"FORUM CONVENIENS OR FORUM NON CONVENIENS"

MacSHANNON v. *ROCKWARE GLASS LTD.*

FYFE v. *REDPATH DORMAN LONG LTD.*

> We maintain with firmness that a practice with such motives and such consequences, far from enjoying a a constitutional sanction, merits the unequivocal condemnation of bench and bar.[1]

When Paxton Blair wrote this in 1929 in a celebrated discussion of the doctrine of *forum non conveniens,* he was emphasizing that the most common area of application of the doctrine involved "foreign corporations". He went on to picture the circumstances wherein the corporation was typically sued in a jurisdiction alien to both the plaintiff's residence and the place where the cause of action arose. The English Court of Appeal has recently dealt with such a situation in *MacShannon* v. *Rockware Glass Ltd.* and *Fyfe* v. *Redpath Dorman Long Ltd.*,[2] where the plaintiff's actions were not "unequivocably condemned", but were upheld by Stephenson and Waller, L.JJ. (Lord Denning, M.R. dissenting).

Peter McKinley MacShannon, and Kenneth Duncan Fyfe were both resident in Scotland. MacShannon's action stemmed from minor injury, in the nature of severe bruising of the back muscles, which he received while employed in the defendant's factory in Scotland. Similarly, Fyfe claimed damages for injuries sustained when he tripped over an obstruction, during inspection of an oil well production platform. Advised respectively by solicitors for a large trade union and a professional association, MacShannon and Fyfe served proceeding on the companies' registered offices in England.

Before attempting to view the judgments in a wider perspective, it is essential to examine *The Atlantic Star*[3]: not simply because of the critical rôle it plays in the judgments, but because it is in the nature of

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[1] "The Doctrine of *Forum Non Conveniens* in Anglo-American Law" (1929) 29 *Col. L. Rev.* 1 at 34.

[2] Cases heard conjointly [1977] 1 W.L.R. 376; [1977] 2 All E.R. 449. Cited hence forth as *MacShannon's Case.* Note: the earlier decision in *Logan* v. *Bank of Scotland (No.* 2) [1906] 1 K.B. 141 (C.A.) is given *only* in the *All England Reports* as a case cited by counsel but not referred to in the judgments.

[3] [1973] Q.B. 364; [1972] 3 W.L.R. 746; [1972] 3 All E.R. 705 (C.A.) [1974] A.C. 436; [1973] 2 W.L.R. 795; [1973] 2 All E.R. 175 (H.L.).

a "watershed" case. The development of the law was fully reviewed in the extensive arguments and opinions; and theories behind decisions were placed to the fore, with for example, Lord Simon of Glaisdale (in dissent) deciding strictly on the basis of an expressed preference for a distinguished English system. References to *The Atlantic Star* have overtaken the treatment of many areas of jurisdiction in conflict of law cases, as summarized in *Halsbury*. Further, it is beyond argument that *The Atlantic Star* did change the law. Thus it is first necessary to give close scrutiny to the case. It may be argued that the judgments were not meant to be pulled apart — and in the sense of losing the overall thrust of opinion this is so — but it is important to point to whatever difficulties or uncertainties may be present, as it appears that subsequent cases are to stand or fall upon detailed interpretations of it. It is to this that we turn.

The Atlantic Star

The relevant facts of the case have been well rehearsed. In brief, while attempting to manoeuvre in Belgian waters during a sudden fog, the Dutch vessel Atlantic Star collided with two barges (Belgian and Dutch), sinking both and drowning two men. Various actions were commenced in the Commercial Court of Antwerp, including those on behalf of the owners, cargo and dependants of the Belgian barge. The owners of the Dutch barge commenced an action *in rem* in the English Court of Admiralty, and security was arranged. A stay of proceedings was refused the owners of the Atlantic Star at first instance, although Brandon, J. noted that "so far as convenience is concerned, the Commercial Court of Antwerp is by far the more appropriate forum".[4] The reasons he considered included the place of collision, the lack of connection with England, the ownership of the vessels, dependence on Belgian law and port regulations, and the fact that four other proceedings were then pending in Antwerp. These are purely matters concerning the appropriate forum, and are not strict advantages or disadvantages to either one of the parties.

