CASE NOTE

THE COMMONWEALTH SEA-CARRIAGE OF GOODS ACT (1924), S. 9(2)

Kim Meller Imports Pty. Ltd.
v
Eurolevant SPA and Others (1986)[1]

Sub-section 9(2) of the *Sea-Carriage of Goods Act* 1924 (Cwth) provides that:

> Any stipulation or agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the courts of the Commonwealth or of a State in respect of any bill of lading or document relating to the carriage of goods from any place outside Australia to any place in Australia shall be illegal, null and void, and of no effect.

Dixon C J in *Compagnie de Messagieries Maritimes v Wilson*[2] (hereinafter referred to as *Wilson*'s case) clearly expressed the purpose of this provision in the following words:[3]

> For it can hardly be doubted that its object is to insure that Australian consignees of goods imported might enforce in Australian courts the contracts of sea-carriage evidenced by bills of lading which they held. Section 9(2) is expressed in the strongest words and makes any stipulation or agreement falling within its terms illegal, null, void and of no effect.

In *Wilson*'s case the goods were shipped from Dunkirk to Sydney under a bill of lading which provided that all legal actions arising out of its interpretation or performance should be determined by specified French courts.

Kim Meller's case is a recent illustration of the area of operation of sub-section 9(2) of the Commonwealth statute. In that case a bill of lading provided for the shipment of a quantity of cartons of shoes on board the 'Australian Eagle' from Spezia, Italy, to Australia. The bill of lading was signed by an Italian organisation 'as agents for Eagle Container

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[1] (1986) 7 NSW LR 269.
[2] (1954) 94 CLR 577.
[3] *Ibid*, at 583.

Line, as carrier'. The consignment of shoes was not delivered to Sydney and the plaintiff importer instituted proceedings against: an Italian freight forwarder (the first defendant), the charterer of the ship (the second defendant) and the owner of the 'Australian Eagle' (the third defendant) who was being sued as a bailee of the goods.

In the present proceedings, the defendant-shipowner relied upon clause 21 of the bill of lading which provided that: 'All claims and disputes arising under or in connection with this bill of lading shall be referred to arbitration in London'.

He moved that the proceedings brought against him should be stayed. Counsel for the plaintiff submitted, however, that the provisions of clause 21 were unenforceable and of no effect because of the provisions of sub-section 9(2) of the *Sea-Carriage of Goods Act*, 1924.

Whilst the court would have agreed with this submission in relation to the charterer of the ship, for example, because he was a party to the bill of lading, the same could not be said of the owner of the 'Australian Eagle', the third defendant, who was not a party to the bill of lading but was being sued as a bailee of the goods; the shoes had not been safely kept and then delivered to Sydney as agreed. The court accepted the third defendant's submission that he was outside the provisions of the *Sea-Carriage of Goods Act*, 1924, which incorporated the Hague Rules, because the statutory provisions only apply to parties to a bill of lading.

Concluding his judgment, and referring to sub-section 9(2), Rogers J said:[4]

> I reach the conclusion that the subsection does not apply to third parties to the bill of lading without discomfort. The approach to arbitration has changed in recent times and there is no reason, in my mind, why persons who seek to derive benefits from bills of lading should not be held to the terms which it contains relating to arbitration.

Can we speculate that the owner of the 'Australian Eagle', as a busy businessman, may prefer arbitration in London rather than litigation in Sydney?

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[4] (1986) 7 NSW LR 269, at 272.

CASE NOTE

CONFLICT OF LAWS - TORT - PHILLIPS V EYRE[1]

Jurisdiction Test or Choice of Law Rule?

