Whilst most legal systems have, in the past, tended to apply the lex loci delicti to torts committed abroad with only minor variations, such as limiting recovery to the extent justified by local law in cases where the defendant is a national of the forum (cf. Art. 12 of the *German Civil Code* (EGBGB)), England has invariably applied its own laws. This insular rule was firmly established in the 19th century by *The Halley*[1] at a time when English judges found it inconceivable that an English shipowner, for example, could possibly be held liable for a collision in Belgian waters due to the negligent navigation of a compulsory Belgian pilot merely because Belgian law said so. True, England made some concession to the outside world by insisting that the act complained of must be "not justifiable" according to the law of the place of commission. For this proposition of law, it is customary to refer to the judgment of Willes J. in *Phillips* v. *Eyre,*[2] a case dealing with the false imprisonment of the plaintiff in Jamaica by order of its governor, who was made the defendant to the action. The defendant relied on a subsequent act of indemnity passed by the Jamaican legislature as a justification of his action. In his judgment, Willes J. said:

> "A right of action, whether it arises from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto . . . . . 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 . . . . . 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 . . . . . Secondly, the act must not have been justifiable by the law of the place where it was done."[3]

To those uninitiated in the mystique of the common law, it may perhaps be surprising that the judgment of Willes J. could ever have been regarded as having definitively established, not only a choice of law rule, but one in favour of the lex fori. Indeed, on one view, the statement 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" comes close to the vested rights doctrine propounded by Holmes J. (cf. *Slater* v. *Mexican National Railroad Co.,*[4]) involving the concept that the act complained of gives rise to an obligation which follows the person and may be enforced wherever he is found according to the law of the place of acting. However, our common law moves in mysterious ways, and *Phillips* v. *Eyre* has been held, in subsequent decisions, to have laid down that whenever a plaintiff sues in England on a tort committed abroad, his rights are to be determined according to English law. (For a history tracing the post *Phillips* v. *Eyre* development cf. Gerber: "Torts in the Conflict of Laws" 40 A.L.J. 44, 73).

This problem was raised again in *Boys* v. *Chaplin*[5] which was regarded as a test case and appealed right up to the House of Lords. It was hoped by dis-

1. (1868) L.R. 2 P.C. 193.
2. (1870) L.R. 6 Q.B. 1.
3. at pp. 28, 29.
4. (1904) 194 U.S. 120.
5. [1969] 2 All E.R. 1085.

interested parties that the existing choice of law rules would be re-examined and perhaps even brought more in line with other legal systems. However, although many of the more recent United States decisions were cited and discussed which have sought to introduce a new flexibility into the American "law of the tort" rule, by seeking to isolate and apply the local law of the state which has the most significant relationship with the occurrence and the parties, the centrifugal pull of our doctrine of precedent proved ultimately too strong, and English law was once more triumphant. True, some of the judgements were able to inject a new flexibility to judicial attitudes, and the result is logical and compelling, nevertheless, the path collectively chosen is, on the whole, clumsy and cumbersome, as well as introducing an unnecessary element of extra-territoriality, thereby ignoring that conflict of laws is nothing if not part of international law. Above all, by its shifting majorities, the case has added a new dimension to the already tricky rules for the extraction of principles of law from decided cases and made the ratio decidendi a chattel dangerous per se.

The facts were mundane enough. Plaintiff and defendant, both British subjects, were members of Her Majesty's armed forces temporarily stationed in Malta, although normally resident in England. The plaintiff was injured by the admitted negligence of the defendant in the use of a motor vehicle in Malta. In view of the fact that the plaintiff continued to receive his pay, and obtained more remunerative employment after his discharge, he suffered no "economic loss"—apart from £53 for medical expenses which were admitted—capable of being made the subject of an action in Malta. The bulk of his claim was made up of "general damages"—pain and suffering, loss of expectation of life etc.—which was unknown to the lex loci delicti. The problem was therefore 'can an English tribunal try an action which is "justifiable" according to the law of Malta?'. It is against this background that all five law lords, applying English law, allowed the claim for general damages in the amount of £2250. Unfortunately, at this point unanimity comes to an end.

Thus, Lord Hodson commenced his speech by stating that the generally accepted rule of English law is that an act done in a foreign country is a tort and actionable in England only if it is both "(i) actionable as a tort, according to English law, or in other words, is an act which, if done in England, would be a tort; and (ii) not justifiable, according to the law of the foreign country where it is done."[6] His Lordship then proceeded to state that the first part of the rule in *Phillips* v. *Eyre* "was not however concerned with choice of law but only whether the courts of this country should entertain the action."[7] In other words, part (i) of the rule was concerned solely with problems going to jurisdiction, involving what may be termed a 'threshold question' which shuts the court's door in the plaintiff's face unless he can establish that the foreign wrong bears the hallmark of an English tort. This view was first put forward by Yntema[8], but has found little support amongst academic writers; it was specifically rejected by Windeyer J. of the Australian High Court.[9] It is perhaps unfortunate that, having denied that *Phillips* v. *Eyre* was concerned with choice of law, Lord Hodson continued to look on the decision as the universal solvent which would determine the law to be applied. His Lordship was, however, at pains to point out that it did not follow that because *Phillips* v. *Eyre* provided merely a test going to jurisdiction, the consequences of a foreign tort must be determined

6. at p. 1089.
7. at p. 1090.
8. 27 C.B.R. 116.
9. *Anderson* v. *Eric Anderson Radio & T.V. Pty. Ltd.* (1965) 114 C.L.R. 20.

