RECENT PROBLEMS WITH CHARACTERIZATION OF STATUTORY RIGHTS IN THE CONFLICT OF LAWS

RYDER v. *HARTFORD INSURANCE CO.*

BALDRY v. *JACKSON*

Modern legislation contains many provisions which modify common-law rules or create private rights with no counterpart in the common law. Some of the provisions are difficult to characterize for choice of law purposes, because they straddle or fall outside the categories found appropriate for characterizing common-law rules. Since each category has attached to it a different localizing rule, the category chosen in the characterization process may be crucial as to whether a plaintiff may rely on a provision in a particular forum. The problem is acute in a federation, but also arises in international litigation.

The characterization problem has recently arisen in *Ryder* v. *Hartford Insurance Co.*[1] in relation to the direct recourse right under compulsory third party insurance legislation, and in *Baldry* v. *Jackson*[2] in relation to statutory contribution rights between co-tortfeasors. Australian jurisdictions have substantially similar provisions on these matters.

Ryder illustrated the way the problem frequently arises where a plaintiff claims under a foreign statutory right. The alternative situation arose in *Baldry,* where the plaintiff claimed under a forum statute in respect of events which occurred at least partially outside the forum. The two situations are distinct. In the latter, the common-law choice of law rules — and consequently the need to characterize — will only arise if the forum statute has not ousted them with a localizing rule[3] which covers the issue before the court.

Characterization problems with the rights considered in *Ryder* and *Baldry* will be examined in the light of principle, authority and policy. It will be suggested that the characterization of statutory provi-

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[1] [1977] V.R. 257 (Supreme Court of Victoria: Jenkinson, J.), hereafter *Ryder*.

[2] [1977] 1 N.S.W.L.R. 494 (Supreme Court of N.S.W.: Allen, M.), hereafter *Baldry*. The same facts gave rise to an earlier decision on a different point reported under the same title: [1976] 1 N.S.W.L.R. 19; affirmed [1976] 2 N.S.W.L.R. 415 (C.A.).

[3] For a discussion of the concept of a unilateral localizing rule in a statute, see David St. Leger Kelly, *Localizing Rules in the Conflict of Laws* (1974), chapters I and II.

sions can be performed satisfactorily within the traditional choice of law process, which is flexible enough to accommodate new juridical categories with appropriate localizing rules attached to them where the traditional categories appropriate to common-law rules are inadequate.[4]

Direct Recourse

A direct recourse provision allows the victim of a motor vehicle accident involving a person insured under the same statute as the one which contains the provision to sue the insured person's insurer directly for the amount the victim could have recovered if he had sued the insured person in tort. The right given by the provision is available when the insured person is dead or cannot be served with process.[5]

The right has variously been characterized as tortious, quasi-contractual and contractual.

The main argument in favour of a delictual characterization is that the right of direct recourse is premised on the commission of a tort. It is possible to argue that the method of ascertaining the insurer's liability under the provision makes it delictual in character, because the extent of the insurer's liability is determined by the extent of the insured's liability in tort to the victim. However, the method of determining liability under any right is not necessarily the same as the nature of the right, which is the important aspect for the purposes of characterization. One party to a contract may promise to perform without negligence. In an action for breach of this term, the existence of the promisor's liability will depend on tort principles. However, this will not change the contractual character of the action.

It is also possible to argue that the cause of action under the provision is essentially the same as an action in negligence by the victim against the insured person except that the legislature has substituted the insurer for the insured as the one to bear liability. This formed one of the principal grounds for Jenkinson, J.'s characterization of the right as tortious in *Ryder*.[6] In favour of this argument, it can be said that the insurer's liability only arises once a tort is committed, and proof of the elements of tortious liability are basic ingredients of the victim's claim. In these respects, the right seems similar to the right

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[4] The effect of the "full faith and credit" provisions of the Commonwealth Constitution and Comonwealth legislation on the traditional choice of law rules is beyond the scope of this article. In any event, they are not relevant in an international conflicts problem. In addition, the traditional choice of law process is assumed to have an analytical base. The merits of the "functional" approach as an alternative description of the manner in which the traditional process operates is beyond the scope of this article. For a statement of the "functional" approach, see P. E. Nygh, *Conflict of Laws in Australia* (3rd ed., 1976), Chapter 10.

[5] See the Motor Vehicles (Third Party Insurance) Act, 1942-1978 (N.S.W.), s. 15(2)(a)(i). Hereafter, references to this Act will be cited as "N.S.W. Act".

[6] *Supra* n. 1 at 266, lines 29-38.

of a victim under the New South Wales third party legislation to sue the Nominal Defendant where the tortfeasor is unidentified,[7] which in *Chadwick* v. *Bridge*[8] was characterized by the High Court as an action in tort, in a non-conflictual context. In *Carslake* v. *Guardian Assurance Co.*,[9] Bray, C.J. was inclined to see the two rights as analogous,[10] although there was no need to decide the point since the case involved no conflictual elements. In cases where the respective provisions apply, the essential elements of liability in tort for negligence — breach of a duty of care owed by the defendant to the plaintiff causing damage to the plaintiff — do not exist between the victim and the insurer, but this did not trouble the High Court in *Chadwick's Case.*[11]

It is submitted that the substitution argument is based on an incomplete description of the nature of the direct recourse right, that the two rights are not analogous, and that *Chadwick's Case* is not to be regarded as binding authority on characterization of the direct recourse right. Although both rights possess ingredients additional to those required to establish a claim in negligence, these ingredients are more numerous and substantial in the direct recourse right. The right under s. 30(2) merely has the additional requirement of proof that the tortfeasor cannot be found after due inquiry and search. The direct recourse right, however, requires proof that the tortfeasor is an "insured person" under the Act, that the insurer is an "authorized insurer" under the Act, that the insured person is dead or cannot be served with process, and that the insurer has been given notice of the claim within a certain time prescribed by the Act.[12] In *Carslake's Case,* Walters, J., *obiter,* distinguished the two rights and rejected the substitution argument as a proper analysis of the nature of the direct recourse right. He characterized the right as non-delictual.[13] It is submitted that the views of Walters, J. on this point are to be preferred to those of Bray, C.J. cited earlier.[14] In *Ryder,* Jenkinson, J. did not mention the objections to the substitution argument outlined above.[15]

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[7] N.S.W. Act, s. 30(2).

[8] (1951) 83 C.L.R. 314 *per* Dixon, J. at 319; *cp.* Williams, J. at 320-1 and Webb, Fullagar and Kitto, JJ. at 321.

[9] (1977) 15 S.A.S.R. 378 (F.C.).

[10] *Id.* 383-4.

[11] *Supra* n. 8.

