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# AN APPRAISAL OF THE JURISDICTION COURTS IN ASCERTAINING THE APPLICABLE LAW OF TORTS IN CONFLICT OF LAWS SITUATION

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## Abstract

Conflict of laws is an aspect of law which deals with conflict between different legal systems, whether at international or domestic levels. This aspect of law is mostly used to resolve the conflict between legal systems where parties to it come from different jurisdictions. There is generally uncertainty in the application of law of torts in conflict of laws situation in

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Nigeria especially where a foreign element is involved, which puts the court in a dilemma as to whether it should follow the forum law or foreign law? This uncertainty is normally caused by the fact that there are several factors to be considered in order to arrive at the applicable choice of law. The paper through doctrinal research methodology, appraises the applicable law of torts in conflict of law situations in Nigeria, in cases of internal conflict of laws and those with foreign elements. The paper finds that the problems which dominate cases with foreign elements is the issue of jurisdiction, especially where more than one territorial are is involved. It is therefore, partly recommended that the use of the English courts' rules in ascertaining the applicable law of torts in conflict of laws should only serve as a guide to Nigerian courts, not as a binding one that has absolute application in all cases.

**1.1 Introduction**

The existence of different forms of interaction between peoples of different nationalities, races and tribes with different ideological and legal systems gives rise to conflict of laws of multiple nature. When there is a conflict between the legal system and laws of different nations, a branch of law known as private international law is called in to resolve the conflict.[177] However, if the dispute is between systems of law within a particular state, the problem assumes a special character and recourse must be had to the different rules of court and local statutes for the resolution of such conflicts. Conflicts of Laws exist both in international and municipal laws.[178] There is generally uncertainty in the applicability of laws of tort in conflict of laws situation in Nigeria. In other words, when there is a case of tort involving foreign element in Nigeria, the courts always face the problem of which law is applicable. Furthermore, the courts are always uncertain which of the laws of conflict would apply i.e. is it the forum law or the foreign law of torts that would apply? This uncertainty is caused by the fact that there are several factors to be considered in order to arrive at a choice of the applicable law. This paper appraises the applicable law of torts in conflict of laws situation in Nigeria. This is done by examining the court which has jurisdiction in cases of internal conflict where a tortious act has been committed in two or more geographical locations within Nigeria.

In conflict of laws or private international law proper, one of the problems which dominate every case with foreign element is jurisdiction. This is because in a case where there is a foreign element, it means there is more than one territorial area

[177] Morris (2005). *Conflict of Laws*, (6th ed.). Oxford, England: Sweet & Maxwell. P. 35

[178] Ibid

involved by the facts of the case. That is to say, the facts of the case took place in two or more places i.e. territorial areas or geographical areas.

In this case, which court is competent to hear and determine cases involving claims for damages/compensation? Each of these courts would claim that one fact or another took place in its jurisdiction. This may pose a problem for a court. One of the problems that is commonly available or faced in cases with foreign elements is the one usually relating to the Choice of applicable law. In other words, where there is more than one applicable law. If there is more than one applicable law, which law would be chosen for the purpose of application and determination of the case? Where for example, the applicable law in Zaria, Jebba and Lagos are different, which law would be chosen for application in order to enable the court award or disallow the payment of compensation?

### 1.2 Nature and Scope of Conflict of Laws

Before dwelling into the main aspect of this paper, it is pertinent to examine the nature and scope of conflict of laws. Conflict of laws or private international law (the terms are used interchangeably) is the field of procedural law dealing with the choice of law rules when a legal action implicates the substantive laws of more than one jurisdiction and a court must determine which law is most appropriate to resolve the action[179]. It is that part of law in each state, country, or other jurisdiction that determines whether in dealing with a particular legal situation, its laws or the laws of some other jurisdiction will be applied. The term ‘private international law’ is widely used in Europe in preference to ‘Conflict of Laws’ usually used in the United States. Oluwole Agbede in his book ‘Themes on Conflict of Laws’ tries to distinguish the term ‘conflict of laws’ from ‘private international law’ with these words:

> *“It should be added that conflicts of law arises in Nigeria not only at the international level but equally at the state level. Hence it is necessary if not for clarity to distinguish the totality of the conflict of laws situation as ‘conflict of laws’, and limit the term ‘private international law’ to problems of conflict of law of international dimension.[180]”*

Following this distinction, Agbede defines conflict of law in Nigeria as the branch of law that has been developed in Nigeria as in other jurisdiction, as a result of the universal awareness of the need to do justice to all manner of people regardless of race, creed or the arbitrariness that is often involved in the choice of the court.[181]

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[4] Nazi Nahman Vs Allan Wolowicz (1993) 3 NWLR (Pt.282) Pg.443 at 459 H – A

[179] Ademola, J. Y. (1999). *Limits to the Application of Foreign Laws*. Maltose Law Books, Enugu p. 85

[180] ibid

[181] Collier, J.G. (2001*). Conflict of Laws*, (3rd ed.). London: Cambridge University Press. P. 115

On the other hand, he defines private international law as a department of law which comes into play whenever an issue before the court contains a foreign element; it is its function to ascertain which of several potentially applicable legal systems must be chosen for the determination of such an issue[182].