according to the lex loci delicti, for to do so "would be to adopt what is called 'the obligation' theory formerly accepted in the united States of America." This conclusion enabled his Lordship to regard the choice of law as 'open' and thus afforded him an opportunity of examining the clinical results of the American experiments which appear to be producing a new approach by cutting the umbilical chord of the once powerful lex loci rule. Before crossing the Atlantic, however, it was still necessary to eliminate the non-justification according to the foreign law rule. It will be remembered that the claim in dispute was unknown to Maltese law, so that on one view, an act which is not actionable according to that law may be regarded as "justifiable." Indeed, the Court of Appeal in *Machado* v. *Fontes*[10] so held in a claim between two Brazilians, one of whom sued the other in England for a libel published in Brazil, such an act was punishable as a crime in Brazil but did not give rise to civil liability. The Court of Appeal held that the requirement of non-justifiability was satisfied if the act was not "innocent" where committed. As the act complained of gave rise to penal sanctions, it was held that the condition of *Phillips* v. *Eyre* was met. In the result, an act which is a crime in Brazil can be pleaded as a tort in England. Although this decision has met with considerable criticism both in England and in Commonwealth countries, it had never been specifically overruled. Indeed, the trial judge, Milmo J., felt himself compelled to follow it. It is difficult to imagine a worse decision, and Lord Hodson had little hesitation in advocating that it should be overruled. In the result, Lord Hodson held that the term "not justifiable" should be read restrictively, in the sense that the act complained of must give rise to *civil* liability where committed before it can be sued upon in England. In an interesting aside, Lord Hodson suggested that it was this synthetic enlargement of "not justifiable" in the decision of *Machado* v. *Fontes* which led English courts to apply English law ("the substantial ground for rejecting the claim is that when *Machado* v. *Fontes* is out of the way and "innocence" by the local law no longer leaves the way clear for the application of the lex fori, one must look and see exactly what is the wrongful act sued on which is actionable in the foreign country and also here" p. 1092). Implied in this view is the assumption that the natural or primary choice of law rule led ineluctably to the lex delicti and that it was only the failure of that law to provide a civil remedy that the lex fori (English law) stepped in by default.

Thus Lord Hodson took the view that the claim in the instant case must fail unless some new flexibility is introduced which would allow an English tribunal to relax the requirement of civil liability according to the lex loci in exceptional circumstances; in this case, the fact that neither party had any "connection with Malta except by reason of their service which was of a temporary nature and the interests of justice in such a case . . . . . requires some qualification of the general rule" (p. 1093). His Lordship was not, however, prepared to grant a similar concession "if both parties were Maltese residents or even if the defendant were a Maltese resident" (p. 1093). Without further ado, his Lordship concluded:—

> "I would for myself, therefore adopt the AMERICAN LAW INSTITUTE RESTATEMENT (second) CONFLICT OF LAWS (Proposed official draft, 1st May, 1968). If controlling effect is given to the law of the jurisdiction which because of its relationship with the occurrence and the parties, has the greater concern with the specific issues raised in the litigation, the ends of

10. [1897] 2 Q.B. 231.

justice are likely to be achieved although, as the American authorities show, there is a difficult task presented for decision of the courts, and uncertainty has led to dissenting judgments in the appellate courts.

I would accordingly, in agreement with Lord Denning M.R., treat the law of England as applicable since even though the occurrence took place in Malta this was overshadowed by the identity and circumstances of the parties, British subjects temporarily serving in Malta . . . . . On the facts of this case, giving the rule as I understand it, which is propounded in *Phillips* v. *Eyre,* a flexible interpretation, I would dismiss the appeal." (p. 1094)

In the result, his Lordship decided

(i) *Phillips* v. *Eyre* does not deal with choice of law but jurisdiction.

(ii) *Machado* v. *Fontes* is overruled, so that as a general rule, a plaintiff complaining of a wrong committed abroad must prove that it is actionable where committed as well as actionable as a tort in England.

(iii) The rights and liabilities arising out of a foreign tort will be determined with respect to each issue according to the relevant law of the state which, *as to that issue* has the most significant relationship to the occurrence and the parties.

(iv) A claim for pain and suffering is a matter of substantive law.

Lord Guest commenced his speech by noting (obiter) that to justify an action in England, the act must be actionable both by the law of England as well as by the lex loci delicti and that he was not in favour of "applying the proper law of the tort whatever that law might be" (p. 1095). However, his Lordship decided the case on the narrow ground that a claim for pain and suffering was merely an element in the quantification of the total compensation, thus becoming a matter of evidence (or procedure) traditionally determined by the lex fori.

For this highly novel proposition Lord Guest sought support from the Scottish claim for solatium. However, it is rarely helpful to establish legal rules by analogy, particularly when the comparison involves legal systems as disparate in this area as those of England and Scotland. Thus the validity of Lord Guest's proposition rests on the following assumptions:—

(i) that "solatium" in the concept in which he uses it is akin to "general damages" as applied in England;

(ii) that Scottish law regards "solatium" in this wider sense to be a matter of procedure and that English law should do likewise;

(iii) that insofar as Scottish courts have decided contrariwise, these decisions are wrong.

Unfortunately, there are some difficulties in the way before these assumptions can be accepted. Thus, there is a long line of Scottish authorities which has held "solatium" to be a substantive right which cannot be regarded merely as a head of damages. Furthermore courts have to date refused to differentiate between solatium claimed by surviving relatives for shock and grief, (actio injuriarum) and solatium at the suit of an injured victim as compensation for pain and suffering.

