COMMENT

PHILLIPS v. *EYRE*[1] — JURISDICTION TEST OR CHOICE OF LAW RULE ?

In *Gorton* v. *Australian Broadcasting Commission and Another*[2] it was stated[3] by Fox J. in proceedings before the Supreme Court of the A.C.T. that 'It is the common submission of all parties that so far as concerns publication in any jurisdiction I should determine liability by reference both to defences available in that jurisdiction and to defences available in this Territory. It is agreed that the defendants will not be liable, so far as concerns publication in a particular jurisdiction, if a defence exists according to the law of that jurisdiction for matter published there. This common approach accords with the views expressed in Dicey and Morris, *The Conflict of Laws*, 8th ed., p. 940, and Cheshire's *Private International Law*, 8th ed., p. 275. There being no authority to the contrary binding on me, I am prepared to act on the basis submitted.'

In *Gorton*'s case, the plaintiff alleged publication of defamatory matter contained in an interview which was broadcast in the Capital Territory and in each of the six states of Australia. It is interesting to compare the view expressed by Fox J. in *Gorton*'s case in relation to defences available according to the *lex loci delicti*, with the approach adopted recently in *Cawley* v. *Australian Consolidated Press Ltd.*[4] In that case, the alleged defamation arose out of the publication of a letter to the editor of *The Bulletin* which was circulated throughout Australia. In addition to defences available under the law of New South Wales, the *lex fori*, the defendant pleaded the defence of fair comment contained in statutes which were part of the various *leges loci delicti*. Hunt J. observed that the defendant's right to rely upon those defences was not contested by the plaintiff and pointed out that '... there is firm academic opinion in favour of the existence of such right; Dicey & Morris, *Conflict of Laws*, 10th ed., at pp. 961, 962; Cheshire's *Private International Law*, 9th ed. at pp. 281, 282, 283. The High Court has, however, so far refrained from expressly agreeing with that opinion.'

By recognising the availability of defences according to both the *lex fori* and the *lex loci delicti*, it would appear that both Fox and Hunt J.J. were treating the well-known *Phillips* v. *Eyre* test as a combined choice of law rule; 'actionable' according to the law of the forum and, in addition, 'not justifiable' according to the law of the place where the act

1 (1870) L.R. 6 Q.B. 1.
2 (1973) 22 F.L.R. 181.
3 Ibid, at p. 182.
4 [1981] 1 N.S.W.L.R., 225.

was done. Both judges relied for support upon the 'firm academic opinion' provided by Dicey & Morris and Cheshire; textbooks which have maintained the view that the rule stated by Willes J. in *Phillips* v. *Eyre* is a choice of law rule. It is very surprising, however, that neither Fox or Hunt J.J. referred to the leading Australian writers on the Conflict of Laws, such as Nygh's *Conflict of Laws in Australia*,[5] where the view, based upon the High Court authority of *Anderson* v. *Eric Anderson (Radio and TV) Pty. Ltd.*,[6] is that the formulation by Willes J. in *Phillips* v. *Eyre* is not a choice of law rule at all but a 'jurisdiction' or 'threshold' test. Thus, once the plaintiff has passed this threshold, to establish that the court has jurisdiction over the cause of action, the forum applies its own law exclusively and no further reference is made to the *lex loci delicti*. This approach has been followed in *Kolsky* v. *Mayne Nickless Ltd.*[7] There the New South Wales Court of Appeal preferred the High Court's interpretation of *Phillips* v. *Eyre* to the possible uncertainties of the 'flexible' approach used by Lord Wilberforce in *Chaplin* v. *Boys*,[8] where he and Lord Hodson treated *Phillips* v. *Eyre* as a cumulative choice of law rule.

It may be noticed that in *Cawley*'s case Hunt J. also considered what he described as an 'alternative construction' of the second limb of the test in *Phillips* v. *Eyre*, suggested by the High Court,[9] to the effect that 'it (the act) was such as to give rise to a civil liability by the law of the place where the act was done'. Hunt J. pointed out that, if this was the correct approach, then this would require a consideration of any defences available according to the *lex loci delicti*.