An example of a situation that might involve the different laws of two places is that of a contract signed in one state and mailed to another. Complications may arise if one of the states provides that a contract so delivered is effective once mailed, while the other state provides that it is not effective until received. The conflicts of laws rules applied by a court in this situation are commonly designed to decide a case by the law of the territory having the closest connection with the transaction. An often expressed ideal is that of making the decision the same regardless of where the case is decided. If the case contains no foreign element, the Conflict of Laws is irrelevant. For example, if a Nigerian man and woman who are both Nigerian citizens (it is possible for two Nigerians by birth not to be Nigerian citizens), domiciled and resident in Nigeria, go through a ceremony of marriage and later, one of them while they are still domiciled and resident in Nigeria, petitions the Nigerian Court for divorce[183]. No foreign element is involved, and problem of jurisdiction arises in relation to the validity of the marriage, or the grounds on which a divorce can be granted, as well as any procedural or evidential matters, are all governed by Nigerian Law alone. The same applies to two Ghanaians in the same circumstance, who contracts there for the sale and purchase of goods to be delivered from Kumasi to Accra with payment in Ghana Cedi, and the seller sues the buyer and serves him with a court claim in Ghana.

But if we vary the facts and suppose in the first example at the time the wife petitions for divorce, the husband is domiciled and resident in Togo, and that the ceremony had taken place in Togo, and the husband argues that the marriage did not comply with the requirement of Togolese laws so that there is no marriage to dissolve, the conflict of laws becomes relevant. The husband's absence raises the question of the court's jurisdiction and his argument raises that of whether Nigerian law or Togolese law is to determine the validity of the marriage.[184]

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[182] Ibid

[183] Dicey and Morris, (2000) *The Conflict of law*,13th ed. vol. I, Sweet and Maxwell, London p.419

[184] Ibid

Conflict of laws means that part of the domestic law[185] of each country which deals with cases that contain a foreign element[186]. There are three elements in the above definition: domestic law country, and foreign element. Since conflict of laws has its own rules and principles, it is as much a department of the law as for instance, the law of contract, tort, corporate law, or environmental law. But it differs from the foregoing legal categories in that they are substantive in character while conflict of laws is rather selective and procedural. A substantive law creates and defines the rights and duties of the parties. Procedural law establishes the means by which those rights and duties are proved and regulates the proceedings for finding that right at every stage.' For instance, the law of tort defines a civil wrong and stipulates its correlative right to remedy in damages. Conflict of laws does not perform a similar action; it rather stipulates or selects the legal system whose law of tort ought to define a particular civil wrong and its correlative right, or the court to try the case. Just as one can, for instance, talk of a tortious act or a contractual right, there is no such thing as a conflict of laws right or duty.[187]

Though conflict of laws has its own des which we examine below, those demurely select the applicable legal system and do not create or define any substantive right. Consequently, conflict of laws is just a method or technique of legal analysis[188]. On this perspective, conflict of laws is analogous to comparative law but differs from it in having its own rules, which is not characteristic of comparative law[189]. Conflict of laws performs three major functions. First, where a case contains a foreign element it is the conflict of laws rules that determine whether the court asked to exercise jurisdiction in the case actually has jurisdiction. The conflict of laws rules of every legal system contain elaborate rules for determining the question of jurisdiction in a conflict of laws case.

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[185] This means the local body of law or legal system of any country. Conflict of laws is said to be domestic in character because it is the prerogative of each legal system to determine its conflict of laws rules and these may vary from one legal system to another

[186] Halsburv's Laws of England (Conflict of Laws), 4 ' ed.. para. 60 1; Halsburv's Laws of Ausnalia, Volume 4. para. 85-1

[187] Ibid

[188] J. – G. Castel, "Conflict of Laws - Some Differences Between the Systems Found in the United States and Canada.," (1 962) 1 1 American Journal of Comparative Law, 3 15 at 322

[189] Alan Watson, Lecal Trans~lants: An Approach to Comparative Law (Athens: The University of Georgia Press, 1993.2" ed.), pp. 1-6.