[12] The requirement of notice has now been abolished in N.S.W.: Notice of Action and Other Privileges Abolition Act, 1977, s. 4 and Schedule 1, as amended by Notice of Action and Other Privileges Abolition (Amendment) Act, 1978, s. 3(b)(i). Where the notice requirement is still law, it has been held that it is an essential element of the cause of action, which does not accrue for limitation purposes until it is fulfilled: *Carslake's Case, supra* n. 9 *per* Bray, C.J. at 381-2, Walters, J. at 385-6, Zelling, J. at 389; see also *dicta* of Gowans, J. in *Hall* v. *National and General Insurance Co. Ltd.* [1967] V.R. 355 at 363-4.

[13] *Supra* n. 9 at 386-7.

[14] See *supra.* Zelling, J., the third judge in the case, did not refer to the point.

[15] *Supra* n. 1 at 266, lines 29-46.

He cited no authority on the direct recourse provision in a conflictual context in support of the argument, and did not refer to the conflicting views in *Carslake's Case.*[16]

In addition, unlike the liability of the Nominal Defendant under s. 30(2), the insurer's liability under a direct recourse provision arises *directly* from the contract of insurance between the deceased or absconded insured and the insurer. In *Hall's Case,* Gowans, J. saw this as the essential feature of a direct recourse provision.

> The foundation of the right sought to be enforced . . . is a contract between an authorized insurer and its insured, upon which the Northern Territory Ordinance has superimposed rights and obligations as between the insurer and a person having a right of recovery against the insured.[17]

Until *Ryder,*[18] authority favoured a non-delictual characterization, although there was disagreement on the form of the alternative characterization. In *Plozza* v. *South Australian Insurance Co. Ltd.,*[19] Hogarth, J. rejected tortious characterization.[20] Chamberlain, J. favoured the opposite view on the same conflictual facts as *Plozza* in *Li Lian Tan* v. *Durham, and General Accident Fire and Life Assurance Corporation Ltd.*[21] but his remarks were *obiter,* since the deceased insured person was found not to be negligent. Despite its being an earlier decision of the same Court, *Plozza* was not referred to in the case. In *Hall's Case,* Gowans, J. considered he did not need to decide the characterization issue on a procedural application,[22] so his remarks on the subject were *obiter.* However, his Honour's preference for a non-delictual characterization is apparent in the passage from his judgment referred to previously. The remarks formed part of an attempt[23] to distinguish *Koop* v. *Bebb*[24] which would not have been necessary had his Honour considered a tortious characterization to be correct. In *Nominal Defendant* v. *Bagot's Executor and Trustee Co. Ltd.,*[25] in which he dissented on another ground, Bray, C.J. characterized the right of indemnity given to the Nominal Defendant by s. 32(1) of the New South Wales third party legislation as non-delictual.[26] From his citation of *Plozza*[27] in support of his view, his Honour clearly considered that the right under s. 32(1) and the direct recourse right were analogous and that both could be characterized as non-

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[16] *Supra* n. 9.
[17] *Supra* n. 12 at 363, lines 2-6.
[18] *Supra* n. 1.
[19] [1963] S.A.S.R. 122, hereafter *Plozza.*
[20] *Id.* 126-7.
[21] [1966] S.A.S.R. 143 at 149.
[22] *Supra* n. 12 at 363, lines 8-15.
[23] *Id.* 362-3.
[24] (1951) 84 C.L.R. 629 at 643-4.
[25] [1971] S.A.S.R. 346 (S.C.: Bright, J., and F.C.), hereafter *Bagot.*
[26] *Id.* 365.
[27] *Supra* n. 19.

delictual.[28] Although the majority did not need to decide the point, Mitchell, J. agreed with Bray, C.J.'s reasons on the characterization issue.[29] On appeal, the High Court did not specifically mention the characterization issue, but in a joint judgment a majority of the Court stated without any qualification their agreement with the judgment of Bray, C.J.[30]

In *Hodge* v. *Club Motor Insurance Agency Pty. Ltd.*,[31] Bray, C.J. based his decision that the foreign direct recourse provision in question[32] was justiciable in the forum on a non-tortious characterization of the provision.[33] His Honour reaffirmed his views in *Bagot*[34] and again approved *Plozza*.[35] Although Bright, J.'s judgment is not explicit on the point,[36] it is submitted that he favoured a non-delictual characterization since he found the provision to be justiciable in the forum, which it would not have been under the tort choice of law rule. Zelling, J. preferred to decide the case on another ground.[37] However, his Honour's consideration of the implications of holding the provision to be justiciable[38] would not have been necessary on a delictual characterization, since this would have defeated the right at the threshhold. Therefore, it is submitted that there is a majority and, possibly, unanimity on a non-delictual characterization of the direct recourse provision in a decision directly on the point. The conflicting *dicta* of Bray, C.J. and Walters, J. in *Carslake's Case*[39] bearing indirectly on the point have already been discussed.[40]

Nevertheless, in *Ryder*,[41] Jenkinson, J. characterized the right as tortious and not justiciable in Victoria. It is respectfully submitted that an examination of the reasons for his decision shows that his Honour took insufficient account of the authority against a tortious characterization, and did not substantiate his conclusion in principle.

Jenkinson, J. mentioned the authority in favour of a non-delictual characterization, but made no attempt to distinguish it and little attempt to indicate in it any weakness in principle.[42] In particular, his Honour

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[28] The correctness of this analogy is considered later in the article (see p. 198, *infra*). However, the correctness of the analogy does not destract from his Honour's approval of *Plozza*.

[29] *Supra* n. 25 at 375. The third judge, Hogarth, J. (the judge in *Plozza*) made no reference to the point.

[30] (1971) 125 C.L.R. 179 at 183.

[31] (1974) 7 S.A.S.R. 86 (F.C.), hereafter *Hodge*.

[32] S. 4A of the Motor Vehicles Insurance Acts 1936-1968 (Qld.). The accident occurred in South Australia.

[33] *Supra* n. 31 at 89.

[34] *Supra* n. 25.

[35] *Supra* n. 19; *supra* n. 31 at 89.

[36] *Supra* n. 31 at 95.

[37] *Id.* 101-2.

[38] *Id.* 101.

[39] *Supra* n. 9.

[40] See p. 192, *supra*.

[41] *Supra* n. 1.

[42] *Id.* 260-1. For example, his Honour says: "Nor have the principles of private international law with respect to quasi-contractual obligation been so

failed to deal effectively with *Hodge,*[43] which involved the same facts as the case before him: a foreign direct recourse provision and an accident in the forum.[44] His Honour's one attempt[45] to destroy the reasoning in *Hodge* does not have the desired effect. He drew attention to the fact that the foreign right at issue in *Batthyany* v. *Walford,*[46] which Bray, C.J. said was similar in nature to the direct recourse right, was characterized as non-delictual for domestic purposes. However, this does not of itself destroy Bray, C.J.'s analogy. Indeed, there was no suggestion in the judgments of the Court of Appeal in *Batthyany* v. *Walford* that the right would have been characterized any differently for conflictual purposes, or that it would not have been justiciable in England.[47] Jenkinson, J. did not question the correctness in substance of Bray, C.J.'s analogy, which would have been a more profitable line of attack.