However, it is clear that this interpretation of the second limb in *Phillips* v. *Eyre*, although it was mentioned by some members of the High Court, was certainly not adopted and applied by that court. Thus, once the threshold test was satisfied by showing that what was complained of was 'actionable' according to both the *lex fori* and *lex loci delicti*, the law of New South Wales, as the *lex fori*, was applied exclusively and no further reference was made to the law of the A.C.T. It was never suggested that it was necessary for the plaintiff to go further and demonstrate that the defendant would have been civilly liable according to the *lex loci delicti*.

In *Cawley*'s case Hunt J. concluded[10] that 'For my part, and until an appellate court identifies precisely how there is a departure from what was laid down in *Koop* v. *Bebb* (1951) 84 CLR 629 and in *Anderson*'s case (1965) 114 CLR 20, I am satisfied that the defendant has in this case correctly pleaded the defences of statutory fair comment as part of the *lex loci delicti*'. It is submitted, with respect, that what was 'laid

5 (3rd ed. 1976).

6 (1965) 114 C.L.R. 20.

7 (1970) 72 S.R. (N.S.W.) 437.

8 [1971] A.C. 356.

9 *Koop* v. *Bebb* (1951) 84 C.L.R. 629, at p. 643; *Anderson* v. *Eric Anderson (Radio & TV) Pty. Ltd.* (1965) 114 C.L.R. 20, at pp. 34-35.

10 [1981] 1 N.S.W.L.R., 225, at p. 228.

down' in the cases referred to by Hunt J. was not the 'alternative construction' of the requirement of 'civil liability' according to the *lex loci delicti*, as part of *Phillips* v. *Eyre* as a cumulative choice of law rule. The foundation of the High Court's decision was that *Phillips* v. *Eyre* provides a jurisdictional test only.[11] Treating *Phillips* v. *Eyre* as a 'double-barrelled' choice of law rule as Hunt J. did in *Cawley*'s case is thus clearly a departure from the High Court's interpretation of *Phillips* v. *Eyre*.[12]

It can be argued that the High Court's approach places too much emphasis upon the law of the forum. It is not difficult to imagine circumstances where this interpretation produces unsatisfactory results as in *Anderson*'s case itself where the defendant had a complete defence according to the law of New South Wales as the *lex fori* but the damages would have been apportioned according to the law of the A.C.T. as the *lex loci delicti*. The same unfairness can, of course, result from *Phillips* v. *Eyre* as a combined choice of law rule. Lord Wilberforce was aware of this possibility in *Chaplin* v. *Boys*. He therefore applied techniques, which have been developed in America to provide flexibility, to deal with what he regarded as an exceptional situation, where an application of the *Phillips* v. *Eyre* test as a choice of law rule would have produced unsatisfactory results. In *Chaplin* v. *Boys* the parties were British servicemen, temporarily stationed in Malta, where the accident occurred. Applying *Phillips* v. *Eyre* as a cumulative choice of law rule, the damages recoverable would have been limited to the smaller amount recoverable as general damages under Maltese law. However, Lord Wilberforce pointed out[13] that 'The rule limiting damages is the creation of the law of Malta, a place where both respondent and appellant were 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 when an English court, if free to do so, should renounce its own rule. That rule ought, in my opinion, to apply.' Thus English law, as the system with the greater interest in the particular issue, was applied by Lord Wilberforce. The other members of the House of Lords agreed that English law should apply but, unfortunately, for differing reasons. It was only Lord Wilberforce, and less articulately Lord Hodson, who favoured a 'flexible' approach. However, Lord