Assume that a Nigerian domiciled in a state in Nigeria and a Canadian domiciled in Manitoba entered into a contract in Winnipeg to be performed in Nigeria, and a question arose in a Manitoba court as to the rights of the parties under the contract. A court in Manitoba will apply the province's conflict of laws des to determine whether jurisdiction lies in that court or in a court in Nigeria. If it decides that it has jurisdiction, then it will proceed to the next stage of a conflict of laws case; otherwise it will strike out the action for want of jurisdiction. Second, conflict of laws determines which of the potentially applicable legal systems will provide the de for the decision.[190] In other words, it selects the applicable law. This is a fundamental and common function of conflict of laws. This is technically called 'choice of law,' which we shall explain in detail later.[191]

Once the legal system providing the de of decision has been chosen by the application of choice of law des, then conflict of laws will have finished its function. It withdraws for the chosen legal system to determine the substantive rights of the parties.[192] Using our above example: where a Manitoba court, after assuming jurisdiction, decides by the application of its conflict of law rules that the contractual rights or liabilities of the parties will be determined according to a Nigerian state law, then the conflict rules of Manitoba would have finished their functions and will leave the matter to be decided in Manitoba according to the Nigerian state law. The Manitoba court would then ask for the proof of the Nigerian law on the point and apply it. Third, sometimes conflict of laws performs a third function, i.e, it determines the circumstances and conditions for the recognition and enforcement of a foreign judgment

### 1.3 Sources of Conflict of Laws in Nigeria

Different aspects of law have different sources, though in majority of cases, sources of law are substantially similar. Conflict of Laws of Private International Law as it is known in some quarters, has various sources that facilitated its development, such as Public International Law, Case Law and Writings of renown jurists as well International conventions and treaties among others.

#### 1.3.1 Public International Law

Public international law is one of the sources of conflict of law rules in Nigeria. In 1960 Nigeria became an independent and sovereign state and also a member of the international community regulated by public international law. It has continued to be an important source of conflict of laws both for Nigeria and other members of the international community. Public international law has made its impact on conflict of

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[190] Morris (2005). *Conflict of Laws*, (6th ed.). Oxford, England: Sweet & Maxwell. P. 35

[191] Ibid

[192] Ibid

laws through the medium of international agreements and treaties, such as the Rome Convention of 1980 which deals with conflict of laws des relating to contractual obligations, and the Brussels Convention of 1968, which provided for free circulation of judgment throughout the signatory states, thereby encouraging international business and intercourse in and among those states.[193]

**1.3.2 Case Law and Juristic Writings**

Judicial decisions and juristic writings are important sources of conflict of laws in Nigeria. In eighteenth century England, these sources were responsible for the evolution of the subject and have continued to play a radical role in its further development.[194] Judicial decisions are for England what juristic writings are for civil law jurisdictions in die Continent. The hierarchy of authorities in a conflict adjudication has been judicially stated by Sir William Scott in Dalrymple v. Dalrymple[195]:

> The authorities to which I shall have occasion to refer are of three classes; first the opinions of learned Professors given in the present or similar cases; secondly, the opinions of eminent writers as delivered in books of great legal credit and weight and, thirdly, the certified adjudication of the tribunals of Scotland upon these subjects need not Say that the last class stands highest in point of authority[196].

Unfortunately, these sources are not used as creatively as in other jurisdictions, books of authority are rarely cited and the old English decisions are mechanically applied under the reception clause, even when such decisions have been overtaken by statutes or later decisions in England. For instance in Benson v. Aishiru[197], the Supreme Court of Nigeria was presented with an opportunity to restate English conflict of laws des in the light of the Nigerian Constitution.

1.3.3 Nigerian Legislation

Nigeria since independence in 1960 has been actively legislating both at the federal and state levels. Statutes which contain provisions touching on conflict of laws constitute an important source of conflict of laws. It would be exceptional anywhere to have a single enactment devoted entirely to conflict of laws? This is mainly due to

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[193] Ibid

[194] Castel, J.G, (1995) Back to the Future! is the “New” Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?. *Osgoode Hall Law Journal*, Vol. 33 No. 1, 1995, p 47.