In practice, it is customary in Scotland for plaintiffs seeking damages for physical injuries to claim a lump sum made up of solatium and patrimonial loss, the latter being compensation for loss of earnings causally referable to the tort. It is probably true to say that neither solatium nor patrimonial loss, as the terms are understood in Scotland, has an exact English equivalent. Thus solatium when awarded to surviving relatives is unknown to English law. Insofar as the

term is used to denote compensation for pain and suffering, it is merely an element—no more—of the damages that go to make up the English concept of "general damages" which includes, in England, prospective loss attributable to the injury. Patrimonial loss, on the other hand, is made up in Scotland of past and future loss of earnings and thus approximates to the English concept of "special damages", though these, in turn, include only those losses incurred before trial, the remainder being included in general damages. True, this arbitrary division is more a rule of practice than a rule of law, yet special damages are generally described as "restitution", whereas general damages are viewed as "compensation". On any view, however, it will be apparent that neither solatium nor patrimonial loss can readily be transported across the Tweed. Furthermore, Scottish courts have held "solatium" in both its meanings to be not only a substantive right, but there is a strong suggestion that patrimonial loss is to be determined by the lex loci delicti. Thus, in *Mackinnon* v. *Iberia Shipping Co.*[11] the plaintiff, a Scotsman, was employed on a ship registered in a Scottish port which was lying at anchor in the territorial waters of the Dominican Republic. He was injured in the course of his employment and sued his Scottish employers in Scotland for damages in the usual form, i.e. claiming both solatium and patrimonial loss. The Court of Sessions re-affirmed the earlier decisions of *Naftalin* v. *L.M.S. Ry. Co.*[12] and *M'Elroy* v. *M'Allister*[13] which had held that solatium was an independant substantive right which fell to be determined by the lex loci delicti. In the result, the plaintiff was compelled to plead and prove that the right to solatium was a jus actionis under the laws of the Dominican Republic.

Thus Lord Guest's proposition is only tenable if *MacKinnon's* case was wrongly decided. This his Lordship seeks to demonstrate by asserting that both *Naftalin* and *M'Elroy* were claims by surviving relatives, involving a different concept of solatium which is derived from the old action of assythment, whereas *Mackinnon* involved a delict derived from the actio legis Aquiliae, actionable only on proof of loss, so that in this sense it was an element of damages determinable by the lex fori. In support, he cites an aside by Lord Sorn:—

> "In reaching the above conclusion, it has been assumed that a claim for solatium is a separate right of action and that its relevance, therefore, must depend upon the actionability of such a claim under the foreign law. It was in fact so decided in *Naftalin* v. *L.M.S. Ry. Co.* and *M'Elroy* v. *M'Allister,* but in both of these cases the claim for solatium was put forward in that peculiar action by which our law allows a person to sue for compensation in respect of the death of a near relative, whereas in the present case the claim is comprised in an ordinary action of damages. I am not saying that this difference affords a good ground of distinction and merely mention the point in order to say that we were not asked to consider it, the pursuer not having disputed the applicability of these two decisions to the present case." (at p. 1096 (1969) 2 All. E.R.)

With respect, Lord Guest's criticism of *Mackinnon's* case is sound, and it does appear illegitimate to transfer the connotation of "solatium" as applied to claims by surviving relatives to actions for personal injuries where it clearly bears a different meaning. Nonetheless, it must still be shown that solatium as

11. (1955) S.C. 20.
12. (1933) S.C. 259.
13. (1949) S.C. 110.

applicable in personal injury claims is characterised as procedural by the law of Scotland. On this point, the Scottish authorities—such as they are—can hardly be regarded as encouraging. Thus, in *M'Elroy's* case (a widow's claim for, inter alia, patrimonial loss arising out of the death of her husband in England; i.e. a "right" recognised both by Scottish and English law, though at the time of issue of the writ, statute-barred in England) Lord Justice-Clerk (Thomson) stated (obiter)

> "Had there been a relevant averment of actionability under English law an interesting question would have arisen as to whether the pursuer was entitled to ask the Scots Court, as the Court entitled to deal with "remedy", immediately to proceed to assess damages on the same principle as it would assess damages in an ordinary action at the instance of a widow for patrimonial loss, or whether it was incumbent on the pursuer to aver and prove the character and scope of the rights conferred on her by English law on the basis of which the Scots Court would ultimately assess damages. As this question does not arise, I express no opinion on it." (1949 S.C. 110 at p. 118)

In the same case, Lord Russel was more outspoken:—

> "It was to the lex loci delicti that the defendant was subject at the moment of his negligent act, and it would seem just and equitable that his liability, if any, should by that law be regulated." (at p. 127)

It will therefore be readily apparent that Lord Guest's contention rests on a very slender authority, all of it based on the law of Scotland, of little relevance in an English context, and indeed, to the writer's knowledge no English decision has ever held that a claim for pain and suffering is a matter of procedure.[14]

In the result, Lord Guest may be cited for the following propositions

(i) a claim for pain and suffering is a matter of remedy or procedure determinable according to the lex fori,
(ii) "to justify an action in England for a tort committed abroad the conduct must be actionable by English law and by the laws of the country in which the conduct occurred, the lex loci delicti." (p. 1095)
(iii) (obiter) matters of substance are tried according to the lex loci delicti;
(iv) (obiter) the 'proper law of the tort' is not part of English law.

Lord Donovan's speech was brief. His Lordship was content to leave the rule in *Phillips* v. *Eyre* as enunciated by Willes J., in particular, he was not prepared to substitute "actionable" for "not justifiable"—

> "the latter was deliberately chosen; and it makes for justice . . . . . If "actionable" be substituted for "not justifiable" a reason has to be found for allowing such damages in the present case. The one which has found favour with some of your Lordships is, I think, that while "double actionability" ought to be the rule, yet departure may be made from it in individual cases where this appears to be justified by the circumstances. This introduces a new element of uncertainty into the law which I would prefer to exclude." (p. 1097)

Thus Lord Donovan's test would appear to demand no more from the lex loci than that the act complained of is "not justifiable" according to that law in

14. but cf. *Kohnke* v. *Karger* [1951] 2 K.B. 670.

the sense that civil liability is not an essential pre-requisite. At first sight, such a test may seem a little odd, particularly when one recalls the result of *Machado* v. *Fontes,* which must surely constitute the high water mark of absurdity. However, Lord Donovan seeks to guard against such consequences by means of *forum non conveniens.* Thus, he states