11 See *Pozniak* v. *Smith* (1982) 56 A.L.J.R. 707 at 712, where Mason J., considering *Phillips* v. *Eyre*, said: 'Whether this rule is merely a preliminary or "threshold" rule or whether it also operates as a choice of law rule has been a matter of vigorous debate. See the discussion in Nygh, *Conflict of Laws in Australia* (3rd ed., 1976), pp. 258 *et seq*. However, as the author indicates, the balance of Australian authority favours the preliminary or threshold view. It also holds that it is the *lex fori* that determines questions of substance — *Koop*; *Anderson* at pp. 41-42, *per* Windeyer J.; *Kolsky* v. *Mayne Nickless Ltd.* (1970) 72 S.R. (N.S.W.) 437 at 444. In the first of these cases this Court specifically rejected the suggestion that the *lex loci delicti* should be applied as the substantive law (see p. 644).'

12 Compare with the correct approach adopted by Begg J. in *Maple* v. *David Syme & Co. Ltd.* [1975] 1 N.S.W.L.R. 97.

13 [1971] A.C. 356, at p. 392.

Wilberforce cautioned that the circumstances of *Chaplin* v. *Boys* were exceptional and that 'There must remain great virtue in a general well-understood rule covering the majority of normal cases provided that it can be made flexible enough to take account of the varying interests and considerations of policy which may arise when one or more foreign elements are present'.[14]

Lord Wilberforce's approach in *Chaplin* v. *Boys* was approved of and applied in *Corcoran* v. *Corcoran*[15] where Adam J. of the Victorian Supreme Court thought the circumstances of the case indicated the need for individual justice rather than a rigid application of the *Phillips* v. *Eyre* test.[16] Whilst the accident between husband and wife was actionable according to the law of Victoria, where the parties were resident and their car was registered, the injury which occurred in New South Wales could not be characterised as a tort according to the law of New South Wales because of the principle of inter-spousal immunity applicable in that State. The court took the view, however, that '... this is clearly a case where the rules in *Phillips* v. *Eyre* are flexible enough to admit of an action in the circumstances of this case although if rigidly applied they would defeat the wife's action'.[17]

It was pure chance that the accident happened in New South Wales and Victorian law clearly had the greater interest in applying to the issue. However, whilst one would agree with the result of the decision, which is, coincidentally, consistent with the High Court's approach of applying the law of the forum to determine the substantive issue, it must be remembered that the rule in *Phillips* v. *Eyre,* as a jurisdiction test, was not satisfied. Strictly speaking the court did not have jurisdiction over the cause of action. Can the *Phillips* v. *Eyre* test just be ignored in this fashion in the interests of individual justice in the circumstances of the particular case ?

This, and a number of equally difficult questions, remain unresolved in this area of the law relating to foreign torts. It was a great pity that *Corcoran* v. *Corcoran* did not go on appeal to the High Court where the respective arguments relating to 'certainty' and 'flexibility' could have been fully canvassed and an authoritative decision made by the High Court. Until this situation eventuates, it is submitted that inferior courts should apply *Phillips* v. *Eyre* as a jurisdiction test on the authority of *Koop* v. *Bebb* and *Anderson* v. *Eric Anderson (Radio and TV) Pty. Ltd.*

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14 Ibid, at p. 391.

15 [1974] V.R. 164.

16 See *Borg Warner (Aust) Ltd.* v. *Zupan* [1982] V.R. 437, at p. 453, where Marks J. referred to *Corcoran* v. *Corcoran* and stated that 'In my view, the approach by Adam, J. should be approved and preferred to that of *Kolsky*. It is consistent with what was said in *Chaplin* v. *Boys* and emphasizes the essential public policy ingredient of private international law.'

17 *Corcoran* v. *Corcoran* [1974] V.R. 164, at p. 170.