[195] (1811) 16 1 English Reports 665

[196] Ibid

[197] (1967) Nigerian Monthly Law Report 363.

the fact that conflict of laws generally is not a department of law, like the law of contract or property or tort; but its raison *d'etre* and principles traverse all these departments of the law. It is those statutes dealing with such specific legal subjects that reveal the conflict provisions designed for each one of them. The courts have a duty, in accordance with the rules of statutory interpretation and the general principles of conflict of laws, to apply such provisions.
Under Section 4 of the 1999 Constitution of Nigeria, the federal government has exclusive legislative competence over ail matters in the exclusive legislative lid set out in Part One of the Second Schedule of the constitution, i.e., sixty-eight items. The federal government also has legislative competence over those matters in the concurrent legislative list, contained in the first column of Part Two of the Second Schedule to the constitution. From the perspective of conflict of laws, the implication in the above constitutional provision is that both the federal and state governments have the legislative competence to enact conflict of laws des and principles in their separate spheres of legislative activity.

**1.3.4 Nigerian Customary Law as a Source of Conflict of Laws**

The most important basis for choice of customary law is the parties' origin, i.e., are the parties Nigerian natives? Generally, where both parties are natives of Nigeria customary law applies. But problems still arise where such parties are subject to different systems of customary Law in such a case the court will in the light of the transaction between the parties, apply the ordinary rules of construction and the general principles of conflict of laws to ascertain which customary law will govern the case. English law will apply by virtue of the agreement of parties or on account of the same nature of the transaction to customary law. In the area of tort, Nigerian courts have equally received the common law conflict of laws rules. The common law position was stated by Willes, J., in the case of Phillips v. Eyre[198]:

[198] (1870) Law Report 6 Queen's Bench 1 at 28-29

As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England ... and secondly, the act must not have been justifiable by the law of the place where it was done In Benson v. Arshiru[199], the Nigerian Supreme Court relied on Phillips v. Eye, supra and held:

> After considering this and other authorities cited to us we are satisfied on the following points: The rules of the common law of England on questions of private international law apply in the High Court of Lagos. Under these rules, an action in tort will lie in Lagos for a wrong alleged to have been committed in another part of Nigeria if two conditions are fulfilled: first, the wrong must be of such a character that it would have been actionable if it had been committed in Lagos: and secondly, it must not have been justifiable by the law of the part of Nigeria where it was done: Phillips v. Eyre. These conditions are fulfilled in the present case[200].

Examples of adherence by Nigerian courts to common law rules can therefore be multiplied indefinitely. It serves to demonstrate the importance of the reception statute that brought English law into Nigeria Therefore, an ascertainment of the scope of English law received into Nigeria is a prerequisite to any determination of the extent and quantum of English conflict of laws des received into Nigeria.

[199] (1967) Nigerian Monthly Law Reports 363
[200] Ibid

### 1.4 Conflict of Laws in Cases between Nigerians and Non-Nigerians

The law resolving conflicts between English law and customary law in Lagos State and the Northern State and governing relations between Nigerians and non-Nigerians could be better understood when viewed from the perspective of the parties to the dispute, that is, whether they are;

i. Nigerians and indigenous non-Nigerians (Africans)
ii. Cases between Nigerians and non-Nigerians other than indigenous Africans

Non-Nigerian Africans are native foreigners" within the meaning of the High Court enactment of Lagos State and that of the Northern states, and native foreigners are natives within the meaning of the enactment, thus all cases between them and such elements are governed by the same rules. Accordingly, the rules governing cases between Nigerians explained above govern cases between Nigerians and indigenous non-Nigerian Africans.

Section 26(2) of the High Court Laws of Lagos State, stipulates that customary law applies in cases between natives and non-natives "where it may appear to the court that substantial injustice would be done to either party by a strict adherence to any rules of law which would otherwise be applicable. Such rules of law include, of course, rules of English law. Section 34(2) of the High Court Law of the Northern States[201] is similar to this provision and specifically mentions "rules of English Law" in place of "any rules of law which would otherwise be applicable." English law therefore governs cases between Nigerians and non Nigerians other than indigenous Africans. According to Park, to arrive at the rule to apply, the process of reasoning must go through three stages:

> First, the parties being a native and non-native, the court begins by assuming that English law applies. Secondly, if it appears that English law would result in substantial injustice being caused to the natives, therefore customary law becomes appropriate; and thirdly, if it is shown that the native agreed to be controlled by English law, the conclusion shoots back to the original assumption that English law should govern.

This rule was applied in *Koney v. Union Trading Company*[202]. In that case, an action was brought for breach of contract by an educated African carpenter against a European Company (a non native). The defence relied on the English statute of limitations and the plaintiff in reply contended that English law should not govern the case, relying solely on the fact that he was an African. The West African Court of Appeal however dismissed such assertion pointing out that under the relevant

[201] Section 34(2) of the High Court Law of the Northern States
[202] (1934) 2 W.A.C.A 188 51

statutes, the usual result of a combination of that fact with the further fact that the other party was not an African was to make English law applicable. The defence of limitation was therefore valid against the plaintiff and his action failed. However, in *Nelson v. Nelson*[203], the W,A.C.A. was of the firm view that substantial injustice would be caused to the plaintiff by the application of English law, which would have resulted in denying the plaintiffs of the customary law rights.

