CASE NOTES

CORCORAN v. CORCORAN[1]

Conflict of laws — Interspousal action for damages for negligence brought in Victoria in respect of an accident occurring in New South Wales — Interspousal action allowed by Victorian law but not by New South Wales law.

An action was brought in the Victorian Supreme Court by a wife against her husband for personal injuries caused by the negligent driving of a motor car by her husband. The parties were resident and domiciled in Victoria. The problem arose because the accident occurred in New South Wales, and:

> By the law of New South Wales a spouse is not entitled to sue the other spouse in tort in respect of personal injuries, save in the one case where the injuries have arisen out of the use of a "registered motor vehicle" within the meaning of that expression in s. 16B of the Married Persons (Property and Torts) Act 1901-1964 (N.S.W.).
>
> The motor vehicle which was being used in the present case was . . . registered in Victoria. Although being lawfully driven in New South Wales at the time of the accident, as being a visiting motor vehicle, it was not a registered motor vehicle within the meaning of the New South Wales Act . . .[2]

The plaintiff could have argued that interspousal immunity is merely a procedural matter and thus a matter for the *lex fori*,[3] or alternatively that the immunity is a matter of personal capacity and thus a matter for the *lex domicili*.[4] It was argued that the Victorian legislature had laid down what conflicts principles were to govern such a situation and had excluded the *lex loci delicti* in this respect. Adam J., however, regarded this as a case of conflict of the substantive tort laws; which had to be resolved by the unmodified common law conflicts principles,[5] and this note will proceed on this basis.

The principles are said to be contained in the following passage from the judgment of the Court of Exchequer Chamber, known as the rule in *Phillips* v. *Eyre*:

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[1] [1974] V.R. 164. Supreme Court of Victoria; Adam J.

[2] *Id.* 165. In view of the High Court's decision in *Anderson* v. *Eric Anderson Radio & T.V. Pty Ltd* (1965) 114 C.L.R. 20, the defendant did not seek to argue that the defence of interspousal immunity was established by virtue of the "full faith and credit" provisions of s. 118 of the Constitution or s. 18 of the State and Territorial Laws and Records Recognition Act 1901-1964.

[3] *Chaplin* v. *Boys* [1971] A.C. 356, 381 *per* Lord Guest. Limitation legislation is so classified: *Phillips* v. *Eyre* (1870) L.R. 6 Q.B. 1, 29-30 and *John Robertson & Co. Ltd* v. *Ferguson Transformers Pty Ltd* (1972-1973) 129 C.L.R. 65. However, Matthews J. refused to draw an analogy between interspousal immunity and limitation legislation in *Warren* v. *Warren* [1972] Qd.R. 386, 388-389.

[4] *Warren* v. *Warren* [1972] Qd.R. 386, 389-391.

[5] [1974] V.R. 164, 166-167.

> 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 . . . *The Halley* . . . Secondly, the act must not have been justifiable by the law of the place where it was done.[6]

Unfortunately, this passage, which has been elevated to the standing of a legislative enactment, raises more questions than it answers. Although the rule is more than a century old, neither part of the test is of settled meaning or classification.

The operation, at least, of the first part is clear. A court will not enforce claims based on a foreign tort greater than the claims it would enforce if the same facts occurred within jurisdiction.[7] *Corcoran's* case raised the question of the meaning of the second part. The diverse opinions expressed in the Court of Appeal[8] and the House of Lords[9] in *Boys* v. *Chaplin* and the reactions of the various Supreme Courts[10] to that case have only served to clarify the range of alternative answers to that question. It is submitted that the rule cannot be interpreted piecemeal: one would expect that the meaning of each part of the rule would be related to the meaning of the other part and to the classification of the part as either a choice of law rule or a jurisdictional requirement. Unfortunately, the judgment in *Corcoran's* case followed the pattern of previous cases, and was confined to a consideration of the meaning of one part of the *Phillips* v. *Eyre* rule—as already stated, the second part.

Counsel for the plaintiff[11] accepted that "the law" referred to in the rule is civil law and made no attempt to rely on *Machado* v. *Fontes*[12] in which it was held that criminality by the *lex loci delicti* sufficed. The plaintiff hypothesised various situations to try to satisfy the rule. If the defendant had been driving as an employee then the employer would have been vicariously liable. If someone else had suffered personal injury or property damage, then he would have had a right of action by the *lex loci delicti*.[13] At first sight these submissions appear to amount to no more than an argument that marital immunity is merely procedural and therefore governed by the *lex fori*, but there is a distinction. To say that marital immunity is procedural is to say that by the *lex loci delicti* the one spouse has a cause of action against the other but is barred from using it. To say that "the act of the defendant is not justifiable" because the plaintiff would succeed against someone other than the

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[6] (1870) L.R. 6 Q.B. 1, 28-29.