His Honour accepted as a sufficient characterization of the direct recourse provision the statement of Gowans, J. in *Hall's Case,*[48] that the provision was a personal or private right created by a foreign statute which would be enforced by the *lex fori* if it was not penal, fiscal, local or public in character or contrary to the public policy of the forum.[49] However, Gowans' J.'s statement by itself takes the characterization process no further, because foreign statutory rights, like foreign non-statutory rules, will only be enforced if they form part of the *lex causae.*[50] Under the forum's choice of law rules, characterization to achieve this result still had to take place. Gowans, J., recognized this, for he went on, in the passage cited earlier in this article,[51] to characterize the provision on traditional lines. Moreover, on the same facts as *Ryder,* he characterized the foreign provision as non-delictual.[52] Jenkinson, J. ignored this aspect of Gowans, J.'s judgment. Moreover, in approving Gowans, J.'s statement, Jenkinson, J. was not placing private rights under foreign statuses in a new juridical category

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Footnote 42 (Continued).

fully developed as to encourage classification under that rubric". This is a justification but not a reason for refusing to characterize the right in this fashion if there are other good reasons in principle for doing so.

[43] *Supra* n. 31.

[44] The provision at issue in *Ryder* was s. 113 (1) of the South Australian Motor Vehicles Act, 1959-1970; see also the rest of s. 113, and s. 114 of the same Act.

[45] *Supra* n. 1 at 262-3.

[46] (1887) 36 Ch. D. 269.

[47] *Id.* 278-282 *per* Cotton, L.J. See also *Dicey and Morris on the Conflict of Laws* (9th ed. by J. H. C. Morris, 1973) at 927, where the case is used as authority on the choice of law rule for quasi-contract.

[48] *Supra* n. 12 at 361; *cf.* Bright, J. at first instance in *Bagot, supra* n. 25 at 354-5.

[49] *Supra* n. 1 at 260, lines 32-36, 261-2, 263, lines 3-6.

[50] It is submitted that the statement in *Dicey and Morris* relied on by the judges in the passages referred to (*supra* nn. 48 and 49) is not intended to contradict this fundamental principle of the conflict of laws.

[51] See p. 193, *supra; Hall's Case, supra* n. 12 at 362-3.

[52] See the argument earlier in this article (p. 193, *supra*) on this point.

with its own localizing rule. His decision that the foreign statutory provision in question was not justiciable in the forum was based on a characterization of the right within a traditional category.[53]

His Honour successfully distinguished the provision in *Bagot*[54] which was characterized as non-tortious from a direct recourse provision.[55] However, this of itself does not affirmatively show that the direct recourse right is tortious. His Honour attempted to offer affirmative proof in two ways. The weaknesses of the substitution argument which he advanced[56] have been demonstrated earlier in this article.[57] Indeed, his Honour admitted later in his judgment that the direct recourse provision contained ingredients "irrelevant to tortious liability at common law",[58] though he considered this did not damage the substitution argument.[59] His Honour also attempted to draw an analogy between a direct recourse provision and a provision imposing conclusive vicarious liability on a motor vehicle owner in third party proceedings[60] which was characterized as tortious in *Gould* v. *Incorporated Nominal Defendant*.[61] However, in *Gould's Case*,[62] Menhennitt, J. viewed the two provisions as different in nature. Jenkinson, J. admitted that differences in nature existed between the two provisions,[63] but failed to show why these did not destroy his analogy. He did not think that the presence in both provisions of ingredients of the cause of action irrelevant to tortious liability or of policy reasons for imposing liability different to those in tort made it wrong to classify both provisions as tortious.[64] However, by itself this factor provides no affirmative proof that the two rights are analogous. His Honour made no further attempt to show that the two provisions possessed features which were so similar as to make the provisions analogous.

Therefore, there exist strong reasons in principle and authority for a non-tortious characterization of the direct recourse provision. A tortious characterization would also be inimical to the policy behind compulsory third party motor vehicle insurance, which is to ensure that an accident victim can be assured of obtaining full compensation as quickly and cheaply as possible. If the Court decides to characterize both forum and foreign direct recourse provisions as part of the general law of tort and, as such, subject to the rule in *Phillips* v.

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[53] *Supra* n. 1 at 266, 268-9, especialy at 269, lines 45-52.
[54] *Supra* n. 25 and N.S.W. Act, s. 32(1).
[55] *Supra* n. 1 at 266, lines 23-28.
[56] *Id.* 266, lines 29-45.
[57] See p. 193, *supra*.
[58] *Supra* n. 1 at 269, lines 1-2.
[59] *Id.* 268-9.
[60] N.S.W. Act, s. 16(1).
[61] [1974] V.R. 488.
[62] *Id.* 494-5. It is submitted that this distinction is correct in principle.
[63] *Supra* n. 1 at 268.
[64] *Id.* 268-9.

Eyre,[65] the victim will be defeated in all possible conflictual situations.[66] The reason is that the same insurer will never be liable in respect of the same insured under both the *lex fori* and the *lex loci delicti*. This will be so even if both jurisdictions contain direct recourse provisions, because the right of action granted by the provision in each jurisdiction will only be available against persons insured under the third party legislation of that jurisdiction.[67] Consequently, the acts on which the right is based will always be "justifiable" in at least one of the two jurisdictions even on the most favourable interpretation to the victim of the rule in *Phillips* v. *Eyre*.[68] Therefore, if the insured tortfeasor is dead, the victim will be reduced to suing his estate which may involve the expense, delay and inconvenience of appointing an administrator *ad litem*, or to suing out of the victim's natural forum. If the tortfeasor cannot be found, the victim may encounter difficulties, delays and expense in securing compensation at all.[69] On the other hand, if the court construes a forum direct recourse provision as ousting the common-law choice of law rules and providing its own localizing rule which is fulfilled on the facts of the case before it, the victim will not be defeated. However, this solution is only relevant in a conflictual context when the victim sues under a forum provision in respect of an accident outside the forum.[70] Finally, a tortious characterization may subject the victim to a shorter limitation period.[71]

Characterization of a direct recourse provision as quasi-contractual is more plausible and attractive than a tortious characterization, but is also subject to grave weaknesses.

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[65] (1870) L.R. 6 Q.B. 1 at 29. A foreign provision will always be subject to the forum's choice of law rule; a forum provision will only be so if the court adopts the first analysis suggested in *Koop* v. *Bebb*, *supra* n. 24 at 641-2.