**1.5 Theories and Application of Conflicts of Laws**

At this junction, the paper will discuss the theories and application of conflicts of laws. In the course of the development of conflict of laws, many theories evolved. As such, some of the most fundamental theories would be considered here. The old theory among those theories was that the governing law in any conflict situation should be the *lex fori*[204], this means the law of the forum or court. That is the positive law of the state, country, or jurisdiction of whose judicial system the court where the suit is brought is an integral part.[205] Secondly, the *lex loci delicti*[206], law of the place where the tort was committed; and thirdly that the governing law in conflict of laws situation should be the proper law. From the above development of conflict of laws, it was understood that there are three fundamental stages, hence three fundamental theories emerged, namely, the *lex fori* theory, the *lex loci delicti* theory and proper law theory. They are hereby explained:

1.5.1 The *Lex fori* theory

The *lex fori* has been defined by Bryan A. Garner[207] as the law of the forum or the court where the suit was brought. According to him, "it is the positive law of the state, country, or jurisdiction of whose legal system the court where the suit is brought or remedy sought is an integral part"[208] Traditionally, the dominant principle applied in the UK and other common law jurisdictions is the *lex fori*.[209] By this, it means that irrespective of where a tort is committed, if the plaintiff decided to sue in England, the English Law will be applied to the case even if the result would be different had a foreign law were to be applied. The rationale for this is that, tortious liability is seen more as a penal sanction (crime) than civil liability (contract).[210] Coupled with the fact that issues of penal sanctions do not have extra-territorial

[203] *[1995] HCRev 2; (1995) 1 High Court*
[204] Morris, op cit. p. 302
[205] Suleiman, I.N. (1996) *The Nigerian Law Dictionary*, Tamaza, p. 190
[206] Ibid p. 302
[207] Bryan A. G., (2004) *The Black's Law Dictionary*, (9th Edition), Thompson Business, United States of America, , p. 993.
[208] Ibid
[209] In the United Kingdom as well as most of the common law countries, the rule in Phillips v Eyre used to be the applicable choice of law rule in tort before its modification in the recent time.
[210] Ibid

effects, the *lex fori* advocates form the opinion that applying foreign tort laws may undermine the public policy of the forum state as what is objectionable in the foreign state may not be objectionable in the forum state.[211]

*Lex fori* has been criticized to be an infringement on territoriality principle and also invites forum shopping on the part of litigants in the quest for the most beneficial place to litigate an issue.[212]Torts are in the realm of private law and as such, it is expected that the law in one state may be different from another state that equally has connection with a tortious act. Hence, there may be potential conflict in the laws that may be applicable to such a tortious claim. Where a tort has connection with two different legal districts or states, it poses at least two conflicts of laws questions. The first one is - which of the states' court has jurisdiction over the action and the second, which of the states' law is applicable to the action. To appreciate the immediate and remote concerns on these issues, the conflict scenario in intangible property laws is graphically captured by learned Agbede[213] thus;

> Trans border disputes in respect of intangible property rights may arise from infringement of rights over a registered trademark, design, patent, or a grant of copyright or by way of a transfer or transmission of these rights. Such disputes will normally call to question issues of jurisdiction of courts; the ascertainment of the applicable law, and the enforcement of the ultimate judgment. Claims in respect of intangible property are generally territorial. Consequently, cases in this respect were few and far between not only in Nigeria but also in common law jurisdictions. However, with the modern trend of globalisation, the situation has taken a different dimension. The future poses increasing challenges.

The foregoing analysis of the learned professor is apt and accurate. The question one would ask is, how would conflict of law answer to such a dilemma of intellectual property scenario? If intellectual property is territorially limited, then it means that the 'situs' of such claim is the territory in which the incorporeal right is registered but that being the case, it then means that, a foreign author or owner of a patent or copyright or trademark proprietor registered abroad will not have the right to sue in a Nigerian court because same being viewed as a right in rem and common law will not permit.

1.5.2 The *Lex loci deliciti* Theory

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[211]O'Brien, J (1999) *Conflict of Laws*, 2nd ed., (London, Cavendish Publisher, p.382,

[212] See La Forest J. decision in McLean v. Pettigrew [1945] S.C.R. 62.

