-contractual classification is clearly preferable. In most cases, the question is simply one of where suit may be brought. The plaintiff in *Hodge* might have brought his action in Queensland instead of South Australia. The plaintiff in *Ryder* might have brought his action in South Australia instead of Victoria. Is any harm done by relegating the plaintiff to the State where the policy of insurance was issued? The answer to this question lies in matters relating to convenience of trial. If the accident occurred in Victoria, that is an excellent reason for bringing suit there. Witnesses to the accident may be Victorian; Victorian police may have investigated the accident; a view can only be taken in Victoria; medical and hospital services will most likely have been provided in Victoria; in the event of death, the inquest will have been held in Victoria. Add to these factors the distinct possibility of a Victorian plaintiff and the unacceptability of the classification adopted in *Ryder* becomes apparent. *Forum conveniens* factors cannot be used to justify it. It is little wonder that Jenkinson J. suspected that his reasoning in *Ryder* would be branded "mechanical jurisprudence".[31]

The implications of *Ryder* are significant in another important respect. *Hodge, Gould* and *Ryder* were all concerned with the enforcement in the forum of sister-state law. But decisions on that question may have serious implications for the application of forum law itself, particularly to events occurring in a sister-state. *Kemp* v. *Piper*,[32] it will be recalled, concerned the applicability of South Australian law to an accident in Victoria. In that case, Bray C.J. was concerned to emphasise the orthodox view that the application of forum law to events occurring outside the forum is dependent on the forum's choice of law rules. Even the most orthodox of conflicts theorists must recognise exceptions to the dominance of the forum's choice of law rules in this regard. One exception is that a statute of the forum may define its own territorial extension, in which event the common law choice of law rules are superseded. When a statute does not do so expressly, but there are indications, whether contained in the statute or to be inferred from ts purposes, which point in the same direction, a problem arises. In the absence of express treatment of the issue in the statute itself, the determination of the application of the forum statute may be made on one of two bases. Either the forum's conflict categories and choice of law rules will prevail or the application of the statute will be based on the legislative intent and the ends which the statute is to achieve.

The leading case on this matter is, of course, *Plozza* v. *South Australian Insurance Co. Ltd.*[33], a case noted earlier in this discussion. The significance of that case in the present context lies in the rejection of the "tort" category for a right of direct recourse against a compulsory third party insurer. In *Hodge,* Bray C.J. appears to have been willing to accept the correctness of this approach. For Jenkinson J., on the other hand, *Plozza* may have been wrongly decided:

31. [1977] V.R. 257, 271.
32. [1971] S.A.S.R. 25.
33. [1963] S.A.S.R. 122.

"Section 113(1) of the South Australian Act, like the Victorian statue under consideration in *Koop* v. *Bebb,* in my opinion, "purports only to enact a rule to form part of the general body of the law of ". . . the State by which it was enacted . . . " relating to civil liability for wrongful acts, neglects and defaults . . ." "[34]

If this be the case then there can be no question, even in a South Australian forum, of its extending to accidents in Victoria. It must rely for its territorial application upon common law choice of law rules. Since, in Jenkinson J.'s view, the relevant category is that of torts, s.113 may possibly be confined to accidents in South Australia involving South Australian-insured motor vehicles. Given the clear intent of the South Australian and equivalent sister-state legislation, this result would be little short of disastrous. In the event of an accident occurring in Victoria involving a South Australian insured motor vehicle, the direct recourse action would be available neither in South Australia nor Victoria. This conclusion could only be avoided by a South Australian forum on one of two bases. Either "non-justifiable for the purposes of *Phillips* v. *Eyre* is not equivalent to "actionable", or, following the alternative reasoning in *Koop* v. *Bebb,* the parasitic statutory right of the forum is available whenever the primary tortious right relied upon satisfies *Phillips* v. *Eyre.*