> "So far as *Machado* v. *Fontes* is concerned we do not need to alter the rule laid down by Willes J. It is enough to say that the case in question, while within the rule, was an abuse of it; and that considerations of public policy would justify a court here in rejecting any such future case of blatant 'forum shopping'."
>
> His Lordship concluded his speech by adding:—
>
> "I do not think we should adopt any such doctrine as 'the proper law of the tort' with all its uncertainties. There is no need here for such a doctrine—at least while we remain a United Kingdom. Nor would I take the first step towards it in the name of flexibility. I would dismiss the present appeal on the ground that an English court was competent to entertain the action under the rule in *Phillips* v. *Eyre* and that once it had done so it was right that it should award its own remedies." (p. 1097)

Lord Donovan may therefore be cited for the following propositions:—

(i) "The proper law of the tort" doctrine does not form part of English law;

(ii) *Phillips* v. *Eyre,* though not itself prescribing a choice of law rule, requires actionability as a tort according to English law and non-justification at the place of commission, i.e. *Machado* v. *Fontes* correctly stated the law although (obiter) public policy would nowadays enable courts to reject "any such future case of blatant 'forum shopping' "

(iii) "An English court was competent to entertain the action under the rule in *Phillips* v. *Eyre* and that once it had done so it was right that it should award its own remedies." (p. 1097)

(iv) "All questions of remedy, both as to its nature and kinds or heads of assessment of pecuniary damages must be determined in an English action entirely by English principles", i.e. 'pain and suffering' is a matter of remedy which "must be awarded in accordance with the lex fori." (The above quotes are taken from the judgment of Lord Upjohn in the Court of Appeal (1968) 1 All E.R. at pp. 294-5. In view of the fact that Lord Donovan incorporated it by reference, it is submitted that paragraph (iv) above is part of Lord Donovan's decision.

Lord Wilberforce's speech is at once the most powerful, logical and formidable. His Lordship saw the principal problem turning on the question whether a plaintiff should be allowed to claim for pain and suffering in England, when, although the foreign tort gives rise to civil liability where committed, the particular right sought to be enforced is unkown to the foreign law. Dealing with the authorities, his Lordship observed that *Phillips* v. *Eyre*

> "like many judgments given at a time when the relevant part of the law was in course of formation, it is not without its ambiguities, or, as a century of experience perhaps permits us to say, its contradictions. And if it were necessary to advance the law by re-interpretation, it would be quite legitimate to extract new meanings from words and sentences used. Two of the judgments of the Court of Appeal have done just this, reaching in the process opposite

conclusions. I do not embark on this adventure for two reasons: first, because of the variety of interpretation offered us by learned writers no one of which can claim overwhelming support; secondly, and more importantly, because, on the critical points, I do not think there is any doubt what the rule as stated has come to be accepted to mean in those courts which apply the common law. And it is with this judicially accepted meaning and its application, that we are now concerned." (p. 1098)

As to the first part of the rule—actionable as a tort according to English law—his Lordship had no doubt that it laid down, not a test of jurisdiction but a choice of law rule. In other words, "actions on foreign torts are brought in English courts in accordance with English law." His Lordship noted that the obligatio theory had long been rejected by English courts and that "it can hardly be restored now by anything less than a revolution in thought." Lord Wilberforce added that the development in both Canada and Australia had been on similar lines, quoting with approval the joint judgment of the High Court of Australia in *Koop* v. *Bebb*.[15]

> "English law as the lex fori enforces an obligation of its own creation in respect of an act done in another country which would be a tort if done in England, but refrains from doing so unless the act has a particular character according to the lex loci actus."

His Lordship concluded that under the existing rule, "actionability as a tort under and in accordance with English law is required." (p. 1100)

Dealing next with the second part of the rule—not justifiable according to the lex loci delicti—his Lordship was of opinion that this had been held to mean that English courts were prepared to assume jurisdiction not only over acts committed abroad which are actionable as delicts according to the lex loci actus, but over those which give rise to criminal responsibility, a view which has been followed, with various degrees of reluctance, by superior courts both in Canada and Australia.

His Lordship then proceeded to examine whether the composite rule as stated above could still be regarded as satisfactory in this day and age, "can any better general rule be devised, or is the existing rule, with perhaps some adjustment, the best suited to our system?" (p. 1100) His Lordship pointed out that the lex delicti rule had some powerful attractions, it was both logical, and had the most doctrinal appeal. However, it also had disadvantages in that it would require proof of foreign law, thus complicating the task of legal advisers. Furthermore, in view of the fact that most foreign torts nowadays involve claims for personal injuries, where the place of the wrong is frequently fortuitous, it would not infrequently lead to unjust results if liability were to become fixed by the law of the place with which the parties "may have no more connection than a temporary, accidental and perhaps unintended presence" (p. 1101). Furthermore, such added emphasis on the locus delicti will only enhance the difficulty in identifying the locus in a particular case is (cf. *Monro* v. *American Cyanamid Corp.*[16]). Difficulties of this kind, his Lordship thought, had driven the courts in the United States to abandon the lex delicti as an universal solvent in favour of a more flexible rule based on a principle of "contacts" or "interests". The question was therefore whether some such flexibility should be added to the English rule as currently applied by English courts.

15. (1952) 84 C.L.R. 629.
16. [1944] 1 K.B. 432.

Before considering this question, however, his Lordship had to dispose of *Machado* v. *Fontes*. He held that the principle embodied in that decision was both illogical and one which invited "forum shopping", and the doubtful advantage it provided in allowing two nationals of the forum to sue one another for criminal acts not civilly actionable under the lex loci were not sufficient counter-balance to support the authority of that decision. For these reasons, Lord Wilberforce was prepared to overrule *Machado* v. *Fontes,* subject, however, to one important qualification:—

> "Assuming that, as the basic rule, we continue to require actionability by the lex fori subject to some condition as to what the lex delicti requires, we should, in my opinion, allow a greater and more intelligible force to the lex delicti than is included in the concept of unjustifiability as normally understood. The broad principle should surely be that a person should not be permitted to claim in England in respect of a matter for which civil liability does not exist, or is excluded, under the law of the place where the wrong was committed. This non-existence or exclusion may be for a variety of reasons and it would be unwise to attempt a generalisation relevant to the variety of possible wrongs. But in relation to claims for personal injuries one may say that provisions of the lex delicti, denying, or limiting, or qualifying recovery of damages because of some relationship of the defendant to the plaintiff (such as loss of consortium) or some head of damage (such as pain and suffering) should be given effect to. I can see no case for allowing one resident of Ontario to sue another in the English courts for damages sustained in Ontario as a passenger in the other's car, or one Maltese resident to sue another in the English courts for damages in respect of pain and suffering caused by an accident in Malta. I would, therefore, restate the basic rule of English law with regard to foreign torts as requiring actionability as a tort according to English law, subject to the condition that civil liability in respect of the relevant claim exists as between the actual parties under the law of the foreign country where the act was done." (p. 1102).