[213] Agbede IO Intangible Property Rights in the Conflict of Law in Aremu JA, Contemporary Issues in International Law & Diplomacy( being Essays in honour of Amb MT Mbu) Lagos: Total Communications Ventures 220

The *lex loci delicti* theory is the application of the law of the place where the tort was committed. It was the prevailing doctrine on the continent of Western Europe with slight modifications prior to the coming of the Rome II Regulation. It was also the applicable rule in the United States before and during the first part of the twentieth century. Proponents of the *lex loci delicti* theory stress that it avoids unnecessary forum shopping and leads to certain, uniform, and predictable results. However, the theory has faced criticisms among which is the difficulty in arriving at the locus of more complicated tortuous instances as against road accident scenarios around which much analysis on locus is focused. Many lawyers and writers were of the view that the law of the place where events occurred is the only law which can attribute legal consequence to them. A foreign judgment can be enforced as though it were a judgment of the domestic court by registering it in the domestic court. This is usually brought about by legislation in that behalf by each of the countries.

In Nigeria, that legislation is the Foreign Judgments,[214] judgments of courts in certain foreign countries may be enforced in Nigeria and judgments of the courts in Nigeria may, in turn, be enforced in such countries. According to the proponents of this theory, everyone should be entitled to adjust his conduct to the law of the country in which he acts.[215] Willes, J. in the case of Philips v. Eyre stated that, "*The civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law*".[216] This theory was supported by Professor Beale and it formed the basis of the First American Restatement of conflict of laws. The theory was also criticized thus;

1. The theory does not take into consideration the tort-feasor, the victim, the nature of the tort. These may lead to unjust result.
2. By applying the theory of the place of commission or *delicti*, it is always difficult to determine *lex loci delicti* commission in transport cases, especially where several elements occurs in different countries.

### 1.6 Domicile/Jurisdiction in Conflict of Laws

Domicile is relevant to an individual's "personal law," which includes the law that governs a person's status and their property. It is independent of a person's nationality. Although a domicile may change from time to time, a person has only one domicile, or residence, at any point in their life, no matter what their

[214] (Reciprocal Enforcements) Act, Cap. 152. Under the Act

[215] Olaniyan, H.A (2012) 'Nigerian Conflict of Laws through the Cases: A Researcher's Critical Comments (Part 1)', *African Journal of International and Comparative Law*, Vol. 20, No.3, p. 20

[216]Philips vs. Eyre (1870) L. R. 6 Q. B. I. 28.

circumstances.[217] Domicile is distinct from habitual residence, where there is less focus on future intent. As domicile is one of the connecting factors ordinarily used in common law legal systems, a person can never be left without a domicile and a domicile is acquired by everyone at birth.[218] Generally domicile can be divided into domicile of origin, domicile of choice, and domicile by operation of law (also known as domicile of dependency).[219] When determining the domicile of an individual, a court applies its own law and understanding of what domicile is.[220]

The lex domicile of a person is given much more weight in a question of succession, than in a question of contract. The proponents of *lex loci delicticommisi* posit that the law of the place where a tort occurs should be the applicable law. For instance, let us assume two Nigerian soldiers are on a short holiday in Germany and one negligently knocks down the other, even if both parties eventually returned to Nigeria and are before a Nigerian court in respect of the action, the German Law should apply to the case because, that is the law of the place of the wrong. It is thought that, that is the law that assigns liability to that very conduct. This approach has been critizised as it may in some instances negate the reasonable expectation of the parties.[221]

## 1.7 Approach to the Ascertainment of Applicable laws of Torts in Conflicts of Laws

Unlike contract, where disputes can be anticipated, an ascertainment of the applicable law clause to that effect may be inserted by the parties, tort injuries, on the other hand, are mostly unexpected and parties are not likely to give future thought to any choice of applicable law[222]. Under these circumstances, until injuries occur and the injured party decides to pursue a claim for compensation, the issue of the ascertainment of the applicable law in tort would not arise. The issues of ascertainment of applicable law in tortuous wrong in conflict of laws situation becomes even more complicated from the later half of the 19th century, due to technological advances and modern means of transportation and communication. For example, the marketing of products is not restricted to national boundaries. Therefore, just as the law of contract responded to the pressure

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[217] Uddin, M. (2018) "Domicile as a Personal Connecting Factor: An Assessment of Judicial Decision". *International Journal of Global Community*. USA Vol 1: pp. 3-5

[218] Ibid

[219] Ibid

[220] Pitel, S. (2016). *Private International Law in Common Law Canada: Cases, Texts and Materials, 4th ed*. Toronto: Emond. p. 154.

[221] For instance in Walton v Arabian American Oil Co (1956) 233 F (2d) 541, the suit was instituted in the US by an employee who sustained personal injury in his US employer's property in Saudi Arabia. The court applied the law of Saudi Arabia on the basis of lex loci delicticommisi.