BREAVINGTON V GODLEMAN & OTHERS 1988

The appellant was injured in an accident which occurred in the Northern Territory. He was a passenger in a car driven by the second respondent when it collided with a vehicle driven by the first respondent. He, although resident in the Northern Territory at the time of the accident, had become resident in Victoria when the writ was served on him. The appellant had sought both special and general damages. In Victoria the full range of damages was available and was not limited as to quantum. The first and second respondents pleaded, however, that the appellant's claim was barred by the Northern Territory *Motor Accidents (Compensation) Act* 1979 which provided a partial 'no fault' scheme of compensation for motor vehicle victims; the statute precluding actions for damages other than damages for pain and suffering and loss of amenities. These pleadings were treated as preliminary points of law at first instance and argued before trial.

O'Bryan J. summed up[2] the issues in this way:

> The question raised by the defences is whether, having regard to the provisions of the *Motor Accidents (Compensation) Act* 1979 of the Territory, the plaintiff can maintain an action for damages in Victoria and, if he can, whether he may include damages other than damages in respect of pain and suffering or loss of amenities of life.

Putting this in the context of the applicable *Phillips v Eyre* principle, the judge considered that it was necessary, in the first place, to decide whether that rule was a jurisdiction, or 'threshold' test, as suggested by the High Court in *Anderson v Eric Anderson Radio and TV Pty Ltd*[3] and, having satisfied that test, the court would apply the *lex fori* exclusively (to satisfy this jurisdiction test, what a plaintiff complained of must be actionable according to the *lex fori* and 'not justifiable' according to the *lex loci delicti*) or, alternatively, whether the *Phillips v Eyre* test was a rule which may require an application of the *lex loci delicti* in certain cases.

O'Bryan J found that the requirements of *Phillips v Eyre*, as jurisdiction test, were satisfied. What the appellant complained of was actionable in

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[1] (1870) LR 6 QB 1.
[2] [1985] VR 851, at 852.
[3] (1965) 114 CLR 20.

Victoria and, in addition, actionable ('not justifiable') according to Northern Territory law. In spite of the Territory legislation excluding liability in certain cases, the statute relied upon still gave rise to civil liability for particular heads of damage. Thus the court had jurisdiction over the cause of action. Having decided this question, the judge then said:[4]

> But that is not the end of the matter. There has been much discussion in the past century whether the rules in *Phillips v Eyre* concern anything more than jurisdiction. The dispute in the present case centres upon a choice of law issue of whether the law of the Territory (*lex loci)* or the law of Victoria (*lex fori*) should be applied to the substantive issues.

After reviewing *Anderson's* case and *Chaplin v Boys*[5] at some length, *O'Bryan* J referred to the High Court decision in *Pozniak v Smith*[6] (which applied *Anderson's* case and *Koop v Bebb*[7]) and concluded[8] that:

> There can be no doubt that *Pozniak* provides strong support for the argument of the plaintiff in the present case that Victorian law should determine the extent of the damages. Although Northern Territory law limits the damages recoverable in the action for damages in the Territory and thereby affects substantive law, the weight of Australian authority favours the *lex fori* as the choice of law in all cases.

However, the Victorian Full Court (*Young* CJ, *King* and *Beach* JJ.), rather than using the authority of High Court decisions such as *Anderson's* case and *Pozniak v Smith*, preferred to rely upon a statement of principle by Lord Wilberforce in *Chaplin v Boys*:[9]

> 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.

This is a formulation of the *Phillips v Eyre* test as a cumulative choice of law rule. Applying that test, the Full Court concluded that the appellant ought not be permitted to recover as damages in Victoria more than he could have recovered by virtue of *The Motor Accidents (Compensation) Act* 1979.

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[4] [1985] VR 851, at 854.
[5] [1971] AC 356.
[6] (1982) 151 CLR 38.
[7] (1951) 84 CLR 269.
[8] [1985] VR 851, at 858.
[9] [1971] AC 356, at 389.