His Lordship then asked himself whether some qualification to the above rule should be entertained in cases, such as the present, where injustice would otherwise occur i.e. where strict adherence to the requirement of actionability by the lex delicti would appear manifestly unreasonable. It is in relation to this point, and *this point only,* that Lord Wilberforce examines the more recent United State's decisions. On this aspect, his Lordship's views have led to misunderstanding, causing several learned writers to suggest that his Lordship was prepared to compromise on the choice of law rule, and indeed favoured the application of the lex delicti (e.g. McGregor: 33 M.L.R. 1, Nygh: 44 A.L.J. 160). It is respectfully submitted that this view is mistaken. Lord Wilberforce's sole concern is to ascertain whether the virtue of certainty may be compromised in the interest of justice by the introduction of some degree of flexibility (a step Lord Donovan specifically refused to entertain). Thus, his Lordship makes it quite clear that he is not prepared to compromise on the English choice of law rule; cf. his comment on *Babcock* v. *Jackson*[17] "the basic law, as accepted in New York, as elsewhere in the United States of America, was the lex delicti which, for the reasons I have given, ought not to become the basic law in England, but the judgment of the court established a principle equally applicable whatever the basic law might be" (p. 1103).

17. (1963) 191 N.E. 2d 279.

Nonetheless, it is within the ferment of the current American revolution that Lord Wilberforce finds the answer to the dilemma posed by the facts of *Boys* v. *Chaplin,* for, fundamental to the current American doctrine, is the segregation of all the relevant issues. Whether one applies the lex fori or the lex delicti as the "dominant" substantive law, it is still desirable "through segregation of the relevant issue and consideration" to ask

> "whether, in relation to that issue the relevant foreign rule ought, as a matter of policy or as Westlake said of science, to be applied. For this purpose it is necessary to identify the policy of the rule, to enquire to what situation, with what contacts, it was intended to apply; whether not to apply it, in the circumstances of the instant case, would serve any interest which the rule was devised to meet . . . . . No purely mechanical rule can properly do justice to the great variety of cases where persons come together in a foreign jurisdiction for different purposes with different pre-existing relationships, from the background of different legal systems. It will not be invoked in every case or even, probably, in many cases. The general rule must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from what other rule, should be preferred. If one lesson emerges from the United States decisions it is that case-to-case decisions do not add up to a system of justice. Even within these limits this procedure may in some instances require a more searching analysis than is needed under the general rule. But unless this is done, or at least possible, we must come back to a system which is purely and simply mechanical." (p. 1104)

It is thus by segregating the issue of non-actionability by Maltese law; by asking what purpose the Maltese rule served, that Lord Wilberforce found the most compelling and logical solution posed by the facts of the present case.

> "The issue, whether this head of damage should be allowed, requires to be segregated from the rest of the case, negligence or otherwise, related to the parties involved and their circumstances, and tested in relation to the policy of the local rule and of its application to these parties so circumstanced. So segregated, the issue is whether one British subject, resident in the United Kingdom, should be prevented from recovering, in accordance with English law, against another British subject, similarly situated, damages for pain and suffering which he cannot recover under the rule of the lex delicti. The issue must be stated, and examined, regardless of whether the injured person has or has not also a recoverable claim under a different heading (e.g. for expenses actually incurred) under that law. This Maltese law cannot simply be rejected on grounds of public policy, or some general conception of justice. For it is one thing to say or presume that a domestic rule is a just rule, but quite another, in a case where a foreign element is involved, to reject a foreign rule on any such general ground. The foreign rule must be evaluated in its application. The rule limiting damages is the creation of the law of Malta, a place where both respondent and appellant were temporarily stationed. Nothing suggests that the Maltese State has any interest in applying this rule to persons resident outside it, or in denying the application of the English rule to these parties. No argument has been suggested why an English court, if free to do so, should renounce its own rule. That rule ought, in my opinion, to apply." (p. 1104)

Finally, his Lordship stated that he was not prepared to accept the proposition advanced by Lords Guest and Donovan viz. that a claim for pain and suffering was akin to solatium as an ingredient in general damages:

> "I have no wish to deprecate the use of these familiar tools. In skilfull hands they can be powerful and effective, although I must add that in some applications, particularly in Scottish cases, they have led to results which give me no satisfaction . . . . . I note that a purely legal analysis in the Court of Appeal led Lord Upjohn to one answer, Diplock, L. J. to another. So I prefer to be explicit about it. There certainly seems to be some artifice in regarding a man's right to recover damages for pain and suffering as a matter of procedure. To do so, at any rate, goes well beyond the principle, which I entirely accept, that matters of assessment or quantification, including no doubt the manner in which provision is made for future or prospective losses, are for the lex fori to determine. Yet, unless the claim can be classified as procedure, there seems no basis on the traditional approach for denying the application of Maltese law. I find the basis for doing so only in the reasons I have stated." (p. 1104-5)

Lord Wilberforce may therefore be cited for the following propositions:—

(1) A claim for pain and suffering is a matter of substantive law;

(2) *Machado* v. *Fontes* is overruled. Henceforth English law requires actionability as a tort according to English law, subject to the condition that civil liability in respect of the relevant claim exists as between the actual parties under the law of the foreign country where the act was done;

(3) Notwithstanding however a failure by the foreign law to provide a like remedy between the parties to the action, an English court may nevertheless entertain the claim if—

   a) the relationship between the parties and the lex delicti is purely fortuitous; and

   b) there is no overriding element of public policy according to the foreign law which would deny the application of English law to the parties in the particular circumstances. In the instant case the failure of the law of Malta to provide damages for pain and suffering will not be given effect to in a tort action arising in Malta involving one British subject resident in England and another British subject similarly situated, unless the evidence discloses that the law of Malta has an interest in the application of its own laws to persons not resident in Malta or in denying the applications of English domestic law to these parties.