[222] Abla Mayss, Conflict of Laws, (2nd edition) Cavendish Publishing, London, (1994) p. 113

of international trade in the 19th century, so in the 20th century the law of torts has responded to these pressures. In trying to respond to these pressures, theories have evolved for the ascertainment of the applicable law of torts in a conflict of laws situation[223].

Under his principles of preference theory, Professor Cavers proposed five "principles of preference" for tort conflicts and two principles for contract conflicts. His principles on tort choice of law generally leaned in favour of the preferred place where the tort victim will be most compensated and which will serve as sufficient deterrent to a *tortfeasor*. Currie's governmental interest analysis theory is one that analyses the competing interests of states to which the parties to a tortuous relationship belong. It posits that the applicable law with respect to a tortuous transaction should be the law of the state whose interest would be most affected if not applied. In view of this, it postulates the true and false conflict situations as well as the "un-provided case"[224].

The comparative impairment theory, advanced by Baxter, is an off-shoot of Currie's government interest analysis. Its main thrust however is that unlike the forum preference in a true conflict situation as posited by Currie, the courts can reach satisfactory outcomes through the extrapolation of conflicting interests. Under the Leflar's better law theory, Professor Leflar recommended five choice-influencing considerations courts should use when resolving choice of law issues. The fifth consideration focuses on the "better rule of law." Leflar argues that courts have almost always tacitly considered whether one of the competing laws is "anachronistic, behind the times" such that they could reasonably and candidly acknowledge that they prefer to apply the more "realistic practical modern" law to achieve justice in the individual case[225]. An ascertainment of the scope of English law received into Nigeria is a prerequisite to any determination of the extent and quantum of English conflict of laws des received into Nigeria.

**1.8 Application of the Rule of Ascertainment by Nigerian Courts**

Phillips v Eyre was first applied in the Nigerian case of Benson v Ashiru. In this case the plaintiff sued in the High Court of Lagos on behalf of himself and dependant relatives of Adetutu Ashiru deceased, under the English Fatal Accidents Act of 1846. He claimed damages representing the pecuniary loss sustained by Adetutu's death. The accident which resulted in the death of the plaintiff's wife occurred in Ijebu Remo, Western Nigeria. The Judge found that the plaintiff has proved negligence against the defendant and also that the Fatal Accident Act, 1846 applied. This finding

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[223] Stone, P., (1995) *The conflict of laws* (Harlow: Longman Group Limited,). P. 84

[224] Ibid

[225] Alloti., A. (1970) *New Essays in African Law* (London: Butterworths,), p. 60

of the court on the applicable law was contested by the defendant. It should be noted that the Fatal Accidents Acts, 1846 and 1864 applied in Lagos as an English Statute of General Application while the Torts Law applied in the Western Nigeria. The trial court found that both laws applied to the death in Ijebu Remo concurrently. The defendant contented the Supreme Court should dismiss the action as it had earlier decided in Amanambu v Okafor[226] that the laws applicable in a region could not apply in another region. Counsel to the defendant argued that by the Law of England (Application) Law (cap. 60), English statutes of general application ceased to apply as such in Western Nigeria from 1st July, 1959. In resolving this controversy,[227] the Supreme Court noted as follows:

> The rules of the common law of England on questions of private international law apply in the High Court of Lagos. Under these rules an action of tort will lie in Lagos for a wrong alleged to have been committed in another part of Nigeria if two conditions are fulfilled: first, the wrong must be of such a character that it would have been actionable if it had been committed in Lagos; and secondly it must not have been justifiable by the law of the part of Nigeria where it was done: Phillips v. Eyre.[228] These conditions are fulfilled in the present case.

Another issue that came up in the case was whether the plaintiff had the capacity to sue in this case having not clearly show the capacity in which he had sued and his relationship with the deceased as required by both the Torts Law of Western Nigeria and the Fatal Accident Act. On the question of capacity, the court found that an amendment was not necessary as both laws allow the plaintiff to institute the action as presently constituted. However, the action failed because the plaintiff was not able to prove his marriage with the deceased. The Supreme Court turned down the damages granted the dependant (not plaintiff) by the trial court, holding that since the plaintiff has no interest in the matter, he could not sue on behalf of those that had interest. One more important issue discussed in this case that is of paramount concern to conflict of laws practitioners is the question of applicable law to the tort in question. It appeared both counsel and the apex court were totally at lost with choice of law rules in foreign torts cases as postulated in the cases cited by the Supreme Court. The lower court held that the Fatal Accident Act of Lagos applied concurrently with the Torts Law of Western Nigeria. This is an obvious error as rightly pointed out by the Supreme Court. Although, the trial court applied the

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[226] (1966) LCN/1310(SC)
[227] Ibid
[228] *(1870) L. R. 6 Q.B. 1*

correct law (forum law), being the Fatal Accident Act, his lordship's reasoning was however, not in tandem with established rule of law.