The Court of Appeal upheld the decision, but the House of Lords (Lords Reid, Wilberforce, and Kilbrandon, with Lords Simon and Morris dissenting) allowed the appeal to stay proceedings.

Lord Wilberforce, after discussion of earlier case law, works from the test given by Scott, L.J. in *St. Pierre* v. *South American (Gath & Chaves) Ltd.*,[5] which he names "the governing statement at the present time".[6] The *St. Pierre* test was that mere balance of convenience was not sufficient to justify a stay. Further:—

> two conditions must be satisfied . . . (a) the defendant must satisfy the court that the continuance of the action would work

[4] [1972] 1 Lloyd's Rep. 534 at 539.
[5] [1936] 1 K.B. 382 at 398.
[6] [1974] A.C. 436 at 464.

an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way, and (b) the stay must not cause an injustice to the plaintiff. On both, the burden of proof is on the defendant.

Lord Wilberforce then cites some principles which he believes are embodied in the passage. In this restatement he suggests that "advantage" to the plaintiff and "disadvantage" to the defendant is the "critical *equation*".[7] This may be leading to a different light in which to view the test. His Lordship adds: "this is done by an *instinctive process* — that is what *discretion,* in its essence is",[8] and while this may be true, it is of little assistance analytically, as we approach the heart of the judgment.

Lord Wilberforce had earlier stressed that "oppressive" and "vexatious" are descriptive and not statutory words[9] (although as we shall note, there is no specific guideline as to how far the concept of "abuse of the process of the court" may be extended). In a difficult passage he appears to further temper the *St. Pierre* formulation. Lord Wilberforce cites a theoretical example offered by Lord Denning[10] that, in the case of a motor collision in Italy between two Italian citizens, one of whom catches the other in England and sues him, this would be purely Italian and (inferentially) should be stayed. Lord Denning gives a similar example in *MacShannon's Case,* which in its context purports to be based upon changes by the House of Lords in *The Atlantic Star.*[11] Applying the theory of the *St. Pierre* test to such a situation: while the action may be oppressive and vexatious to the defendant, the example fails to consider the additional complication of a positive "substantial"[12] advantage to the plaintiff. It becomes important to decide if Lord Denning intended to include this possibility, or whether if he did, it is in complete accord with Scott, L.J.'s wording. Based on this apparent omission from Lord Denning's example, Lord Wilberforce continues that it must follow that advantage to a plaintiff is not in itself decisive. More importantly, he adds that the only way we can determine whether this "substantial" advantage to the plaintiff can or cannot be decisive is if the "court can *additionally* consider the nature of the case, and the disadvantage to the defendant".[13] Clearly then, the disadvantage to the defendant is placed in some balance with *advantage to the plaintiff.*[14] The degree of dis

[7] *Id.* at 468 (my emphasis).

[8] *Ibid.* (my emphasis).

[9] Note however the opposite emphasis in the assertion: "the disadvantage t the defendant . . . must be serious . . . the words oppressive or vexatious point th up as indicative of the degree and character of the prejudice that must be shown *Supra* n. 6 at 469.

[10] *Supra* n. 6 at 468-69. From *Maharanee of Baroda* v. *Wildenstein* [1972] Q.B. 283 (C.A.).

[11] [1977] 1 W.L.R. 376 at 381.

[12] Note Lord Wilberforce's discussion of the definition of "substantial" in th context: [1974] A.C. 436 at 468.

[13] *Id.* at 469 (my emphasis).

[14] This in itself is a different expression of what was formerly the defendan burden to prove no injustice to the plaintiff.

advantage to the defendant which is necessary, is to be determined also by the seriousness of the latter.

Lord Wilberforce, in setting the scope of his opinion, had stated: "I should be most reluctant, even if I were capable, of replacing it [the *St. Pierre* test] by some wider and more general principle".[15] However, it seems that there has been significant qualification.

