but it seems that, unless there is further judicial consideration of the matter, the restriction will apply to the Victorian Transfer of Land Act as from 1969.

JUDITH A. EARLS

HARTLEY v. VENN AND ANOTHER[1]

Private International Law—Choice of law for a foreign tort—Effect of a complete defence in the place of commission—Jurisdiction—What constitutes the law of the forum.

The plaintiff was injured in a motor accident in New South Wales as a result of the defendant's negligence. The plaintiff was contributorily negligent. An action was brought in the Australian Capital Territory before Kerr J. If the action had been brought in the place of commission of the tort, N.S.W., the plaintiff's contributory negligence would have supplied a complete defence. Nevertheless, His Honour gave judgment for the plaintiff and merely apportioned damages under the relevant A.C.T. Statute.

It was clearly established that the rules of Private International Law should have been used to decide between the laws of the A.C.T. and N.S.W. The instant case being a tort, the Court framed its judgment in terms of the choice of law rules laid down in *Phillips v. Eyre*.[2] Before considering what His Honour said, it is convenient to look at the doctrine of that case.

The Governor of Jamaica had imprisoned the plaintiff, who sued claiming damages for wrongful imprisonment. Willes J. for the Court of Exchequer Chamber laid down the famous test that to 'found a suit in England', (i) 'the wrong must be of such a character that it would have been actionable in England' and that (ii) 'the act must not have been justifiable by the law of the place where it was done'. An Act of Indemnity had been passed making the Governor's action 'lawful'. Hence it was 'justifiable', and that meant the plaintiff did not succeed.

There has been a trend noticeable in the recent texts and cases, for example, *Boys v. Chaplin*[3] and *Anderson v. Eric Anderson Radio and T.V. Pty Ltd*,[4] to treat the *Phillips v. Eyre* two part test as going only to jurisdiction. This means that, as well as the jurisdictional rules usual in civil suits with a foreign element, a Court must be satisfied that the wrong is 'actionable' in the forum and 'not justifiable' in the place of commission, to put the two conditions briefly. There is no conclusive evidence in *Phillips v. Eyre* that Willes J. intended to so state the law. He makes no mention of needing to apply any further law if he decided that he had jurisdiction. The Court of Exchequer Chamber never suggested that it did not have jurisdiction. It should have if its test only concerned that. Rather, the Court seems to have taken jurisdiction on the basis of service, the orthodox basis in Private International Law. It then seems to have used its two conditions to see whether plaintiff would succeed.

The Court of Appeal in *Boys v. Chaplin*,[5] on the other hand, did use the two conditions as a jurisdictional test only. Having satisfied itself that it had jurisdiction, it went on to choose the appropriate law. Lord Denning M.R. favoured the notional 'Proper Law of the Tort' which has been advocated by some writers. This is the system of law, analogous to the proper law of con-

[1] (1967) 10 F.L.R. 151. Supreme Court of Australian Capital Territory: Kerr J.
[2] (1870) L.R. 6 Q.B.1.
[3] [1968] 1 All E.R. 283.
[4] (1965) 114 C.L.R. 20.
[5] [1968] 1 All E.R. 283.

tract, which is considered to have the most real connection with the doings of the parties. Diplock L.J. appeared to prefer the *lex loci delicti*, the law of the place of commission. Upjohn L.J. chose the *lex fori*, the law of the country in which the court sat.

It is submitted that such a restriction on *Phillips v. Eyre* as the Court of Appeal made is unjustified by the case itself. But there is much to be said for re-examining the doctrine of *Phillips v. Eyre* and limiting its effects. The two conditions unduly emphasize the law of the forum when, after all, the wrongful act took place in a foreign country under a system of law perhaps very different from that of the forum. One might wonder why the law of the forum is relevant at all, providing the type of remedy sought is one known to the court. In the nineteenth century, there was perceptible certain insular tendencies in English Private International Law. *Phillips v. Eyre* may be a product of this type of thinking. In the case itself,[6] Willes J. seemed well aware of this danger. Lord Denning re-emphasized this consideration in *Boys v. Chaplin* and hence read down the test in *Phillips v. Eyre* as relating to jurisdiction only. He then went on to choose a law which took full account of what was in effect the actual legal climate in which the delict took place.

The majority of the Australian High Court in *Anderson v. Eric Anderson*,[7] which just predated *Boys v. Chaplin*,[8] seems to have treated the two *Phillips v. Eyre* conditions as merely jurisdictional or 'threshold'. The dissenter was Kitto J., who may be thought to have conformed more closely to what has been suggested to have been the view of Willes J. The jurisdictional idea had been circulating in textbooks for some time. Examples of this are cited by Windeyer J.[9] The majority openly embraced the idea. Windeyer J. asks[10] 'when the two conditions are fulfilled—what then?' and answers[11] that 'a court . . . must decide the rights of the parties as it would in an action based on a similar event occurring in its own domain'. The other judges of the majority (Barwick C.J., Taylor and Menzies JJ.) used a similar approach.