[66] *Cf.* E. I. Sykes and M. C. Pryles, *Australian Private International Law* (1979) at 337-8; R. W. Harding, "Common Law, Federal and Constitutional Aspects of Choice of Law in Tort" (1965) 7 *Univ. of W.A.L.R.* 196 at 196-205.

[67] *Cf.* Sykes and Pryles, *op. cit. supra* n. 66 at 338; *Hall's Case, supra* n. 12 at 356-360; *Hine* v. *Fire and All Risks Insurance Co. Ltd.* (1972) 7 S.A.S.R. 49.

[68] *Supra* n. 65. The interpretation most favourable to the victim would be the meaning ascribed to "justifiable" in the second limb of the rule, in *Machado* v. *Fontes* [1897] 2 Q.B. 231, which was disapproved by a majority of the House of Lords in *Boys* v. *Chaplin* [1971] A.C. 356. On the status of *Machado* v. *Fontes* and the requirements of the tort choice of law rule in Australia, see Sykes and Pryles, *op. cit. supra* n. 66 at 330-334, and the cases cited therein.

[69] A possible procedure could be to obtain an order for substituted service (see Supreme Court Rules, 1970 (N.S.W.), Part 9, r. 10) and default judgment, and after the relevant period to satisfy the judgment by suing the insurer direct (N.S.W. Act, s. 15(1)). The Nominal Defendant cannot be sued in these circumstances, because the tortfeasor is neither "uninsured" nor unidentified (N.S.W. Act, s. 30). The difficulty may be overcome in relation to foreign third party policies by a forum provision which allowed a victim to sue the forum's Nominal Defendant where the tortfeasor was insured under corresponding third party legislation in another jurisdiction (see N.S.W. Act, s. 15(2)(a)(ii)). This represents a solution outside private international law rules.

[70] This was the second analysis suggested in *Koop* v. *Bebb*, *supra* n. 24 at 641-2. It was followed in *Plozza*, *supra* n. 19 at 125-128; *cf.* Kelly, *op. cit. supra* n. 3 at 9-10, 15-16; Harding, *supra* n. 66 at 199-200; Sykes and Pryles, *op. cit. supra* n. 66 at 338.

[71] *Cf.* Bray, C.J. in *Carslake's Case*, *supra* n. 9 at 382.

It is difficult to see the right as an implied contract imposed by law directly between a victim and the insurer. The victim has provided no benefit or service to the insurer sufficiently analogous to established categories where the law has imposed a quasi-contractual obligation in this form.[72] The only authority in favour of quasi-contract has been *dicta* of Bray, C.J. in several cases. His Honour has framed the obligation in this form:

> The liability is, of course, a liability created by statute, but jurisprudentially . . . it should be classified as quasi-contractual. The insurer is liable to pay to the plaintiff the amount of the judgment she could have obtained against [the insured] (presumably in Queensland) *as if it had expressly agreed so to do.*[73]

His Honour offered no reasons for the characterization beyond this assertion. His attempted analogy[74] with the right which was characterized as quasi-contractual in *Batthyany* v. *Walford*[75] is not sound. There the obligation was imposed by law on a party who was in a pre-existing relationship with the beneficiary of the obligation. The same could not be said about either the direct recourse right or the right under s. 32(1) of the New South Wales Act. Moreover, even if the right under s. 32(1) can be called quasi-contractual, it is not analogous (as Bray, C.J. in *Bagot* seemed to think it was[76]) with a direct recourse provision since the former is to recover a liquidated sum, and does not arise from a contract.[77]

It is easier to characterise the right as quasi-contractual on the ground that the law creates it to prevent the insurer being unjustly enriched at the victim's expense.[78] However, although there may be a general principle of unjust enrichment underlying the various categories of restitution claims,[79] the right again does not appear to be sufficiently analogous to the established categories.[80] It is not even similar to the

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[72] *Dicey and Morris, supra* n. 47 at 924-929; G. C. Cheshire and C. H. S. Fifoot, *The Law of Contract* (3rd Aust. ed. by J. G. Starke and P. F. P. Higgins, 1974), Part Nine, *passim;* Robert Goff and Gareth Jones, *The Law of Restitution* (1st ed. 1966, used here), Chapter 1.

[73] *Hodge, supra* n. 31 at 90 (emphasis supplied). See also *Stewart* v. *Honey* (1972) 2 S.A.S.R. 585 (F.C.) at 592, and *Bagot, supra* n. 25 at 365-6.

[74] *Bagot, supra* n. 25 at 366; *Hodge, supra* n. 31 at 91.

[75] *Supra* n. 46.

[76] *Bagot, supra* n. 25 at 365, 375 (Mitchell, J. agreeing on this point); see *supra* n. 28.

[77] The High Court's approval of Bray, C.J's judgment (*supra* n. 30 at 183) does not amount to endorsement of his Honour's views on this point, since the High Court also approved the judgment of Bright, J. who (*supra n.* 25 at 354-5) adopted a different method of characterization and did not mention quasi-contract.

[78] Unjust enrichment would occur if the insurer were allowed at the expense of the victim to escape his obligation to indemnify the tortfeasor because the tortfeasor could not be sued.

[79] Goff and Jones, *op. cit. supra* n. 72, Chapter 1.

[80] Cheshire and Fifoot, *op. cit. supra* n. 72, Part Nine.

right to recover a debt created by judgment, statute or custom,[81] since it does not involve a liquidated sum.

The right is also not sufficiently analogous to subrogation, which may be "subsumed under the quasi-contractual category".[82] The plaintiff is suing in his own name to assert a separate substantive right given to him in his capacity as a victim of the insured's negligence.[83] He is also immune from some of the defences that an insurer may raise in an action by the insured.[84]

Even if a quasi-contractual characterization were correct, the localizing rule for the category[85] would probably produce the same result as a characterization of the provision as contractual.

It is submitted that a contractual characterization of a direct recourse provision has the most to recommend it in principle, authority and policy. It has already been demonstrated[86] that an essential feature of the provision is that the insurer's liability arises directly from the contract of insurance, and would not exist if the insurer were not a party to the contract. In this respect, the obligation appears similar to a term implied by statute into a contract,[87] in this case to confer a benefit on a third party on the occurrence of specified circumstances.

By granting a right to the victim to enforce the insurer's implied obligations, the statute to that extent abrogates the common-law doctrine of privity of contract. The circumstances in which the obligation becomes enforceable are specified with sufficient certainty, as are the limits of the class of potential third party beneficiaries. It is true that normal implied terms take the form of promises enforced by the ordinary common-law rules of contract, whereas a direct recourse provision takes the form of an obligation which also creates its own rule of enforcement. Nonetheless, it is suggested that the difference is minimal enough not to destroy the contractual analogy.