The application of these comments to the facts of *The Atlantic Star* is less clear. After rejecting a "paper tiger" advantage to the plaintiff (that the object of the suit was to obtain security), his Lordship noted of the plaintiff's advantage in having a better chance of success in Belgium (in the light of a surveyor's report favouring the *Atlantic Star*), that "there is nothing wrong with this".[16] Lord Wilberforce continued: "But one must weigh the considerations on the other side. I need not repeat the latter — they are disadvantages real and strong".[17]

Unfortunately, there are no earlier comments in terms of disadvantages to the defendant.[18] This is not to assert that the judgment is baseless or contradictory, but rather that it is uncertain. The final paragraph offers the factor which perhaps was found most compelling: that on the "[plaintiff/] respondent's application", witnesses had already been exposed to a full inquiry in Belgium.[19] It seems that this is not to be styled as a "disadvantage to the defendant". The exact nature of the inconsistency in the judgment appears to depend on how we fashion this factor, although it may not be valid to regard it as simply another element relating to the "appropriate forum".

Lord Reid's judgment is also of importance. He commences similarly by paraphrasing the then current position on the basis of the *St. Pierre* approach.[20] His Lordship then introduces the concept of the "natural forum" and suggests that where a case is brought outside such a forum and the defendant seeks a stay, it is for the plaintiff to offer "some reasonable justification" of his choice.[21] In looking to the plaintiff's justification Lord Reid speaks of the "key" being found in what is oppressive to the defendant. As Lord Wilberforce had equivocally expressed it, "oppressive" is to be interpreted liberally, and is to be "put in the scales". It is the court's "discretion" as to what is "in a reasonable sense", "looking to all the circumstances", the "solution".[22] The difficulty is that we are not told against what, and to what effect, the balancing of the oppression acts. It is unclear how primary would be the plaintiff's onus to give

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[15] [1974] A.C. 436 at 468.
[16] *Id.* at 471.
[17] *Ibid.*
[18] Except in the ironic sense that it would be a disadvantage to the defendant for the case *not* to be heard in the appropriate forum.
[19] [1974] A.C. 436 at 471.
[20] *Id.* at 453.
[21] *Id.* at 454. "Natural forum" is not defined. Certainly it must incorporate some elements that would also make up a doctrine of *forum non conveniens* as we shall see.
[22] *Ibid.*

"reasonable justification". This doubt is supported by Lord Reid's animated comment upon Lord Denning's suggestion, with regard to "forum shopping", that "if the forum is England, it is a good place to shop in"[23] (with which criticism Lord Denning agrees in *MacShannon's Case*).[24] The distinction may be blurred if we are considering a burden of adducing evidence rather than burden of proof.[25] This becomes a divisive issue in *MacShannon's Case* as we shall see. Again, some development must be marked by the changes whereby the plaintiff is to show reasonable justification, and the demand on the defendant to show oppression is liberalized. The question arises whether the new demand on the plaintiff is part merely of a balancing process, or whether it has *prima facie* import.

Unfortunately, Lord Reid's discusssion of the facts does not clarify the point. His only further reference to the plaintiff's claims to "reasonable justification", is in the form that "proceeding in the *appropriate* Belgian forum offers no *difficulty*".[26] Equally obscure are comments which might have applied to demonstrate the operation of the new element of balancing. We are told (in terms foreign to "oppression to the defendant") that "On the whole I think that the appellants have shown clearly enough that they *ought* not to be required to litigate here as well as in Antwerp".[27] The third majority view, of Lord Kilbrandon, does not help to define the analysis, as it does not purport such departures from the *St. Pierre* form.

A New Test

MacShannon's Case presents the law with a challenge. It is not only of interest in the demands which its circumstances place on interpretation of *The Atlantic Star*.[28] It remains significant (despite the direct and indirect refusal of all three judges to view it as a policy consideration), that the defendant companies were able to allege a specific trend of bringing Scottish industrial proceedings into English courts, on the basis of a company's registration.