4. Ancillary Complications

The orthodox approach exemplified in the Victorian decisions is worrying in another respect. In the first place, it reduces the relevance of the doctrine of full faith and credit almost to vanishing point.[35] In *Plozza* and in *Hodge,* Hogarth J. and Zelling J. expressed the view that full faith and credit required the application of a sister-state direct recourse provision if that provision applied on its own terms to the circumstances before the forum. Menhennitt J. and Jenkinson J. denied that the sister-state provisions before them made any such claim to application. They did so on the basis of the denial in *Koop* v. *Bebb* that the Victorian wrongful death legislation claimed to apply to accidents outside Victoria. If the statute makes no claim to application, a Victorian court which does not apply it can hardly be denying it full faith and credit, unless, of course, it is indicated as the governing law by Victorian choice of law rules. But *Koop* v. *Bebb* should not be interpreted so widely. That case was concerned with a statutory provision filling a recognised *lacuna* in the law of negligence. There was no indicator at all of any special territorial application. Its application to events outside Victoria might plausibly be left to choice of law rules. Precisely the opposite is the case in the area of direct recourse. The indication of territorial application is clear in the statute itself. The legislation does not fill a gap in the general law of torts. It provides a special remedy for a special class of case for which the choice of law rule relied on by Menhennitt J. and Jenkinson J. provides an inadequate area of application. Once a claim to application is made by sister-state law, full faith and credit must become relevant. Indeed, it may be that it is *only* when such a claim is made that full faith and credit is a relevant factor. To give full faith and credit to sister-state law only when forum choice of law rules point to the

34. [1977] V.R. 257, 269.
35. In the most recent discussion of full faith and credit, the judgments of Zelling J. in *Hodge* and of Hogarth J. in *Plozza* are criticised because they do not explain why full faith and credit required application of the sister-state statutes. See Sykes and Pryles, *op. cit.* (*supra* n.28), 181-182. In the case of Zelling J., that criticism is unfounded. See the text, *supra* to nn. 20-22.

sister-state is to give full faith and credit to one's own law rather than to that of the sister-state, a fact which the unity of the common law in Australia has so far concealed.

Even so, it must be admitted that the alternative reasoning in *Koop* v. *Bebb* provides an obstacle to the full development of the radical approach adopted by Bright and Zelling JJ. in *Hodge.* Where a provision is to be classified as tortious, the reasoning in *Koop* v. *Bebb* inhibits an interpretation under which that provision applies to events outside the enacting State. In view of the close relationship between strict tort law and the statutory provisions dealing with compulsory third party insurance, this is particularly unfortunate. *Koop* v. *Bebb* was decided almost thirty years ago when a challenge to *Phillips* v. *Eyre* may have been unthinkable. Since the remarks of Kitto J. in *Anderson* v. *Eric Anderson*[36] and the virtual castration of *Phillips* v. *Eyre* in *Chaplin* v. *Boys,*[37] *Koop* v. *Bebb* must be regarded as having been deprived of some of its authority. It should be remembered that *Chaplin* v. *Boys* involved the application of English law to events in Malta and is itself an example of the application of a forum rule[38] to events occurring outside the forum. Moreover, it is difficult to understand why the High Court found it necessary to deny extra-territorial application to the Wrongs Act (Vic.). The argument put to it was that, if interpreted to cover an accident in New South Wales, the Wrongs Act would infringe the doctrine of extra-territoriality. This argument was clearly wrong since that doctrine is satisfied if a sufficient nexus exists between the enacting State and the events to which the law is to apply. Such a nexus undoubtedly existed in *Koop* v. *Bebb*, where both the deceased and his dependants were permanent residents of Victoria. There was simply no need to deny that the Wrongs Act claimed extra-territorial application. Indeed, the alternative reasoning itself appears to be based on the view that the Wrongs Act does apply to events occurring outside Victoria, provided that choice of law rules are successfully applied to the primary cause of action in tort. Some statutory provisions contain express "localising" provisions; others contain them by clear implication. It is but a small step to determine the application of a provision which is silent on the matter by referring to the aims and objects of the legislation.