It is submitted that the treatment of the *Phillips v. Eyre* conditions as a jurisdictional or threshold matter may well have derived from a wish to alleviate their undue stress on the *lex fori*. The High Court's decision reached exactly the opposite result because the majority went on to apply the law of the forum rather than some more appropriate system. It is against this background of the High Court's having accepted one half of a reform but not the other that Kerr J. sitting as a single judge at first instance had to make his decision in *Hartley v. Venn*.[12]

His Honour used the intellectual framework which confines *Phillips v. Eyre* to the threshold question and decided that he had jurisdiction. The tort was 'actionable' in the A.C.T. That there was a complete defence to it in the place of commission, N.S.W., did not make it 'justifiable' there. On this latter point His Honour was quite happy to be bound by the *obiter* of the High Court in *Anderson's Case*. There, all the judges except Kitto J. had held on the reverse fact situation that, for a court sitting in N.S.W., a tort in the A.C.T. which was sued on in N.S.W. was 'actionable' in N.S.W. and 'not justifiable' in the A.C.T. Even though there was a complete defence to it in N.S.W., the elements of an action were still there.[13] If the defence had not been raised, the plaintiff would have succeeded. Kitto J. analysed the elements of the action differently.

Kerr J. reasoned that if a majority of the High Court asserted that a wrong

[6] (1870) L.R. 6 Q.B. 1, 28.
[7] (1965) 114 C.L.R. 20.
[8] [1968] 1 All E.R. 283.
[9] (1965) 114 C.L.R. 20, 41.
[10] *Ibid.*
[11] *Ibid.* 42.
[12] (1967) 10 F.L.R. 151.
[13] (1965) 114 C.L.R. 20, 23 (*per* Barwick C.J.) 43 (*per* Windeyer J.).

was 'actionable' even although there was a complete defence to it, then it was also 'not justifiable'. He therefore held he had jurisdiction.[14] As a single judge of a Supreme Court, he was no doubt right to follow the High Court.

But the result is an unhappy one. If not 'justifiable' be interpreted to mean that there was a chance of a remedy in the place of commission, then weight is placed in actionability in the *forum*. The phrase 'not justifiable' seemed natural in the circumstances from the lips of Willes J.—the Act of Indemnity justified the Governor's conduct. Its subsequent interpretation has been anything but uniform. The decision in *McLean v. Pettigrew*[15] exemplifies one extreme. There, a statute expressly removed civil liability; the defendant had been acquitted of a criminal charge and his activities were still 'not justifiable' because it was possible that he could have been convicted of some other criminal charge. The other extreme is those cases like *McElroy v McAllister*[16] which seem to equate 'not justifiable' with 'civilly actionable', leaving one to wonder why differing terms were used in *Phillips v. Eyre*. The latter view is more acceptable to those who would wish to lay at least as much stress on the *lex loci* as on the *lex fori*, which is after all a system of law which has been exported by the court into a foreign situation.

Having decided that he had jurisdiction, Kerr J. went on to apply the law of the forum.[17] This was again in accord with the lead of the High Court in *Anderson v. Eric Anderson*.

In his concluding paragraph, His Honour wonders whether the *lex fori* which he applied should have been modified to some extent by reference to the *lex loci*. He wonders whether the existence of a complete defence in the place of commission should have affected the outcome of the case, and decides that because the defence was not raised he did not have to consider it. These remarks by the Court are *obiter* in that His Honour could not have dealt with the defence because it was not raised.

It is submitted that, even if the defence had been raised, it ought not to have affected the outcome of the case by modifying the *lex fori*. The *lex fori* is the municipal law of the forum and nothing else. Once it has been indicated by the choice of law rules, it cannot be altered. This would be like using the choice of law rules twice over.

It was once thought that the law to be chosen was contained under the two heads in *Phillips v. Eyre*. Now the heads in that case have been reduced to a jurisdictional or threshold test. The High Court has decided that, given the right to hear, the law applicable is the *lex fori*. This case note has suggested that this latter development has accentuated rather than diminished the role of the law of the forum. Kerr J. was wrong, it is submitted, if he thought he could reverse this trend by somehow re-applying the choice of law rules at the later stage.

It is easy to sympathize with those who regard the High Court's present attitude to *Phillips v. Eyre* as unnecessarily unfortunate for defendants. It is submitted that to reshape the *lex fori* is not the way to lessen what may well be draconic effects on defendants. Rather, it is to be hoped that some reform in the law to be applied will follow and correspond with the reform in the jurisdictional rules. Otherwise, foreign visitors may find that actions for which they had a complete defence in their own countries return to plague them should they venture to Australia.

J. H. TELFER

[14] (1967) 10 F.L.R. 151, 153.
[15] [1945] 2 D.L.R. 65.
[16] [1949] 2 S.C. 110.
[17] (1967) 10 F.L.R. 151, 155.