There exists persuasive authority in favour of a contractual characterization. In *Plozza,*[88] Hogarth, J. accepted plaintiff counsel's submission that foreign direct recourse provisions partook of "the nature

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[81] *Id.* 815-16. The quasi-contractual status of such a right is also in doubt: *ibid.*

[82] *Ryder, supra* n. 1 at 260, lines 46-49.

[83] *Carslake's Case, supra* n. 9 at 383 *per* Bray, C.J., 386 *per* Walters, J.

[84] See N.S.W. Act, s. 15(3). See also *Stewart* v. *Honey, supra* n. 73 at 592 *per* Bray, C.J.; *Carslake's Case, supra* n. 9 at 390 *per* Zelling, J., and references *supra* n. 83; *Insurance Commissioner of the State Motor Car Insurance Office* v. *Moss* [1969] V.R. 650 at 652.

[85] There may be insufficient authority to say with certainty what the localizing rule for quasi-contract is, but it seems likely to be similar to the proper law concept in contract: *Dicey and Morris, supra* n. 47 at 924-929; Goff and Jones, *op. cit. supra* n. 72, Chapter 44; Bray, C.J. in *Bagot, supra n.* 25 at 365-6; *Stewart* v. *Honey, supra* n. 73 at 592-3; *Hodge, supra* n. 31 at 90-92.

[86] See p. 193, *supra.*

[87] *Cp.* Sale of Goods Act, 1923-1974 (N.S.W.), ss. 17-20 and Part VIII, which imply terms that cannot be excluded in certain contracts.

[88] *Supra* n. 19.

of a statutory extension to [the] contractual liability" of the insurer,[89] although his Honour's words were not necessary to decide the point of law before him,[90] and he had earlier said that the forum provision before him was a "right *sui generis* conferred by the statute".[91] Hogarth, J.'s *dictum* was approved by Zelling, J. in *Hine's Case*[92] and was applied to characterize as contractual a provision which partially abolished interspousal tort immunity.[93] In *Hall's Case*,[94] Gowans, J., *obiter*, seemed to favour a contractual characterization in the passage cited earlier in this article.[95] There has also been academic support for a contractual characterization.[96]

A contractual characterization would also avoid the difficulties and negative policy effects associated with a delictual characterization, which were discussed earlier in this article.[97] As Hogarth, J. pointed out in *Plozza*,[98] the availability and extent of a foreign direct recourse provision will depend on its forming part of the proper law of the contract of insurance. Since the proper law will usually be the law of the place of issue of the policy,[99] if the right is contained in the legislation under which the policy is issued it will invariably form part of the proper law and will be justiciable in the forum.

Slight authority exists for characterization of a direct recourse provision as *sui generis*.[100] There is no authority which requires that characterization take place within the traditional common-law categories.[101] Moreover, it seems correct in principle and policy within the traditional analytical choice of law process to create a new juridical category with an appropriate localizing rule if the statutory rule is not

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[89] *Id.* 128.
[90] *Id.* 129.
[91] *Id.* 127.
[92] *Supra* n. 67 at 55-6.
[93] *Ibid.*
[94] *Supra* n. 12 at 363, lines 2-6.
[95] *Supra* n. 17.
[96] *Dicey and Morris, supra* n. 47 at 961; *cf.* Sykes and Pryles, *op. cit. supra* n. 66 at 337-8, who incorrectly cite *Plozza* as authority for a quasi-contractual characterization, and go on to state a preference for the characterization adopted in *Plozza* and *Hodge*. Although in *Hodge*, Bray, C.J. based his decision that the foreign provision was justiciable on a characterization of it as quasi-contractual (*supra* n. 31 at 89-92), both Bright and Zelling, JJ. did not indicate their preference between alternative non-delictual categories; see also p. 194, *supra*.
[97] See p. 196, *supra*.
[98] *Supra* n. 19 at 128-9.
[99] *Cf. Dicey and Morris, supra* n. 47 at 832-3 (Rule 159).
[100] *Cf. Plozza, supra* n. 19 at 126-7 (although the remark was made in relation to a forum statute which Hogarth, J. clearly regarded as ousting the common-law choice of law rules — *cf.* Kelly, *op. cit. supra* n. 3 at 9-10, 15-16 — and his Honour, *obiter*, preferred the contractual characterization where the common-law choice of law rules applies); *Stewart* v. *Honey, supra* n. 73 at 592 *per* Bray, C.J. (although his Honour went on to characterize the right as quasi-contractual "for the purposes of abstract jurisprudence or private international law").
[101] In *Baldry* (*supra* n. 2 at 499-500), Allen, M. seemed to think that *Koop* v. *Bebb* (*supra* n. 24) required this view. The reasons for the incorrectness of his approach are discussed later in this article.

closely related to a common-law rule. The traditional choice of law rules require every set of circumstances with legal significance to have a localizing rule to determine what system of law governs those circumstances. Traditional juridical categories are merely aggregations of common-law rules which were able to have the same localizing rule or connecting factor because they arose from the same set of circumstances. If a new statutory right is based on a set of circumstances substantially different from those for which the common law devised rules, it is a logical consequence of the traditional choice of law structure that the right be placed in a new category with a localizing rule appropriate to the policy behind the right. However, it is submitted that a new category is not necessary in respect of the direct recourse right, since it is closely related to a common-law rule which can be placed in a traditional category. The localizing rule attached to that category is consonant with the policy behind the right. Even if it was considered necessary to create a new category, it is submitted that the localizing rule which would have to be devised would be similar in effect to the contractual localizing rule because of the similar circumstances in which the statutory right and the common-law contractual rules would apply. Although the cases which support a *sui generis* category do not suggest a localizing rule, it would probably take the form of the law of the place with which the circumstances in which the right accrues have their closest and most real connection.[101a]

Two further comments need to be made. Owing to the utterly anachronistic tort choice of law rule which still operates in Australia, the potential traumatic consequences discussed earlier of a delictual characterization of a direct recourse provision will occur whenever a statutory right is made available to a restricted class of persons, or whenever statutory provisions in two jurisdictions create a right similar in character but make it available to different classes of persons.[102] Unlike the direct recourse provisions, some of these provisions from their nature will have to be characterized as tortious. In these circumstances, the solution can only lie in revision of the tort choice of law rule.[103]

If a non-delictual characterization is adopted, an unresolved question is what law governs the ascertainment of the insured's tort liability, which determines the amount of the insurer's liability under the provision. It is submitted that this matter affects the scope of the right, and as such should be governed by the tort rules of the law

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[101a] The nature of such a localizing rule is elaborated with respect to the contribution provisions discussed later in this article (see p. 207 *infra*).