In Nigerian Tobacco Company Ltd. v. Agunanne,[229] the Supreme Court approved the lower court's ratio that the lex loci delicti governs multi-state tort action. In this case, the respondent sued his employer, Nigerian Tobacco Company Ltd at the High Court of Anambra State in Enugu in Eastern part of Nigeria in respect of injuries he sustained in an accident that occurred in plateau State, Northern Nigeria. The accident occurred as a result of the negligent act of the driver of the Company. When the lower court was faced with the choice of applicable law in this case, the learned trial judge held that:

> Upon a careful consideration of all the relevant authorities on this matter, it appears clear to me that where as in this case, an accident happened in a foreign State and an action is properly instituted in another State in respect of the said accident the proper law that must be applicable for the determination of the suit will be the lex loci, that is to say, the law of the foreign State and not the law of the State in which the suit is instituted.[230]

The trial court eventually found negligence proved against the Company and awarded damages against it accordingly. The Company's defence of the common law doctrine of common employment which though have been expressly abolished by statutes in Western and Eastern but not Northern Nigerian States was rejected by the court. The court was prepared to accept and apply it because the doctrine has not been abolished in northern Nigeria; nevertheless, it was rejected as the driver and the plaintiff were not in the same category of employment.[231]

**1.9 Conclusion**

From the foregoing discussion, it is evident that Nigerian Courts have not only misconstrued but also misapplied the rule in *Philips vs Eyre* as a rule of jurisdiction rather than that of choice of applicable law in torts. This misconception and misapplication have posed a number of problems in view of the interpretations advanced to the decision in *Philips vs Eyre*. Firstly, it is a double barreled jurisdictional rule leaving open the choice of law, and allows for forum shopping. Secondly, the first part of the rule is jurisdictional, while the second part constitutes a

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[229] (1995) 5 NWLR (Pt. 397) 571.

[230] *See Olayiwola Benson & Anor. v. Joseph Ashim [1967] 1 All N.L.R. 184, Grace Amanambu v. Alexander Okafor & Anor. [1966] 1 All N.L.R. 205 and A.O. Ubanwa & 4 Ors. v. C. Afocha & Anor. (1974) 4 E.C.S.L.R, 308.*

[231] Ibid

choice of law rule in favour of the *lex loci delicti.* But it is now indisputable that the first interpretation is the correct one.

Based on the above analyses, the following findings are hereby made:

1. One of the problems that often dominate every case with foreign element is that of jurisdiction. This is understandable because, in a case where there is a foreign element, it simply means there is more than one territorial areas involved by the facts of the case, meaning the event took place in two or more places. Therefore, the jurisdictional problem comes into play thereby throwing up the question of which out of the two courts is competent to hear and determine the case involving claims for damages/compensation? Each of these courts would claim that one fact or another took place in its jurisdiction which often pose a problem for the court.
2. The paper also finds that in cases with foreign elements there is the problem of choice of applicable law. In other words, where there is more than one applicable law, which law will the court choose in order to enable it award or disallow the payment of compensation.

Consequent upon the above findings, it is hereby recommended that:

i. There is no doubt that the Nigerian legislatures both at the National and State levels, have tried in their own ways to find a lasting solution to the problems of jurisdiction of each court created by them. However, more effort is required by the legislative arms of government to clearly enact laws to take care of the issue of jurisdiction and ascertainment of applicable law when the cause or matter has a foreign element. This step will help to develop our legal and judicial systems. This will also assist the courts not to make blind adherence to the rules in *Philips Vs Eyre* and others that were arrived at when human interactions, means of communication and science and technology were not as advanced as they are today.

ii. It is also recommended that the application of the English courts' rule in ascertaining the applicable law of torts in conflict of laws situation should only serve as a guide and not to have absolute application in every case. To this extent, it may only be referred to, by the Nigerian courts where it becomes necessary.

There is also the need to amend some provisions of Section 6(1) (a) and (b) of the Foreign Judgments (Reciprocal Enforcement) Act[232], which excludes the enforcement of decisions of foreign court unless the plaintiff lives and owns a property within that jurisdiction. This may not be a good law as crooks and fraudsters may take advantage of the provision to avoid meeting their international obligations to their foreign business counterparts.

[232] Cap. F 35, LFN, 2004