Like Lord Wilberforce, Lord Pearson was not prepared to decide the issue quasi-mechanically by the deft device of characterising the claim as part of procedural law. His Lordship was in favour of giving a predominant role to the lex fori whose substantive law is to prevail, whilst the lex loci was relevant solely to determine whether the act is "wrongful" according to that law, "there is no requirement that it must be actionable by the law of that place as well as by the law of England; double actionability is not required. The requirement is that that the act must not be justifiable by the law of the place." (p. 1109)

Lord Pearson found support for his view in some early authorities dealing with foreign torts pre-dating *Phillips* v. *Eyre*. Thus, from *Wey* v. *Rally*[18] and *Mostyn* v. *Fabrigas*[19] his Lordship sought to derive two propositions; (i) that what was contemplated was "a normal trial between British subjects according to English law and English procedure" (ii) that "whatever is a justification in the place where the thing is done, ought to be a justification where the cause is tried." It is respectfully submitted, however, that whatever may be the merit of the above decisions as historical curiosities, indicative of judicial attitudes in the early part of the 18th century, when the law of torts had not been developed and conflict of laws only imperfectly understood, when it was generally believed "that if England showed the way, others would see the light and follow" (per Lord Reid, *Indyka* v. *Indyka* [1969] A.C. 33); when jurisdiction was created by the irrebuttable fiction that the act had taken place in England "at (for example) Minorca, to wit in the parish of St. Mary le Bow in the ward of Cheap (London)". These cases have little relevance in an age of greater mobility between peoples where time and distance have become almost a single dimension, and one is little moved by the plea of "cases of wrongs done by one British subject to another in places (e.g. on the coast of Nova Scotia or among the Esquimaux Indians on the coast of (Labrador) where there were in 1774 no regular courts of justice and there would be a failure of justice unless an action could be brought in England." (p. 1107)

Space does not permit a more detailed analysis of his Lordship's exhaustive treatment of the authorities both in England and the Commonwealth save that Lord Pearson held that these authorities "when taken together (they) show that the applicable law, the substantive law determining liability or non-liability, is a combination of the lex fori and the lex loci delicti . . . . . the act must take its character of wrongfulness from the law of the place; it must not be justifiable under the law of the place; if it is valid and unquestionable by the law of the place, (it) cannot, so far as civil liability is concerned, be drawn in question elsewhere". (p. 1109)

His Lordship likewise held that *Machado* v. *Fontes* was correctly decided, since "a criminal act would be even less justifiable than a tortious act", hence an act committed abroad need only be wrongful, not actionable according to the lex loci delicti.

Having stated the rule in the above terms, his Lordship pointed out that it was open to the House of Lords to set it aside, to amend it, or overrule it. He then proceeded to analyse whether "the rule was unsuitable from the beginning or had become out of date by reason of changes in legal, social or economic conditions." His Lordship postulated firstly, that its advantage lay in certainty and secondly, that it enabled an English court to give judgment according to its own ideas of justice. Just as in *The Halley* it seemed unjust to hold the defendant liable for the fault of a pilot whom they were compelled by foreign law to take aboard, so in this case "it would have seemed unjust to award the plaintiff only £53 as damages for serious injuries." (p. 1111) Finally, it would enable an English court to redress the wrongs one Englishman may inflict upon another in a primitive country or unsettled territory where there is no law of torts.

His Lordship held that the disadvantage of the classic rule was found to lie chiefly in "forum shopping" in that enabled a plaintiff to select a forum of the

18. (1704) 6 Mod. Rep 194; 87 E.R. 948.
19. (1774) 1 Cowp. 161; 98 E.R. 1021.

greatest advantage to his case. The manner in which his Lordship guards against this in his proposed rule will be referred to later.

To determine what the rule ought to be, Lord Pearson asked the rhetorical question "if the rule is to be set aside or amended, what should be put in its place or how should it be amended?" From the many possible suggestions, his Lordship summarised the following:

a) The lex loci, save that an English court would refuse to enforce a cause of action repugnant to English public policy;
b) requiring actionability both by English law and the lex loci;
c) a flexible "proper law of the tort".

In order to determine whether *Machado* v. *Fontes* should be overruled, his Lordship examined a number of Australian and Canadian decisions, noting that it had been invariably followed though at times questioned in Australia.

His Lordship finally considered some recent American decisions such as *Kilberg* v. *North East Air Lines*[20]; *Richards* v. *U.S.*[21] as indicative of a trend away from the traditional rule which applied the law of the place of injury, in favour of a more flexible approach based on a grouping on contacts or "centre of gravity". Having thus analysed the varying approaches in Canada, Australia and the United States, his Lordship returned to the three alternative possibilities he had earlier enumerated.