Stephenson, L.J.'s detailed judgment is creditworthy as it is consistent in its terminology and logic. It is only from some details that there is scope to differ. The notices of appeal are presented at length. Before moving to the actual decision, it is of interest to rewrite these submissions to stress the range they might have allowed. Five grounds were given by the appellant.[29] The first claim was the judge's disregard "for the

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[23] *Id.* at 453. Lord Denning [1973] Q.B. 364 at 381-82.

[24] [1977] 1 W.L.R. 376 at 380.

[25] B.D. Inglis, "Jurisdiction, the doctrine of *forum conveniens* and Choice of Law in Conflict of Laws" (1965) 81 *L.Q.R.* 380 at 392.

[26] [1974] A.C. 436 at 454 (my emphasis).

[27] *Id.* at 454-55 (my emphasis).

[28] Unlike for example, the recent N.S.W. case *Maple* v. *David Syme & Co. Ltd.* [1975] 1 N.S.W.L.R. 97 (appeal dismissed) where considerations of *lis alibi pendens* were an encumbrance. Begg, J. quoted extensively from Lord Reid in *The Atlantic Star* with little comment.

[29] [1977] I W.L.R. 376 at 382-83.

plaintiff's failure to offer any or any reasonable justification" for his choice of forum (suggesting lack of emphasis of the plaintiff's duty, as *per* Lord Reid). Secondly it was asserted that the judge was wrong in attributing *decisive*[30] weight to the plaintiff's solicitors' *unproven* belief that it was to the advantage of the plaintiff to proceed in England. Here again, the burden of adducing evidence, and the practical operation of the balancing of interests introduced by *The Atlantic Star* lie within the claim. Thirdly, a new direction is prompted by the suggestion that "the institution as a matter of principle in England of proceedings that ought more *appropriately* to be instituted in Scotland, is such as to amount to an abuse of . . . process".[31] The final two matters include claims of oppression to the defendant on grounds of inconvenience; and the "growing trend" argument to which we have referred.

Stephenson, L.J. offers his judgment of these grounds by affirming Robert Goff, J.'s conclusion that the defendants had shown only insubstantial inconvenience and expense.[32] This serves to reject outright the three main considerations above. From this position however, it appears that his Lordship is compelled to be overly schematic with regard to *The Atlantic Star*. He agrees (with Waller, L.J.)[33] that a first principle is as stated by Lord Wilberforce, that the plaintiff should not lightly be denied the right to sue. This disregards what one would suggest was Lord Wilberforce's *departure* from this starting point. Secondly, it is asserted that the method of balancing the advanges to the plaintiff with the disadvantages to the defendant, as it was indefinitely described by the majority in the House of Lords, is merely an exact restatement of Scott, L.J. in *St. Pierre*.[34] In summary, one would submit that this is doubtful. However, Stephenson, L.J. is very explicit in his rejection of the idea that Lord Reid denied "the duty of a defendant seeking a stay to discharge the burden of proving the plaintiff's reason for coming here is not good enough to outweigh the disadvantages to the defendant".[35] As a result, while the "natural forum" is accepted to be Scotland, the concept as used by Stephenson, L.J. does not alter the defendant's function at all. It is therefore sufficient to accept the unproven belief of the plaintiff's solicitors, with regard to the suggested advantages in procedure and expense. Of the liberalization of the words "oppressive" and "vexatious" his Lordship preferred Lord Wilberforce's revision, which stressed that it must be a serious disadvantage. Inconvenience and expense were found not to amount to oppression to the defendant.

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[30] An apparent allusion to Lord Wilberforce: "A *bona fide* advantage to a plaintiff is a solid weight in the scale, often a decisive weight, but not always so". [1974] A.C. 436 at 469.

[31] [1977] 1 W.L.R. 376 at 382 (given as point (4)).

[32] *Id.* at 383.

[33] *Id.* at 388.

[34] *Id.* at 384.