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SOME EDUCATIONAL CONSIDERATIONS IN RECENT FAMILY LAW CASES

The recent Australian case of *In the Marriage of Bishop*[1] raises a number of interesting issues involving the role played by educational considerations in modern family law. It is the purpose of this comment to analyse the *Bishop* decision and extrapolate from it to examine the place of these issues in the broad context of the law, the family and society. In *Bishop*, the parties had been married in 1965 and their marriage had been dissolved in 1973 when the mother had been granted custody of the two daughters of the marriage. In the instant proceedings, the father applied for an order that the mother be restrained from enrolling the elder daughter, who was aged thirteen, at a College of the Arts where the daughter intended to study ballet. The daughter had previously attended a private school as the result of an agreement made between the parties at the time of the dissolution. Treyvaud J. considered[2] that, '... in appropriate but very rare cases, the question of where a child is to be educated is a proper matter for the court to consider'. The reason why such cases should be rare, his Honour thought, relying on the pre *Family Law Act* case of *Travnicek* v. *Travnicek*[3] was that it was essential that the party responsible for the custody of the child should also have the legal right and duty to control the child's mode of life, education and general upbringing. On the facts in *Bishop*, the judge was of the view that the divergence in the views of the parents as to the child's education were so marked as to affect her future and, therefore, it was appropriate for the court to deal with the matter.

The father's objection was predicated, in essence, on the idea that the school which the daughter desired to attend was both poor and unproven in its educational standard, with the result that the possibility of her receiving tertiary education would be reduced. He had said, in evidence, that he would have no objection to her attending the school were its academic credentials equal to those of the school which she presently attended. The father was also concerned that her interest in the ballet could prove ephemeral, particularly in view of her youth. After a consideration of the evidence which, apart from that given by the parties themselves, was given by a court counsellor and the Principal of the school which the girl wished to attend, Treyvaud J. decided[4] that the welfare of the daughter would be served by permitting her to enrol in the school where she wished to study ballet. At the same time, the judge made the comment[5] that he considered that the father's action had been prompted by the highest motives: if his daughter attended the College of Arts he would not be responsible for the very high school fees

1 (1981) F.L.C. 91-016.
2 Ibid at p. 76,191.
3 (1967) 7 F.L.R. 440.
4 (1981) F.L.C. 91-016 at p. 76,193.
5 Ibid at p. 76,192.

which he was currently paying and he also realised, the judge thought, that, were his daughter not to attend the school she wished, she might well feel that she had been unfairly treated which, in turn, would deleteriously affect their relationship. Finally, Treyvaud J. commented[6] that, even if her ability and interest in the ballet were to be transitory (which he was satisfied it was not), the course of schooling and training which she sought to undertake would have broadened her experience of life and culture.

The first point to arise from *In the Marriage of Bishop* is that, in Australian law, there appears to be some dispute as to the role of the courts in determining matters relating to education. The matter also raised, indirectly, the fundamental distinction between the concepts of custody and guardianship.[7] In contradistinction to the case of *Travincek*, on which Treyvaud J. relied, stands the more recent case of *In the Marriage of Newbery*.[8] There, Demack S.J. had stated[9] that, in his opinion, '... the Court should not be directly involved in answering the question which school a child is to attend. However, he, later, went on to say that, 'Perhaps there may be circumstances when the choice of school is so deleterious to the welfare of the child that it will raise the whole issue of who is to have custody, but it is difficult to envisage this being the only circumstance which called for a change of custody'. *Newbery* is factually distinguishable from *Bishop* on the basis that the earlier case, as Demack S.J. himself pointed out,[10] did not involve, as did *Bishop*, a dispute between parents regarding the educational philosophy or structure in which the children should be brought up. In *Newbery*, the dispute involved which of two state schools the children should attend, and was concerned with their relative location. Demack S.J. commented[11] that it was not the function of the Family Court of Australia to adjudicate on every issue — for example, which code of football or which musical instrument a child should play — as to do so would be to encourage division between families and cast a burden on the courts which they would be unable to bear.