[7] *The Halley* (1868) L.R. 2 P.C. 193; *Anderson* v. *Eric Anderson Radio & T.V. Pty Ltd* (1965) 114 C.L.R. 20.

[8] [1968] 2 Q.B. 1.

[9] [1971] A.C. 356.

[10] The cases are reviewed in Nygh, "Boys v. Chaplin in the Antipodes" (1973) 4 University of Tasmania Law Review 161.

[11] [1974] V.R. 164, 167.

[12] [1897] 2 Q.B. 231. *Machado* v. *Fontes* was applied in *McLean* v. *Pettigrew* [1945] 2 D.L.R. 65. In that case the court not only examined whether the defendant had committed a traffic offence by the *lex loci delicti*, but considered his acquittal by the foreign court irrelevant.

[13] [1974] V.R. 164, 167.

defendant, or that someone other than the plaintiff would succeed against the defendant, is to define "the act of the defendant" in a special way. By this definition "the act of the defendant" is the negligent driving or the breach of the duty of care owed to passengers or other road-users. Thus the fact that the breach of duty did not result in personal injury actionable by the wife does not mean that the breach was justifiable. It was further argued that the act of the defendant was "not justifiable" because the wife in fact had a right of action for her property damage.[14]

As Adam J. pointed out, once the *obligatio* doctrine is rejected[15] there is no reason *in theory* for rejecting any of the above submissions.[16] Nevertheless, His Honour rejected the above submissions—including the last one which goes some way toward satisfying the policy underlying the *obligatio* doctrine.[17] His Honour adopted the views of Lord Wilberforce[18] and Lord Hodson[19] in *Boys* v. *Chaplin*. This approach results in the *prima facie* rule that a plaintiff can have no more rights enforced by the court than he has by the *lex loci delicti*. The *prima facie* rule is, however, open to exception when the interests of justice demand it. I would call this test the "co-extensive rights test" rather than the "double actionability test" as the latter label is also applicable to the rejected submissions.[20]

On the facts the wife had no right by the *lex loci delicti* to claim damages for personal injury. Adam J. considered, however, that there was a suitable case for exception. The New South Wales legislature is not particularly concerned with Victorian residents, and the New South Wales policy of allowing a wife to sue a husband when he is insured is actually advanced by ignoring the *lex loci delicti* when she sues in Victoria.[21] Thus, finally, the plaintiff succeeded. No one would object to the justice of this result, however the method bears some comment.

First, the introduction of an exception to the rule by the House of Lords in *Boys* v. *Chaplin*, which was followed in *Corcoran* v. *Corcoran*, rests on a doubtful interpretation. Much reliance was placed by the House of Lords on the words "[a]s a general rule" which introduce the test in *Phillips* v. *Eyre*. If that test is read in context, it is plain that the "rule" in *Phillips* v. *Eyre* was formulated as a rejection of the proposition that a court will *never* entertain claims based on foreign torts,[22] and a similar conclusion is reached upon reading *The Halley*.[23] Thus the

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[14] *Id.* 168.

[15] Diplock L.J. gave a strong dissenting judgment in support of this doctrine in the Court of Appeal in *Boys* v. *Chaplin* [1968] 2 Q.B. 1, 34ff. where he expressed the view that the second part of the rule is a choice of law rule. When a victim sues a tortfeasor for a foreign tort he is relying on a personal relationship governed by the *lex loci delicti*. The first part of the rule is a jurisdictional requirement.

[16] [1974] V.R. 164, 168-169.

[17] *Id.* 169-170.

[18] [1971] A.C. 356, 384ff.

[19] *Id.* 373ff.

[20] *Cf.* [1974] V.R. 164, 168.

[21] *Id.* 170-172.

[22] (1870) L.R. 6 Q.B. 1, 28.

[23] (1868) L.R. 2 P.C. 193, 202-203.

"rule" in *Phillips* v. *Eyre* can be regarded as meaning that if the two requirements are met the court will "generally" assume jurisdiction; and any "exception" to this rule must, it is suggested, be to refuse jurisdiction even though the rule is satisfied. In *Boys* v. *Chaplin*, of course, the House of Lords used the exception to *Phillips* v. *Eyre* as a means of accepting, rather than rejecting, jurisdiction.