a) *Applying the Lex Loci*

His Lordship held that the traditional American rule, giving preference to the lex loci delicti has been shown by experience to have become out of date. "With the modern ease and frequency of travel across frontiers (not only by air and not only in the United States) the place of the accident may be quite fortuitous and the law of that place may have no substantial connection with the parties or the issues in that action. It would be strange if the English courts now adopted a rule which the courts of many States of the United States have felt compelled to discard by reason of its unsuitability to modern conditions." (p. 1115)

b) *Actionability by Both Laws*

As to the second alternative, viz: that English law should require actionability by both laws for which there is support both in Scotland and Australia, his Lordship could find little to justify such a view; it involves a "duplication of causes of action and is likely to place an unfair burden on the plaintiff in some cases. He has the worst of both laws. Also it would in some cases prevent an English court from giving judgment in accordance with its own ideas of justice." (p. 1115)

c) *The Proper Law of the Tort*

His Lordship held that this doctrine, recently developed in the United States "with its full degree of flexibility seems—at present at any rate—when the doctrine is of recent origin and further development may be expected, to be lacking in certainty and likely to create or prolong litigation. Nevertheless, it may help the English courts to deal with the danger of "forum shopping" which is inherent in the English rules." (p. 1116)

His Lordship noted wryly that in *Dym* v. *Gordon*[22] four judges applied the law of Colorado, while three showed a preference for the law of New York. Implied in this aside is the notion that a rule which can lead to so diverse a

20. (1961) 172 N.E. 2d 526.
21. (1962) 369 U.S. 1.
22. (1965) 209 N.E. 2d 792.

result ought not to become part and parcel of the English conflict of laws. One may pause here to reflect that "certainty" may be purchased at too high a price, particularly when it is remembered that in the instant case which was intended to lay down the English rules once and for all, five law lords applied the lex fori, but each applied it for somewhat different reasons, some making assumptions specifically rejected by others. Indeed, Lord Pearson's final paragraph, with its admission that his own views did not constitute part of the majority, concluded with the pious hope that whatever rule may be ultimately adopted as the general rule, it ought to provide for some exceptions in the interests of justice.

Having thus eliminated what he considered to be the alternatives from further consideration, his Lordship returned to the classic formulation of Willes' statement as interpretated in *Machado* v. *Fontes* which "has advantages of certainty and ease of application", and enables an English court to give judgment according to its own ideas of justice. The sole danger lies in the fact that it offers the plaintiff the opportunity of "forum shopping" and it is here that an English court may be helped by the more flexible approach adopted by the American courts. "In such a case it may be desirable as a matter of public policy for the English courts for the purpose of discouraging "forum shopping" to apply the law of the natural forum. That is a possible and I would think a desirable qualification of the established rule: it would prevent a repetition of what may have happened in *Machado* v. *Fontes*. But it is not a necessary part of the decision in the present case, in which it cannot be said that it was inappropriate for the plaintiff to bring his action in the English courts." (p. 1116) One may be forgiven for suggesting that the rule of forum non conveniens may have been a more sensible answer to that particular problem.

Having thus re-stated the rule in terms of the classic formulation of Willes J. as interpreted in *Machado* v. *Fontes,* his Lordship expressed the hope that "there ought to be a general rule so as to limit the flexibility and consequent uncertainty of the choice of substantive law to be applied. (p. 1116)

Thus his Lordship may be deemed to have decided:

1) a claim for pain and suffering is a matter of substantive law.
2) in case of foreign torts, the substantive law determining liability or non-liability is a combination of the lex fori and the lex loci delicti. Actionability, however, is determined exclusively by the lex fori which plays the dominant role whereas "the law of the place in which the act was committed plays a subordinate role in that it may provide a justification for the act and so defeat the cause of action." (p. 1109) English law, however, does not require actionability by the lex loci delicti, i.e. *Machado* v. *Fontes* was correctly decided.
3) (obiter) since "it cannot be said that it was inappropriate for the plaintiff to bring his action in an English court", the above rule should be subject to the over-riding consideration of public policy which, in an appropriate case may nevertheless apply the law of "the natural forum" where it is made to appear that the plaintiff is taking advantage of the English rule by suing in an English court because English law is more favourable to him.
4) Whatever rule is ultimately adopted, it will require some exceptions in the interests of justice. If the general rule requires the application of the lex fori, it will need to discourage forum shopping. Alternatively, if the rule demands actionability by the lex loci delicti, or by both laws, it will need to provide for the exceptional case like the present.

In the result, the case may be regarded as authoritative for the following propositions of law:

(i) A claim for pain and suffering is a matter of substantive law: (per Lords Hodson, Wilberforce and Pearson; Lords Guest and Donovan contra).

(ii) As a general rule, an action brought in England on a foreign tort will be tried according to English law (per Lords Guest, Wilberforce and Pearson—the term "as a general rule" has been added to incorporate the escape clause foreshadowed by Lord Pearson).

(iii) An action on a foreign tort will fail in England on proof that the act does not give rise to civil liability where committed; in other words *Machado* v. *Fontes* is pro tanto overruled (per Lords Hodson, Guest and Wilberforce; Lords Donovan and Pearson contra).

The above result may be somewhat surprising, but surprise will turn to astonishment when it is realised that propositions (ii) and (iii) are arrived at by assembling shifting majorities. Thus, it will be seen from the above collage that only Lord Wilberforce is wholly logical and consistent and represented in each of the propositions advanced above.

In the result, it is a pity that a decision, which had been awaited so full of hope, should leave a vexed choice of law problem in such confusion and uncertainty. Perhaps the earlier practice of the Privy Council, when it still spoke with a single voice, is to be preferred to the present procedure which enables five Law Lords to take a legal problem for a leisurely walk abroad and return to England via different routes, with the exception of Lord Guest who went to Scotland and stayed there.