[35] *Ibid.*

Lord Denning (dissenting) employs more fully the possibilities of *The Atlantic Star* that we have indicated: "To my mind the House there effected a considerable change".[36] Where another country is the "natural forum" for a claim, proceedings should *"prima facie"* take place there, unless "some good and sufficient reason is shown".[37] It is clear that Lord Denning is elevating Lord Reid's concept of the "natural forum" beyond the acceptance of his fellows in the Court of Appeal. It is likely that Lord Denning is speaking contrary to the spirit of Lord Reid's judgment. It is probable that Lord Reid's words *can* be interpreted in the way Lord Denning presents them.

Difficulties arise however, when applying the theory to the facts. The plaintiffs' submissions fail to establish reasonable justification, as Lord Denning classifies them in a category that he regards as insufficient: that the plaintiffs would merely do better under the English legal system. In *The Atlantic Star,* Lord Kilbrandon had taken a similar approach by openly expressing doubt whether a plaintiff would be disadvantaged by prevention of litigation in a court which might differently view the facts.[38] However, in neither of these opinions does the theoretical distinction seem clear. Lord Kilbrandon had suggested that advantage of a "juridical" kind might be the test. It seems unlikely that Lord Denning had this in view.[39] What is again emphasised is that Scotland is the most appropriate forum for such an action, where the plaintiff lives under the Scottish legal system.[40] While it may have been valid theoretically to base rejection of the plaintiffs' attempted justification in the balance between advantages and disadvantages to the parties, Lord Denning seems to confine this to an example where some special personal nexus with the forum could be shown. It is in this context that the balancing of interests is introduced, and reference to Lord Wilberforce is made.[41]

It is now important to ask what conclusions we can begin to draw. A wide area of debate arises from the difficulties of determining the *ratio decidendi* of *The Atlantic Star* — and particularly from the comments of their Lordships rejecting a doctrine of *forum non conveniens.*[42] Stephenson, L.J. questioned whether the practical distinction between *forum non conveniens* and the English rule as applied in *The Atlantic Star,* might not be merely one of name, but added that the House of

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[36] *Id.* at 380.
[37] *Ibid.*
[38] [1974] A.C. 436 at 478.
[39] Procedural advantages were claimed by the plaintiffs in England, e.g., re the onus of proof of averments under the Scottish system of pleadings, *per* Lord Diplock in *Gibson* v. *British Insulated Callenders' Construction Co. Ltd.* 1973 S.L.T. 2 at 7-9. Note also Lord Wilberforce specifically gave higher damages as a *bona fide* advantage. ([1974] A.C. 436 at 469.)
[40] [1977] 1 W.L.R. 376 at 381.
[41] *Ibid.*
[42] See [1974] A.C. 436 at 454, 464, 476.

Lords had still affirmed a "distinction which the judge and this court have to do their best to understand and apply".[43] Despite the strengths of the majority approach in *MacShannon's Case* the full effect of scattered observations by the court may be seen to amount to a strong call for rationalization. Both Stephenson and Waller, L.JJ. refer to the "common sense" approach, whereby it might be expected that such compensation proceedings be brought in Scotland.[44] While so doing, Stephenson, L.J.'s decision hints at some shortfalls of the approach he takes. His Lordship seems to reject Lord Denning's use of the idea of a "natural forum", on the basis that only a higher court could "carry the law one stage further".[45] Perhaps one can be critical that *MacShannon's Case* has polarized interpretations of *The Atlantic Star* (within, one would suggest, the framework of a desire to expand the law). Lord Denning's discussion of the "natural forum" may well be an appropriate direction in which to move. It is questions of policy of a more public nature which have been excluded. Stephenson, L.J. refuses to give weight to the relevance of the overloading of the court processes with work that might suitably be taken by the more appropriate forum. There are conflicting issues here. One would not criticize the court's acceptance of the plaintiff's claim for consideration of their cases on individual merits, and separate from any trends in litigation. However, at the same time it is surely reasonable to have regard to policy matters in determining what is abuse of the process of the court. As we have seen, Lord Wilberforce spoke generally of the advantages of not treating Scott, L.J.'s words as being of statutory authority. Stephenson, L.J. seems to disregard the absence of concern with "abuse of process", when he suggests generally that the majority of the House of Lords had considered a more liberal interpretation of Scott, L.J.'s *"descriptive words"*.[46] The problem is that to which Maclean rightly pointed in *The Atlantic Star,* and which appears to become only more acute in the circumstances of the present case: the failure to indicate guidelines for the meaning of the extension of "oppressive", "vexatious" and "abuse of the process of the court".[47] Although Maclean has attempted to highlight this failure by comparison with the interpretation of vexatious and oppressive in three earlier cases of significance (as discussed by Lord Wilberforce), this now seems unnecessary.[48] Also unsatisfactory is the conclusion by North: "Liberalization there may be; a general doctrine of *forum non conveniens* there is not".[49]