The judgments in *Gould* and *Ryder* give rise to three other problems. In the first place, they appear to misconceive both the obligatio theory and the rejection of that theory in *Koop* v. *Bebb.* In *Gould,* Menhennitt J. rejected an argument to the effect that the obligatio theory required the application of the New South Wales provision in Victoria. He did so on the basis that, according to the High Court in *Koop* v. *Bebb,* the obligatio theory is not part of our law. While noting the argument set out in *Hall* v. *National & General Insurance Co. Ltd.*,[39] that the rejection of the obligatio theory in *Koop* v. *Bebb* was limited to actions in tort, Menhennitt J. clearly favoured a wider interpretation of the High Court decision.[40] In *Ryder,* Jenkinson J. cited the judgement of Menhennitt J. on this point with apparent approval. Just what the obligatio theory had to do with either case

36. (1966) 114 C.L.R. 20.
37. [1971] A.C. 356.
38. *Chaplin* v. *Boys* involved a common law rule rather than a statutory one, but is that a relevant difference, particularly in light of the insurance aspects of *Chaplin* v. *Boys* and similar cases?
39. [1967] V.R. 355.
40. [1974] V.R. 488, 495.

is a mystery. As discussed in *Koop* v. *Bebb,* the theory was an attempt to justify the application of the *lex loci delicti* rather than the *lex fori* to an action based on a sister-state tort. But neither *Gould* nor *Ryder* was concerned with a sister-state tort. In each case the accident had occurred in Victoria, that is, in the forum. The obligatio theory of the basis of tort liability was simply irrelevant. What *was* relevant in *Ryder,* and arguably relevant in *Gould,* was the question whether a right of action created by a sister-state law and covering the case in hand should be enforced in the forum. As Zelling J. pointed out in *Hodge,* to doubt that the answer to this question is in the affirmative, except in tort actions, is, even under an orthodox approach, to question the principle that transitory causes of action may be enforced anywhere. It is certainly to be hoped that the rejection of the obligatio theory in *Koop* v. *Bebb* will not again be misunderstood and distorted in this way.

Secondly, there is considerable confusion over the conflictual significance to be attached to certain words and phrases which commonly appear in legislation which creates or modifies rights of action. In *Gould,* for example, considerable reliance was placed upon an interpretation of s.16(1) of the New South Wales Act which indicated that it disclaimed any intention to apply to proceedings other than those in New South Wales courts:

> "Having regard to the well-recognised rule that statutes are ordinarily to receive a construction restricted territorially and to the constitutional provision that the powers of the Parliament of New South Wales are to make laws for the peace, welfare and good government of New South Wales and to ordinary principles of statutory construction, it seems to me that, when s.16(1) is referring to proceedings, it is referring to proceedings in New South Wales courts. Indeed, as a matter of the ordinary interpretation of the statute, it cannot, I think, have been the intention of the Parliament of New South Wales to lay down a rule which was applicable in any proceedings outside the State of New South Wales. The rule laid down is laid down only for the purposes of proceedings and the proceedings for which it is laid down are, it seems to me, only proceedings in New South Wales courts".[41]

This argument derived some support from *Anderson* v. *Eric Anderson*[42] where three members of the High Court suggested that cl.15, Law Reform (Miscellaneous Provisions) Ordinance, 1955 (A.C.T.), which introduced the principle of apportionment into A.C.T. law, was limited, in its own terms, to proceedings brought in the A.C.T. An argument that the A.C.T. ordinance should be applied in New South Wales proceedings could not rely upon the doctrine of full-faith and credit since the ordinance made no claim to application in a New South Wales forum. This argument is fundamentally misconceived. It is unrealistic to interpret a provision commencing — "In proceedings in [the enacting State or Territory] . . ." or "In proceedings in [a named court of a State or Territory]" — as indicating anything at all as a matter of territorial claim or disclaimer. Phrases of this type are simply devices used by draftsmen for convenience of expression. In both *Anderson* and in *Gould,* the clear policy behind the

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41. *Id.,* 492. See also *Ryder* v. *Hartford Insurance* [1977] V.R. 257, 269. The latter case is criticised by Sykes and Pryles, *op. cit.* (*supra* n.28), 181, on a different and not entirely satisfactory ground.
42. (1965) 114 C.L.R. 20.

relevant provision was to change the law of the enacting jurisdiction, not the law of a sister-state. How, indeed, could it be otherwise? Neither the Australian Capital Territory nor the New South Wales legislature has power to alter the conflicts rules of sister-states. Nor is it to be supposed that either body believes the contrary to be the case. That leaves untouched the question whether, in proceedings in the enacting State, the legislation is to be taken as applying to certain events possessing a nexus with the forum but occurring outside the enacting State. If the answer to this question is affirmative, then the enacting State's legislation has a claim to be applied. The doctrine of full-faith and credit then becomes crucial.