[102] Harding (*supra* n. 66 at 202-3) gives as an example of the second situation a compensation to relatives statute in one jurisdiction which gives rights to a certain class of dependants where a similar statute in another jurisdiction does not give rights to that class.

[103] *Cf.* Lawrence Collins, "Interaction between Contract and Tort in the Conflict of Laws" (1967) 16 *I.C.L.Q.* 103-144, especially at 111-12.

which is the proper law of the contract of insurance (not including, however, the tort choice of law rule of that law). In *Hodge,*[104] Bray, C.J. seemed to assume that this would be the case when he stated that the insurer was liable to pay the victim "the amount of the judgment she could have obtained against [the insured] (*presumably in Queensland*)",[105] Queensland being the proper law of the quasi-contractual obligation. The issue could have a dramatic effect on the amount of the victim's damages in a suit involving a foreign provision if the tort rules of the proper law of the provision and the tort rules of the forum (or possibly the place of the accident) are different, for example, as to heads of damage, apportionment for contributory negligence, and the need to make deductions for income tax when assessing damages for loss of future earning capacity.[106]

Contribution

The Law Reform (Miscellaneous Provisions) Act, 1946 (N.S.W.), s. 5, gives a right to tortfeasors to seek contribution amongst themselves if one has satisfied the judgment in favour of the victim, and the other "is, or would if sued have been, liable in respect of the same damage". The court is directed to make such order for contribution between the parties as is "just and equitable". The provision has been variously characterized for conflictual purposes as contractual, quasi-contractual, tortious and *sui generis*. It is submitted that a *sui generis* characterization is to be preferred.

The provision has been characterized as contractual on the basis that the statute implies that one tortfeasor will indemnify the other. This characterization was expressly rejected in *Gilchrist* v. *Dean.*[107] A contractual characterization fails to recognize that the provision lacks the elements of agreement between particular parties supported by consideration which a contract demands. However, in one Australian jurisdiction privity of contract has been abrogated by statute.[108]

It has also been held that the right is quasi-contractual[109] as it prevents one tortfeasor being unjustly enriched at the expense of another.[110] *Dicey and Morris*[111] assert on the basis of *Plozza*[112] and *Bagot*[113] that the right is of a quasi-contractual nature. However, in

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[104] *Supra* n. 31.
[105] *Id.* 90 (emphasis supplied).
[106] *Cp. Atlas Tiles Ltd.* v. *Briers* (1978) 52 A.L.J.R. 707, in which the High Court decided deductions should not be made, with the Common Law Practice Act Amendment Act 1978 (Qld.), which restored the rule in *British Transport Commission* v. *Gourley* [1956] A.C. 185, in Queensland.
[107] (1958) 2 F.L.R. 175.
[108] Law of Property Act 1974 (Qld.), s. 55.
[109] *Bagot, supra* n. 25 at 365 *per* Bray, C.J.
[110] Cheshire and Fifoot, *op. cit. supra* n. 72 at 773 ff.
[111] *Dicey and Morris, supra* n. 47 at 967.
[112] *Supra* n. 19.
[113] *Supra* n. 25.

Plozza,[114] Hogarth, J. characterized the right as *sui generis* on the authority of *Harvey* v. *R. G. O'Dell Ltd.*[115] In *Bagot,*[116] Bray, C.J. characterized s. 32(1) of the Motor Vehicles (Third Party Insurance) Act, 1942-1978 (N.S.W.) as quasi-contractual. Despite the fact that both rights are a form of indemnity they are not analogous. The right given by s. 32(1) is in respect of a liquidated sum, whereas the contribution right need not necessarily be for a liquidated sum, involves joint tortfeasors, and is not necessarily a right to complete indemnity. In addition, Bray, C.J. did not need to advert to the contribution right because he held that s. 32(1) ousted any right of the Nominal Defendant to contribution.[117]

In *Stewart* v. *Honey,*[118] Bray, C.J. decided that a right under s. 112 of the Motor Vehicles Insurance Acts 1936-1968 (Qld.) was quasi-contractual. His Honour also said:

> The right of indemnity or contribution between tortfeasors should probably be classified for juristic purposes as quasi-contractual; though not imposed by agreement it possesses some analogy to a contract to indemnify in whole or in part.[119]

Section 112 gave one tortfeasor a right to contribution from the insurer of another tortfeasor, when the latter had failed to satisfy his portion of the judgment sum. The right of action was for a liquidated sum, was not between two tortfeasors, and arose only on the tortfeasor himself refusing to pay his share. Again, there were significant differences between the action on the s. 112 right and the contribution right. In addition, his Honour's comments on the contribution right were *obiter.*

It may be argued that the tortious characterization is appropriate because the tortfeasors need have no prior relation, either *inter se,* or with their victim, for liability to arise, and because liability under the contribution provision is premised on the commission of a tort. Once the tortfeasors have come into contact with their victim in a way which breaches a duty they owe to him and causes him damage, they are liable to him without earlier contract. The contribution provision gives a right of action to a tortfeasor who has satisfied the judgment in favour of the victim for the damage of all the tortfeasors to sue the others in order that they share the monetary liability in proportion to their delictual responsibility. This is a statutory grant of a right of action to overcome the unjust common-law rule[120] whereby a tortfeasor could not recover contribution from his joint tortfeasors. In

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[114] *Supra* n. 19 at 127.
[115] [1958] 2 Q.B. 78 at 107-8.
[116] *Supra* n. 25 at 365.
[117] *Id.* 368.
[118] *Supra* n. 73 at 592.
[119] *Ibid.*
[120] *Merrywether* v. *Nixon* (1799) 8 T.R. 186; 101 E.R. 1337.

effect, the statute gives an extra remedy to ensure the just distribution of the monetary liability. However, although the contribution provision only operates when parties are related to one another by their commission of a tort against a third party, the relation of the tortfeasors *inter se* is not tortious. One tortfeasor is not liable to contribute because he has breached a duty of care owed to another tortfeasor.

Nonetheless, in *Baldry*[121] the contribution right was characterized as tortious. The plaintiff, Baldry, had been sued to judgment in New South Wales, in respect of an accident between a car driven by him and one driven by the defendant, Jackson, in Queensland. Baldry then sought contribution from Jackson. Allen, M. characterized the right as delictual for several reasons.

He felt bound by the statement of the High Court in *Koop* v. *Bebb*,[122] that where the legislature enacts a law it is to be applied without textual amendment in a conflictual situation in accord with the relevant rules of private international law. Allen, M. interpreted this[123] as requiring him to characterize the right as belonging to one of the traditional common-law categories adopted for choice of law purposes. As a matter of authority he felt himself bound to choose between quasi-contract and tort.