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[43] [1977] 1 W.L.R. 376 at 385.
[44] See for example *id.* 382 at 388.
[45] *Id.* at 383.
[46] *Id.* at 384 (my emphasis).
[47] A. Maclean, "Foreign Collisions and Forum Conveniens" 22 *I.C.L.Q.* 748.
[48] See *McHenry* v. *Lewis* (1882) 21 Ch.D. 202; (1883) 22 Ch.D. 397 (C.A.); *Peruvian Guano Co.* v. *Bockwoldt* (1883) 23 Ch.D. 225; *Logan* v. *Bank of Scotland* (*No.* 2) [1906] 1 K.B. 141. Maclean's comments sometimes appear narrow. *Cf.* Inglis, *supra* n. 25 at 387-88.
[49] G.C. Cheshire, *Private International Law* (9th ed. 1974) p. 126.

Discussion of the "general doctrine" of *forum non conveniens* has been plagued by lack of definition. This has allowed Inglis for example, to claim the existence of *forum non conveniens* where courts have spoken in terms of abuse of process of the court.[50] One suspects it has allowed the House of Lords to express preference for supposed advantages of an English "system" over a "doctrine" of *forum non conveniens* without noting the feared losses of incorporating a foreign doctrine. It appears that England has been "isolated" by the debate which has grown.[51] There has been a conspicuous lack of mention of the uncertainty and dissent which has followed the doctrine in both Scotland and the United States. It is of interest, for example, that the description of the plea by Mr. Justice Frankfurter as a "manifestation of a civilized judicial system . . . firmly embedded in our law"[52] was in a dissenting judgment five years earlier than the leading American judgment of *Gulf Oil Corporation* v. *Gilbert*.[53]

Lastly, it should again be emphasized that the concept of a natural forum is in itself, not necessarily the same as the concept of *forum conveniens*. We might distinguish those aspects which are characterized by nationality, from those which are policy considerations. It has been claimed that there can be no doctrine of *forum non conveniens* while "oppression" and "vexation" remain the focus. At the present stage we should leave this argument. *MacShannon's Case* is likely for appeal and we can but hope for clarification, and perhaps, for change.

RICHARD J. ARNOLD, B.A. — Third Year Student.

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[50] See J.D. McLean, "Jurisdiction and Judicial Discretion" (1969) 18 *I.C.L.Q.* 931; Inglis, *supra* n. 25; E.I. Sykes, *Australian Conflict of Laws* (1972); *cf.* J.H.C. Morris, *The Conflict of Laws* (1971); G.C. Cheshire, *op. cit. supra* n. 49.

[51] *Baltimore and Ohio Railroad* v. *Kepner* (1941) 314 U.S. 44 at 55-56. A.E. Anton's authoritative treatment of the Scottish law (*Private International Law*), relies on R. Braucher, "The Inconvenient Federal Forum" (1974) 60 *Harv. L.Rev.* 980 with regard to the origin of the doctrine (see pp. 148-49).

[52] *Gulf Oil Corp.* v. *Gilbert* (1946) 330 U.S. 501.

[53] A. Maclean, *supra* n. 50 at 754.