On a more detailed level, the decision is open to even wider criticism. Whilst one must applaud the result as a Chaplinesque triumph of the Little Man over wicked Big Business seeking to shelter behind immunities, the product of 19th century ideologies of little relevance in the jet age, one is nevertheless forced to conclude that hard cases continue to make bad law unless courts take a little more trouble. The result of the decision is to deny the defendant a substantive defence open to him by the lex loci delicti. This unpalatable truth is sugar-coated with "justice" and "public policy", thereby adding to the courts' stock-pile of defensive weapons, which already include "renvoi" and "characterisation", whose camouflage is quickly removed whenever more conventional weapons would lead to an eccentric result. Conceding the observation of Lord Wilberforce that

> "no purely mechanical rule can properly do justice to the great variety of cases where persons come together in a foreign jurisdiction for different purposes with different pre-existing relationships". (p. 1104)

the time had surely come for doing something more radical than creating a patchwork quilt out of the faded pieces of *Phillips* v. *Eyre*. At a time when the Hague Convention—chaired by Professor Graveson of the United Kingdom—had published its recommendations on the applicable law in Traffic Accidents (October 1968), a total lack of reference to them is surely somewhat surprising. One might have hoped that 'if Europe showed the way, England might have been tempted to follow. If so, one's hopes were grievously disappointed.'[23] Given that the judiciary leaves legislating to parliament, one is still left with the

23. With apologies to Lord Reid in *Indyka* v. *Indyka* [1969] A.C. 33.

feeling that on this occasion, their Lordships could, collectively, have done a little better. At a time when nearly everyone else is thinking "European", the strong emphasis on the fact that both parties were British citizens is surely a retrograde step, and one is tempted to echo the dissent of Van Voorhis J. who decried the extension of extra-territoriality

> "as though we were living in the days of the Roman or British Empire when the concepts were informed that the rights of a Roman or an Englishman were so significant that they must be enforced throughout the world even where they were otherwise unlikely to be honoured by lesser breeds without the law."[24]

It is submitted that despite the introduction of extra-territoriality as an additional and significant element in the displacement of the lex loci, it is unlikely that the ultimate development of the English choice of law rules will be in the direction of English law to the exclusion of other laws with a more persuasive claim to be considered. *Boys* v. *Chaplin* should therefore be seen against the narrow particularity posed by its facts. It is clearly inadequate when viewed against the background of a larger landscape. What will an English court do, for example, with two Canadian servicemen, temporarily stationed in England, who are involved in litigation arising out of an accident in Malta where both had gone on vacation and where the guest-passenger-plaintiff was injured by the negligence of his host-driver-defendant? Worse, the parties are domiciled in Ontario where, for good measure, the car is also registered and insured. (Ontario, it will be recalled, still retains a guest-passenger statute which, let us assume, would deny recovery in these circumstances).

Now change the facts and assume the accident took place in England. Anyone naive enough to assume that the problem is now free of any conflict elements should turn to *Lister* v. *McNulty*.[25]

The question is, of course, whether English courts will continue to find reasons for retaining their love-hate relationship with English law, or develop some of the more radical ideas toyed with by some of their Lordships in *Boys* v. *Chaplin*. Taking a wild guess, it is likely that English law will gradually follow the recent changes in the United States. Indeed, despite the pious disclaimer by some of their Lordships that the proper law of the tort, "with all it uncertainties" was not part of English law nor needed "whilst we remain a United Kingdom", it is submitted that some of their own approaches were not so radically different, given the narrower context of the facts of *Boys* v. *Chaplin*, from the contemporary American school which searches, often painfully, for "significant" contacts. Whether all the parties are nationals of the forum state, so as to provide roughage in favour of applying the national law of the parties (*Boys* v. *Chaplin*); or "citizens" of New York, thus favouring the application of the law of New York (*Babcock* v. *Jackson*) notwithstanding that the lex loci delicti in both cases afforded the defendants a good defence, appears to be a distinction without difference. It is here that *Boys* v. *Chaplin* displays its greatest weakness; an over-simplified and superficial approach to the pioneering decisions in the United States, decisions which owe much to the vastly different background against which they must be read and understood. *Dym* v. *Gordon*[26] and *Babcock* v. *Jackson* are cited indiscriminately without apparent awareness that they are,

24. (1963) 191 N.E. 2d 279 at p. 286; c.f. Diplock L. J. (1968). 1 All E.R. at p. 301.
25. [1944] 3 D.L.R. 673.
26. (1965) 209 N.E. 2d 792.

in fact, wholly irreconcilable. Furthermore, the shunting of lex loci onto a siding is frequently done, not so much on verbally expressed policy considerations, than by a manipulative resort to "characterization", so that the desired result is often achieved by, for example, re-classifying a tort action into one of contract (*Levy* v. *Daniels' U-Drive Auto Renting*[27]); or one of family law (*Haumschild* v. *Continental Casualty Co.*[28]); or one of procedure (*Grant* v. *McAuliffe*[29]). This technique can, on occasion, be found in England (*Matthews* v. *Kuwait Bechtel Corpn.*[30]) although English—unlike Australian—courts are a little more cautious in allowing a plaintiff to do his own classifying; c.f. *Letang* v. *Cooper*[31] and *Williams* v. *Milotin.*[32]

Finally, one result of the decision is that the lex delicti is unlikely ever to be advanced again as a plausible rival to the lex fori. However, for the reasons advanced by some of their Lordships in *Boys* v. *Chaplin,* it would appear that the English choice of law rules are committed to changes which will bear some resemblance to the current development in the United States. In Australia, our courts tend to be more conservative; c.f. *Joss* v. *Snowball*[33]. One can only hope that future judgments will pause long enough to examine the consequences of replacing a precise rule of law, with its occasional anomalies, for one which utilises such slippery co-ordinates as "residence", "nationality", "domicile" or "intention" as connecting factors in the search for the substantive law to be applied. In the process, a rule of law may be sacrificed for ad hoc determinations which, in the United States vary from State to State, sometimes even from case to case within the same State Court (cf. *Dym* v. *Gordon* and *Kilberg* v. *N.E. Airlines Inc.*). In the result, one tends to substitute catchwords for principles of law and to vacate an orderly field for a jungle of arbitrary determinations.

> "If one lesson emerges from the United States decisions, it is that case to case decisions do not add up to a system of justice." (per Lord Wilberforce at p. 1104)

P. GERBER*

27. (1928) 143 A. 163.
28. (1959) 95 N.W. 2d 814.
31. [1965] 1 Q.B. 232.
32. (1957) 97 C.L.R. 465.
33. (1969) 91 W.N. (N.S.W.) 45.

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