Secondly, there is an apparent inconsistency between the "co-extensive rights" formulation and High Court pronouncements. Lord Wilberforce held that the first part is a choice of law rule and the second part is a jurisdictional test.[24] Barwick C.J. and Windeyer J. were firmly of the opinion in *Anderson* v. *Eric Anderson Radio & T.V. Pty Ltd* that both parts are jurisdictional tests and when they are satisfied the choice of law rule is that the *lex fori* is applied.[25] The latter view has more support from the judgments in *Phillips* v. *Eyre*[26] and *The Halley*.[27] It is submitted that this distinction cannot be dismissed as a mere semantic quibble but is relevant to the interpretation of both parts in the way outlined in the following paragraph.

The trend of decision[28] is to ignore the wording of the rule in *Phillips* v. *Eyre* itself, which reflects the peculiar facts of that case, and to adopt the wording in *The Halley* where the question was said to be whether:

> such injuries are actionable both by the law of *England* and also by that of the country where they are committed . . .[29]

It is likely that the High Court would agree with Lord Wilberforce[30] that the requirement of each part is the same and is "actionability". It is possible, however, that the High Court would give that word a different meaning to that attributed to it by Lord Wilberforce. The "co-extensive rights" formulation inevitably gives "actionable" a very narrow meaning. The jurisdictional requirement (the second part) is as hard to satisfy as the ultimate question of whether the plaintiff is entitled to succeed by the tort law of the forum (the first part). The severity of this test necessitates the introduction of the possibility of exception. If both parts are regarded as being jurisdictional, then "actionable" could be given a wide meaning as in *Hartley* v. *Venn*,[31] in which Kerr J. considered that the word meant "justiciable"; or "actionable" could be given the wide meaning argued in the submission of the plaintiff in *Corcoran*, which submission was rejected.[32] Whether or not the plaintiff ultimately succeeds depends on the application of the tort law of the forum to the facts.

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[24] [1971] A.C. 356, 385.
[25] (1965) 114 C.L.R. 20, 23, 41.
[26] The rule is preceded by the words ". . . our courts do not undertake universal jurisdiction": (1870) L.R. 6 Q.B. 1, 28.
[27] The Privy Council spoke of the "right to sue": (1868) L.R. 2 P.C. 193, 202, 204.
[28] The cases are reviewed by Nygh, *op. cit.*
[29] (1868) L.R. 2 P.C. 193, 203.
[30] [1971] A.C. 356, 389.
[31] (1967) 10 F.L.R. 151.
[32] *Supra* n. 17.

The "co-extensive rights" formulation appears, therefore, to be a misinterpretation of *Phillips* v. *Eyre* and *The Halley*. Did Adam J. nevertheless, make the proper policy decision in accepting it?

Times have changed since the leading cases were decided. International and interstate intercourse is frequent. Recent conflicts of tort laws have arisen, not so much from differences of policy between independent sovereign legislatures, but rather from anomalies in legislative definitions, or from differing rates of bringing about generally accepted reforms.[33] In such a situation justice demands that recourse to local courts for foreign torts should be readily available despite disparities between the *lex loci delicti* and the *lex fori*. The three main alternatives are:

(a) to allow the plaintiff to sue if he has a cause of action against the defendant by the *lex loci delicti* which is not demurrable or if *in fact* he has such a cause of action against another person or if another person has such a cause of action against the defendant;
(b) to allow the plaintiff to sue if he satisfies (a) or if in a hypothetical situation he would have such a cause of action against another person or another person would have such a cause of action against the defendant; or
(c) the "co-extensive rights" formulation with its exception.

The competition is, as usual, between individual justice and certainty. The first two alternatives which are associated with the "double jurisdictional" interpretation, are reasonably certain and easily satisfied. They ensure that the *lex loci delicti* is given some recognition. They are nevertheless fickle in operation, and success or failure depends on chance circumstances not directly relevant to questions of justice. The certainty of (c) is undermined by the provision for an exception on policy grounds. The exception can apparently be made no matter how "justifiable" the actions were by the *lex loci delicti*.

Current conflicts arise in the area of motor accident litigation which is an area where the importance of "wrongfulness" has faded. This type of litigation could decline in importance with the passing of national compensation legislation.[34] If the rule is to be useful in the traditional areas of tort such as assault, false imprisonment and defamation, it should be certain. It is submitted therefore, that Adam J. should have allowed the plaintiff to succeed by accepting the submission corresponding to (b). Not only is there no reason *in theory* for rejecting the alternatives in (b), but they are also more consistent with the leading cases and more desirable than the "co-extensive rights" formulation.

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[33] Typically, in the areas of contributory negligence and interspousal immunity.
[34] The problem of interspousal immunity will disappear when s. 119 of the Family Law Act 1975 (Cth) comes into operation; provided that section is held to be constitutionally valid *and* is not restrictively interpreted by the courts. S. 119 provides that "Either party to a marriage may bring proceedings in contract or in tort against the other party".

* B.A./LL.B. (A.N.U.); Editor, 1974.