Thirdly, there appears to be come confusion behind the suggestion in *Gould's* case that *Nominal Defendant* v. *Alex Kay Pty. Ltd.*[43] is relevant to the determination of the enforceability of sister-state statutes in the forum. That case concerned a claim for damages by a passenger injured in a motor vehicle accident in New South Wales. The vehicle was under hire from a company engaged in business in Queensland and the terms of the agreement provided that the vehicle was not to be taken outside Queensland without the written consent of the owner. Suit was brought in New South Wales against the owner of the vehicle, and against the Nominal Defendant as a second defendant on the basis that the vehicle was an uninsured vehicle for the purposes of s.30(1), Motor Vehicles (Third Party Insurance) Act, 1942 (N.S.W.). The High Court held that the vehicle had not been shown to have been in New South Wales other than temporarily within the meaning of the Regulations under the New South Wales Act. It was, therefore, uninsured for the purposes of the Act. The Nominal Defendant could not recover from the first defendant under s.32(1) (a) of the N.S.W. Act since the driver, at the time of the accident, had not been driving the vehicle with the authority of the owner. For this conclusion, two main reasons were given: first, the agreement had expired by effluxion of time; second, the driver was in breach of the term requiring him not to drive outside Queensland without the written consent of the owner. In the High Court, it was apparently argued that s.3(2), Motor Vehicles Insurance Act, 1936-1961 (Qld.), required the court to treat the driver in the instant case as the agent of the owner, notwithstanding his lack of actual authority. This argument was rejected by Walsh J. in the following terms:

> "It is sufficient to say that, in my opinion, it is plain that those provisions have no application to this case".[44]

From this dictum, Menhennitt J. drew the following inference:

> " . . . apparently the conclusion was thought to be so clear as to lead to the statement that the provision of a Queensland statute, which was in its operation similar to that of s.16(1) of the New South Wales Motor Vehicle (Third Party Insurance) Act, 1942 (as amended) was plainly inapplicable to a claim made in a New South Wales court arising out of a collision in New South Wales".[45]

The inference is invalid. What may properly be inferred from Walsh J.'s dictum is that the interpretation of s.32(1) of the New South Wales Act *qua* authority to drive cannot be affected by s.3(2) of the Queensland Act. In

43. (1973) 47 A.L.J.R. 132.
44. *Id.*, 137.
45. [1974] V.R. 488, 494.

other words, in an action based entirely on New South Wales insurance law, Queensland provisions applicable to claims based on Queensland law are simply irrelevant. Nothing was, or should have been, said about the question of the enforceability of sister-state statutes *in actions based on sister-state law*. In *Kay,* the claim by the Nominal Defendant for indemnity was, and could only have been, based entirely on forum law. The rights and duties, even the existence, of the Nominal Defendant of New South Wales were based on New South Wales law. In *Gould,* on the other hand, a claim against the registered owners might have been based solely on sister-state law. Given the controversial decision in *Joss* v. *Snowball,*[46] that claim may well have failed, even in the sister-state.[47] Even so, it would not have failed for the reason given in *Kay,* but simply because, as interpreted, the provision did not apply to events occurring outside the enacting State. *Nominal Defendant* v. *Alex Kay* may indicate legislative anomalies in the Australia-wide system of compulsory third party insurance, particularly in relation to claims by or against Nominal Defendants. It is irrelevant, however, to the question which was in issue in *Gould,* in *Ryder* and in the South Australian cases discussed in this article.