In *Newbery*, the judge did, however, refer[12] to a variety of matters which could result in difficulties: the matter of religious education, of different levels of expense and whether the child should be educated in a state or a private school. There can be little doubt that this is an area, in Australia at least, which is likely to be productive of dissention and controversy: there is documentation of a move by parents to eschew the system of state education in favour of the private sector.[13] The

6 Ibid at p. 76,193.
7 See *Hewer* v. *Bryant* [1970] 1 Q.B. 357; *cf. Wedd* v. *Wedd* [1943] S.A.S.R. 104.
8 (1977) F.L.C. 90-205.
9 Ibid at p. 76,070.
10 Ibid at p. 76,068.
11 Ibid at p. 76,068.
12 Ibid at p. 76,068.
13 See G. Sheridan, 'Education Today: How Parents are Grading Schools' *The Bulletin*, 26 January 1982 at p. 42.

issue, however, is more complex still: although many parents regard private schools as providing a more disciplined and rigorous education than those directed by state agencies, there are others who look for educational alternatives more radical than the facilities provided by the state.[14] Thus, for example, although a dispute involving a parent who wishes to send the child to a traditionally organised private boarding school and one who prefers state education is an immediate possibility, a dispute between parents, one of whom prefers the state system and the other a more radical (say, on the lines of A. S. Neill's famous Summerhill School)[15] education process or a school run by one of the more unorthodox religious sects seems ever more likely. A particularly graphic recent issue, which has recently been referred to in *The Times* newspaper,[16] relates to decisions of the European Court of Human Rights concerning the use of corporal punishment in British schools. Without attempting to canvass the correctness or otherwise of these decisions, it is clear from the fact that the actions were brought at all that some parents are strongly opposed to the use of corporal punishment in schools. On the other hand, it is just as clear, from daily observation, that others are not. The likelihood of serious doctrinal difference is thus considerable.

The common law was quite clear: as Cretney describes[17] the position, '... the person with parental rights could determine what education (if any) the child received'. Probably the most graphic instance of the operation of this rule may be found in *Tremain's* case[18] where the child, '... being an infant ... went to Oxford, contrary to the orders of his guardian, who would have him go to Cambridge. And upon his returning to Oxford, there went another *tam* to carry him to Cambridge, *quam* to keep him there.' Of course, circumstances have significantly changed and the State now plays an immeasurably greater part in the education process than it did in the early 18th Century when *Tremain* was decided. In Australia the advent of compulsory schooling[19] has meant, in Brenda Hoggett's words,[20] that '... parents no longer have the right to choose *not* to educate their child'.

Quite apart from statutes regulating the education process, the common law has taken a hand in reaffirming the state's responsibility in the area. In the recent case of *Dipper* v. *Dipper*[21] Ormrod and Cumming Bruce L.JJ. adopted a similar view to that which Treyvaud J. had expressed in *Bishop* to the effect that neither spouse had a pre-emptive right over the children and, where disagreement occurs, the court possesses an adjudicative function. However, *Dipper* is by no means the

14 Ibid at p. 44.
15 See, for example, R. Henning, *Fifty Years of Freedom: A Study of the Development of the Ideas of A. S. Neill* (1972).
16 26, 27 February 1982.
17 S. M. Cretney, *Principles of Family Law* (3rd Ed. 1979) at p. 443.
18 (1719) 1 Strange 167.
19 See B. Boer and V. Gleeson, *The Law of Education* (1982) at p. 39 *ff*.
20 B. Hoggett, *Parents and Children* (2nd Ed. 1981) at p. 16.
21 [1980] 2 All E.R. 722.

major English case on the role of the state as it applies to education and its effect on the relationship of parent and child. In *Re D.J.M.S. (A Minor)*[22] the Court of Appeal upheld, after protracted litigation, the decision of a local authority to place a child in care when his parents had refused to send him to school because of their implacable opposition to the system of comprehensive schools which was operated by the authority. Although it is clear, particularly from the judgment of Geoffrey Lane L.J.,[23] that the views, especially of the father, were wholly unreasonable it is likewise apparent that the Court was prepared to take a rather broader stance regarding education of children and the state's role therein. Thus, Lord Denning M.R. was of the view[24] that the care order should, as a last resort, be implemented, '... so that this child can be educated instead of being deprived of the opportunity to make good in the world. Everybody knows that a child ought to be properly educated. It is utterly unreasonable for the parents to keep him back from school because of their implacable opposition to the comprehensive school system.' Thus, even when parents agree, the state may well have both the opportunity, and indeed, obligation to intervene.