However, it is submitted that the direction in *Koop* v. *Bebb*[124] and the weight of authority did not preclude Allen, M. from characterizing the right as *sui generis*. The remarks in *Koop* v. *Bebb* were silent on the content of the rules of private international law to be applied and provide no foundation for Allen, M.'s restrictive conclusion. Moreover, there is more authority directly on the contribution right in favour of a *sui generis* characterization than exists for any other characterization. *Plozza*,[125] *Harvey* v. *R. G. O'Dell Ltd.*[126] and *Gilchrist* v. *Dean*[127] all stress the *sui generis* nature of the right. On the other hand, decisions characterizing the right as quasi-contractual (*Bagot*[128] and *Stewart* v. *Honey*[129]) or delictual (*Wilson Electric Transformer Co. Pty. Ltd.* v. *Electricity Commission of New South Wales*[130]) were all decisions on statutory rights which may not even be analogous to the contribution right, since they involved liquidated sums, or persons not necessarily related by their commission of a tort against a third party.

As a matter of principle Allen, M. acknowledged that the right "does not fit comfortably into either category";[131] that is, quasi-

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121 *Supra* n. 2.
122 *Supra* n. 24 at 640-1.
123 *Supra* n. 2 at 499.
124 *Supra* n. 24 at 640-1.
125 *Supra* n. 19.
126 *Supra* n. 115 at 107-8.
127 *Supra* n. 107.
128 *Supra* n. 25.
129 *Supra* n. 73.
130 [1968] V.R. 330.
131 *Supra* n. 2 at 499.

contract or tort. He adopted[132] Sholl, J.'s statement in *Gilchrist* v. *Dean*[133] that the right involved "a very special kind of action" but did not explore his doubts further. He rejected the view that, because the right had been characterized for limitation purposes as non-tortious by McNair, J. in *Harvey* v. *R. G. O'Dell Ltd.*,[134] it could not be characterized as tortious for conflictual purposes.[135] This is valid, as it is far from clear that it is not possible to characterize a right differently for different purposes. Allen, M.'s criticism[136] of the authority which adopted this view is, therefore, acceptable on this ground. However, it does not provide affirmative support for his conclusion that the contribution right should be characterized as tortious for conflictual purposes. Allen, M. offers only one reason to support a delictual characterization.

> The claim is to be classified in my opinion as a delictual claim for the purposes of private international law. That rather than quasi-contract is the substantial character of the claim. The claim is directed to determining whether Jackson was guilty of a tort and, if so, the extent of his responsibility for the damage suffered by the person injured, so that just and equitable contribution may be awarded to Baldry, who has paid to the person injured all the damages recoverable by him. The main issue is the delictual responsibility of Jackson.[137]

However, there is unequivocal High Court authority that an action for contribution is not one primarily concerned with delictual responsibility, except in so far as it must be known for the purposes of a just and equitable apportionment of monetary liability. In a joint judgment in *Genders* v. *Government Insurance Office of New South Wales*,[138] the High Court held that the contribution action involved "a liability to pay compensation for loss and damage . . . in respect of bodily injury to a person". The Court went on to say that this liability arose in consequence of a tortious act, but that the contribution action was only a method of enforcing that liability consequent upon the tortious act. In *Bagot*,[139] it was argued that this passage meant that the right was essentially delictual. Bray, C.J. rejected the argument and held the High Court was describing the obligation to contribute as a method of enforcement, independent of the delictual obligation. In *Brambles Constructions Pty. Ltd.* v. *Helmers*,[140] Barwick, C.J. held that a claim for contribution was "a cause of action apart from and

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132 *Ibid.*
133 *Supra* n. 107.
134 *Supra* n. 115 at 107-8.
135 *Supra* n. 2 at 499-500.
136 *Id.* 500.
137 *Ibid.*
138 (1959) 102 C.L.R. 363.
139 *Supra* n. 25 at 365.
140 (1966) 114 C.L.R. 213 at 218.

independent of the cause of action of the injured party". In *Unsworth* v. *Commissioner for Railways,*[141] Taylor, J. held that a contribution action was in effect a claim for partial indemnity and was in no sense an action to recover damages in respect of a tortious injury. Therefore, it appears that authority is contrary to Allen, M.'s assertion, and shows that the nature of the right is independent of the delictual issues on which it is premised.

Allen, M.'s assertion that "the claim is directed to determining whether Jackson was guilty of tort" and that "the main issue is one of the delictual liability of Jackson"[142] is not strictly correct in principle in so far as it maintains that the court must make a finding on Jackson's delictual responsibility in the contribution action. Section 5(2) of the Law Reform (Miscellaneous Provisions) Act, 1946-77 (N.S.W.) directs the court to have "regard to the extent of that person's responsibility for the damage" only as far as need be to ascertain "the amount of contribution recoverable from any person such as may be found by the court to be just and equitable". The court is directed to inquire into delictual responsibility only as far as is required properly to apportion monetary liability.

Allen, M. then quoted the eighth edition of *Dicey and Morris* as authority for the proposition that the right was to be tortiously characterized.[142a] However, in the ninth edition the learned authors characterized the right as quasi-contractual.[143] This latter conclusion has been shown earlier in this article to be open to doubt. However, this does not affect the learned authors' rejection of their earlier view in so far as it deprives Allen, M. of support for a tortious characterization.

It is, therefore, submitted that the contribution right should be characterized as *sui generis* for choice of law purposes, since it has no counterpart in the common-law rules in traditional categories. A consequence of such a characterization is that an appropriate localizing rule must be devised for the new juridical category. As discussed earlier in this article, it is submitted that the rule adopted should be the proper law of the type of statutory right; that is, the law of the place with which the circumstances giving rise to that type of right have their closest and most real connection.[144] The point was put very clearly in *Babcock* v. *Jackson*:

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[141] (1958) 101 C.L.R. 73 at 91.
[142] *Supra* n. 2 at 500.
[142a] *Id.* 500.
[143] *Dicey and Morris, supra* n. 47 at 945.
[144] *Cf. Bonython* v. *Commonwealth of Australia* [1951] A.C. 201 at 219, *In re United Railways of Havana and Regla Warehouses Ltd.* [1961] A.C. 1007, esp. at 1068 *per* Lord Denning, *James Miller and Partners Ltd.* v. *Whitworth Street Estates (Manchester) Ltd.* [1970] A.C. 583, *Compagnie D'Armement Maritime S. A.* v. *Compagnie Tunisienne de Navigation S.A.* [1971] A.C. 572, *Coast Lines Ltd.* v. *Hudig and Veder Chartering N.V.* [1972] 2 W.L.R. 280 for a discussion of the "proper law" concept in a contractual context, in particular the alternative formulations of the "objective proper law" of the contract.