5. Conclusion

The judgments analysed in this article demonstrate that a coherent theory of the basis upon which both forum and sister-state law are to be applied in the forum has yet to be developed. It is clear that, in the hands of Bray C.J., the orthodox approach could be applied in a flexible manner leading to results which accord with common sense and with the needs of a federal system which is groping towards proper determination of interstate civil disputes. It is equally clear that, in other hands, the orthodox approach is capable of giving rise to serious anomalies. The supposed values of an orthodox approach, its certainty and predictability, are clearly at risk. Even on an *a priori* basis, one might reasonably have doubted whether categories derived from Roman law and applied to international conflicts would operate satisfactorily in cases involving modern problems in a federal system. For that reason alone, one might have been tempted to prefer the approaches of Hogarth J. in *Plozza* and of Bright and Zelling JJ. in *Hodge* to that of Bray C.J. in *Kemp,* in *Bagot* and in *Hodge.*

But there is an additional, federal,[48] reason for preferring the radical view to the orthodox one. In a federal system, it is appropriate to start with a presumption in favour of applying sister-state law when it is applicable in its own terms to the circumstances in question. If sister-state law creates rights and duties in respect of events occurring in the forum, the forum should be required to justify a failure to give full faith and credit to the law of that sister-state. To attempt a detailed answer to the question what would count as a justification for this purpose would go far beyond the scope of this article. On the one hand, ill-defined "public policy" would certainly not suffice.[49] On the other, a competing claim to application by forum law or by the law of a third state might well do so. In the event of a competing claim, a method of conflict resolution would become necessary.

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46. (1969) 72 S.R. (N.S.W.) 218.
47. *Cf. Schmidt v. G.I.O. (N.S.W.)* [1973] 1 N.S.W.L.R. 59.
48. Consistent not only with theory, but with the constitutional mandate to give full faith and credit to sister-state laws.
49. *Merwin Pastoral Co.* v. *Moolpa Pastoral Co.* (1933) 48 C.L.R. 565; *Finlayson* v. *Permanent Trustee Co. (Canberra) Ltd.* (1967) 9 F.L.R. 424.

Full faith and credit might possibly be involved at that level. All that is suggested in the present article is that where there are no competing claims, either by forum law or by that of a third state, sister-state law should be applied, not because a forum choice of law rule says so, but because that result is required by s.118 of the Constitution. The purpose of choice of law rules is to solve conflicts, not to create them. The direct recourse cases dealt with in this article all concerned false conflicts. Even in *Ryder,* both South Australian and Victorian law agreed on the policy of compulsory third party insurance. The only "conflict" was one created by the existence of separate States and the limits, real and supposed, on the competence of their respective legislatures. Conflicts of that type are surely ones which the federal constitutional requirement of full faith and credit should be allowed to solve.

Whether the orthodox approach espoused by Bray C.J. will survive in a recognisable form or will be overtaken and replaced by one based on federal considerations is unclear. Whatever the outcome may be, the South Australian Supreme Court under Bray C.J. has emerged as the leading court in Australia on matters relating to the practice and the theory of the conflict of laws. Leaving aside its general treatment of the basis upon which forum and sister-state laws are to be applied in the forum, the court's most important specific contribution lies in its attempts to accommodate the differences between State laws in the area of compulsory third party insurance. In a series of cases, it has been successful in those attempts. It is a matter of regret that there are signs that other courts in Australia may not follow its lead.[50] Should that prove to be the case, specific legislation will be necessary to deal with the conflicts and insurance problems which will be created. Unless a common judicial approach is adopted in relation to determining the application in the forum of both forum and sister-state law, the difficulties created by the cases analysed in this article will spread to other areas of interstate conflicts. Given the confusion which already exists, consideration should be given to the possibility of progressively reforming the law in this area; if necessary, by recourse to Commonwealth legislation under s.51 (xxiv) and (xxv) of the Constitution.[51]

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50. Apart from *Gould* and *Ryder,* see *Baldry* v. *Jackson* [1977] 1 N.S.W.L.R. 494, where Allen M., declining to follow *Plozza, Bagot* and *Hodge,* held that a statutory provision creating rights of contribution in tort actions is to be classified as tortious or delictual rather than quasi-contractual. Once again, *Koop* v. *Bebb* provided the starting point for determining the application of a forum provision to events occurring outside the forum.
51. *Cf.* Nygh. *Conflict of Laws in Australia* (2nd ed., 1971), 726-727; O'Brien, "The Role of Full Faith and Credit in Federal Jurisdiction", (1976) 7 *F.L.R.* 169, 189-191.