There are, of course, a great many ways in which *Re D.J.M.S.* can be perceived and interpreted. Elsewhere[25] the present writer has placed it in the mainstream of English cases which emphasise the welfare of the child as it may be regarded in objective terms[26] but there are other interpretations. First, it may be considered as representing an English repudiation of Article 26 (3) of the *Universal Declaration of Human Rights* which specifies that parents have a prior right to decide the kind of education to be given to their children. At the same time, it is apparent from the facts of the case that the parents were seeking to have the local authority pay for the child's education at a private school.[27] The fact that the parents were unable to afford the cost of private education raises issues relating to the structure and organisation of society itself. It may well be that it is that point which has prompted Freestone, in an interesting note, to comment[28] that, '... it is difficult to argue that the child's best interests were served by being used as a pawn in an essentially political dispute...' There is more than some truth in the comment that the dispute was political in nature; indeed, it could hardly be otherwise. However, there can, equally, be little question that any political character which the case possessed related to individual conceptions of the child's welfare: the parents perceived comprehensive schools as, *per se*, inimical to the welfare of the child whereas the author-

22 [1977] 3 All E.R. 582. For more detailed comment, see F. Bates, (1978) 56 *Can. B.R.* 517.
23 Ibid at p. 590.
24 Ibid at p. 590.
25 *Supra* n. 22.
26 *J.* v. *C.* [1970] A.C. 668; *Re W (An Infant)* [1971] A.C. 682; *O'Connor and Anor.* v. *A and B* [1971] 2 All E.R. 1230. For general comment, see F. Bates, 'Redefining the Parent-Child Relationship: A Blueprint' (1976) 12 *U.W.A.L.R.* 518.
27 Which that body had done in the case of the parents' two elder children.
28 D. A. C. Freestone, (1978) 12 *J.A.L.T.* 42 at p. 43.

ity must have perceived them as representing an advance for the welfare of children generally. It must also be said that the facts of the case[29] suggest that the local authority seemed to have been more rational in their attitudes and behaviour than had the parents.

It is suggested that disputes of the kind which have occurred in the cases earlier discussed are unlikely to decrease either in their intensity or frequency. As Lord Denning M.R. stated in *Re D.J.M.S.*[30] education is an objectively important issue and it is an issue in which the law may be required to intervene more drastically than in the past. The reasons are obvious but have rarely been directly articulated. As employment opportunities for many young people appear to become increasingly constricted, the importance attached by many parents to the periphery of educational activity likewise increases. Sheridan has referred[31] to the parent attitude that relationships and contacts formed at private schools will remain throughout the child's life and prove advantageous. The leading educationist Frank Musgrove, however, has described the matter[32] another way when he writes that parents may be obsessively concerned with their children's social mobility. Musgrove goes on[33] to comment that schools are frequently used as extensions of parental influence and ambition and, thus, narrow the horizons of children, rather than broaden and enhance them, which musgrove regards as a primary function of the school. Although the present writer cannot, from the small amount of information which is presently available to him, venture to make any global predictions as to how the courts will be able to resolve doctrinal disputes between parents or between parents and the state, cases such as *In the Marriage of Bishop* and *Re D.J.M.S.* ought to put all of us on the alert.

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29 The father had been shown a new comprehensive school and had, even though he could not complain about the staff and facilities, nonetheless refused to send his son there because it was comprehensive. The authority had also allowed the father a choice of school, which it did not normally permit. See [1977] 3 All E.R. 582 at p. 586 *per* Lord Denning M.R.

30 Ibid at 0.590.

31 *Supra* n. 13 at p. 45.

32 F. Musgrove, *The Family, Education and Society* (1960) at p. 13.

33 Ibid at p. 55.

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