> Justice, fairness and the best practical result, may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship and contact with the occurrence and the parties, has the greatest concern with the specific issue raised in the litigation.[145]

The method of ascertaining the proper law of the statutory right will be similar to that for ascertaining the objective proper law of a contract. With respect to the contribution right, the court will consider the place where the accident occurred, the residence of the parties, and other persons affected (such as insurers), the place of registration of the cars involved, and the policies behind the statutory provisions which are competing for application. Again, the matter was well put in *Babcock* v. *Jackson,* where the Court said:

> the courts . . . lay emphasis rather upon the law of the place which has the most significant contacts with the matter in dispute.[146]

Applying this localizing rule to the facts in *Baldry,*[147] the court would consider the nature of the right and its relationship to the place of the accident and Jackson's residence as support for a choice of Queensland law, and also that Jackson's insurer would in substance meet the claim of Baldry for contribution. In favour of New South Wales, there would be the residence of both Baldry and the victim, the suit against Baldry by the victim in New South Wales, the insurers of Baldry in New South Wales already having satisfied the victim, and that the journey was to begin and end in New South Wales. On the balance of factors, the happening of the accident in Queensland was only fortuitous and indicates no significant relationship of Queensland law to the contribution proceedings. The residence of Baldry in New South Wales and Jackson in Queensland cancel each other out. The same argument may be put for the place of the insurer, but the New South Wales insurer has already stood the entire damage, and in the interests of pursuing the policy of the Act for equitable distribution of the monetary liability his claim should be given more weight than that of the Queensland insurer. This leaves a considerable number of elements in the balance for New South Wales, indicating that to be the proper law in this case.

As a matter of policy, the adoption of such a choice of law rule avoids the frustration of litigants' claims, when they cannot satisfy the two limbs of the rule in *Phillips* v. *Eyre*[148] if the right is characterized as delictual. This may not be so important in litigation in Australia where all States and territories have almost identical contribution legislation, but is important if the law of an overseas jurisdiction with no

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[145] *Babcock* v. *Jackson* (1963) 191 N.E. 2d. 279.
[146] *Ibid.,* quoting *Auten* v. *Auten* 308 N.Y. 155; 124 N.E. 2d. 99.
[147] *Supra* n. 2.

such right is involved. Also, formulation of the localizing rule in this fashion allows consideration of practicalities (e.g. residence of insurers, place of litigation) which the arbitrary demands of *Phillips* v. *Eyre*[149] do not. Service out of the jurisdiction is possible under the Supreme Court Rules in each Australian jurisdiction and the Service and Execution of Process Act, 1901-1979 (Cth.), both of whose grounds for giving leave include indemnity claims. Therefore, characterization of the right within a traditional common law category is not necessary for this purpose either.

Implications for other Statutory Provisions

The preceding discussion has shown that, while some statutory provisions can be fitted satisfactorily within traditional juridical categories, there is nothing in principle, authority or policy within the traditional choice of law structure to prevent new categories and localizing rules being created to accommodate provisions which do not fit easily into the traditional categories.

In this regard, every statutory provision must be analysed on its own. If a provision is closely related to common-law rules, it is likely that it can be characterized in the same way as those rules. Its availability in a conflictual context will then, as with common-law rules, depend on its forming part of the *lex causae,* which will be determined by the relevant localizing rule for the common-law category. If the provision has no counterpart in common-law rules, it can be characterized as *sui generis,* and a new localizing rule which is appropriate to the circumstances in which the provision operates will be created to govern the availability of the provision.

The implications of this approach may be seen by outlining its operation with regard to several statutory provisions. The Law of Property Act 1974 (Qld.), s. 55 abrogates the common-law doctrine of privity of contract once a third party has accepted the benefit of a contract. This provision can easily be characterized as a statutory modification of the common-law rules of contract. In a suit in another jurisdiction, the provision would apply if Queensland law was the proper law of the contract. Sections 74B to 74F of the Commonwealth Trade Practices Act 1974-1978 give a consumer direct recourse against a corporate manufacturer under certain conditions.[150] Sections 74H and 74L of the Act give a seller a right of indemnity against the manufacturer of goods in certain circumstances.[151] Like the direct

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[148] *Supra* n. 65.

[149] *Ibid.*

[150] Namely, if the goods supplied by the manufacturer are not fit for the purpose for which they were supplied, or do not correspond with a description or sample by which they were supplied, or are not of merchantable quality, or fail to comply with an express warranty given by the manufacturer, or do not have adequate repair facilities and parts available.

[151] Namely, if the seller is sued for breach of any of the implied conditions or warranties under Part V, Division 2 of the Act.

recourse provision previously discussed, these provisions can be regarded as a statutory extension of the manufacturer's obligations under his first contract of supply. The provisions abrogate the doctrine of privity, to the extent necessary to enable a third party beneficiary to enforce them. The circumstances in which the obligations give a right of action are sufficiently certain (when the manufacturer cannot disprove his responsibility for the particular defect involved), as is the class of third party beneficiaries (any buyer of the goods, irrespective of the number of intermediate buyers, provided he is a "consumer" within the meaning of the Act.[152]) In a suit outside Australia, therefore, the provisions would be enforced if Australian law was the *lex causae*.[153]

By contrast, rights under accidents compensation legislation[154] which are not related to liability in contract or tort do not fit easily into the traditional categories. In this case, it is better to characterize them as *sui generis*. An appropriate localizing rule would be one similar to that discussed previously for the contribution provisions. The rights would be available if they formed part of the law of the place with which the accident and its surrounding circumstances (such as residence of the parties involved) had the closest and most real connection. This would accord best with the policy behind the rights, since they would only be justiciable in the forum when the foreign jurisdiction which created them would have a real interest in seeing that the social purpose behind its legislation applied to the parties before the court. Of course, if the rights were granted by a forum statute, the legislature would be able directly to indicate when they applied to situations involving an extra-territorial element.

It has been suggested[155] that the conflictual problems raised by statutory provisions can best be resolved by going outside the traditional choice of law rules. The preceding discussion has shown that the traditional rules are flexible enough to meet the new demands placed on them, provided that the courts ensure that the categories for characterization are never closed.

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152 See s. 4B of the Act.

153 If the forum was Australia, the provisions would probably apply whether or not Australian law was the *lex causae*, owing to ss. 4(1), 5(1) and 6 of the Act (definition of "corporation" and "foreign corporation", and additional operation of the Act).

154 See, for example, Accident Compensation Act, 1972-1977 (N.Z.). It is submitted that rights under Workers' Compensation legislation may easily fall into the same category, despite *Wilson Electric Transformer Company Pty. Ltd.* v. *Electricity Commission of New South Wales, supra* n. 130 and *Mynott* v. *Barnard* (1939) 62 C.L.R., insofar as these cases suggest a tortious characterization of the rights for conflictual purposes or that the choice of law rule for Workers' Compensation cases is the law of the place of the accident.

155 Kelly, *op. cit. supra* n. 3.