In *Chaplin v Boys*, Lord Wilberforce, having stated the *Phillips v Eyre* test as a double-barrelled choice of law rule, recognised the fact that a rigid application of that test in all cases may produce unsatisfactory results and that a 'flexible' approach in some circumstances could be necessary, as in the case of *Chaplin v Boys* itself. Lord Wilberforce, therefore, applied techniques which had been developed in America to provide flexibility, to deal with what he regarded as an exceptional situation. 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 be limited to the smaller amount allowed as general damages under Maltese law. However, Lord Wilberforce pointed out[10] 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.

In contrast, we may notice the words of *Beach* J. in the Victorian Full Court indicating the absence of factors which, had they been present, might have pointed to the need for that flexible approach which Lord Wilberforce found to be necessary in *Chaplin v Boys*. As *Beach* J pointed out:[11]

> ... there are no circumstances in this case which would justify one in saying that although the accident occurred in the Northern Territory, that fact is (to adopt the words of Lord Hodson in *Chaplin v Boys)* 'overshadowed by the identity and circumstances of the parties'. Nor can one say that the cause of action has a much closer contact with Victoria than the Northern Territory or that the interests of Victoria are more clearly involved than any interests of the Northern Territory. The accident occurred in the Northern Territory, the plaintiff and the drivers of the two vehicles involved were then resident in the Northern Territory. In those circumstances, the cause of action has a much closer connection with the Northern Territory than Victoria and the interests of the Northern Territory are more clearly involved than the interests of Victoria.

[10] *Ibid*, at 392.

[11] [1987] VR 645, at 660.

These factors clearly indicate that, as between Victorian law and the law of the Northern Territory, the latter had the greater interest in applying and that *The Motor Accidents (Compensation) Act* 1979, as part of the law of the Territory, was exclusively applicable to determine the damages to be claimed by the appellant.

One would agree with the result of the Victorian Full Court's decision in that the Northern Territory statute was applied to the exclusion of Victorian law because that law had no relevance to the circumstances. However, it must be stressed that the Full Court, rather than following the High Court[12] decisions which have treated *Phillips v Eyre* as a jurisdiction test land then applied the *lex fori*, preferred to regard *Phillips v Eyre* as a cumulative choice of law rule, following the same approach as that adopted by Lord Wilberforce in *Chaplin v Boys*.

It had been hoped that an appeal to the High Court would have provided an opportunity for an authoritative decision being made in this difficult area of the Conflict of Laws. Unfortunately, this has not happened. In terms of a 'clear authority', *Breavington v Godleman & Others* can be compared with the House of Lords' decision in *Chaplin v Boys*. *Mason* CJ said of *Chaplin v Boys* that:

> It is an unsatisfactory decision, if only because, by reason of division of opinion, it does not authoritatively state the law upon the point.

It is submitted that the same can be said of the present case in relation to the choice of law rules relating to tort. A brief review of the High Court judgments will indicate a divergence of opinion as to the appropriate choice of law rule.

Thus *Brennan* J and *Deane* J were satisfied with the existing approach of the High Court to the rule in *Phillips v Eyre*; treating it as a jurisdiction test and then applying the law of the forum. However, *Mason* CJ felt that there was a need for the High Court to re-examine the traditional approach. He regarded *Koop v Bebb* and *Anderson*'s case as authorities for the principle that the *lex fori* is the applicable law. However, Mason CJ thought that there were elements of uncertainty in the two cases which required examination. This, and the fact that Australian courts had followed Conflicts rules which had been formulated by English courts at a time when the judgments of the High Court were subject to the Privy Council, were factors which would justify the present High Court in taking a fresh look at the question.

Mason CJ clearly felt attracted to the modern developments in American law. He said:

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[12] Followed by the New South Wales Court of Appeal in *Kolsky v Mayne Nickless Ltd* [1970] 3 NSWR 511.

> The demolition of the 'vested rights' theory did not exclude reference to the law of the place of the act as an important element in the principle to be applied by the court of the forum in dealing with a foreign tort. After all the law of the place of the wrong is a material factor and, in many cases, the critical factor, in the resolution of the rights of the parties. In most cases the application of that law satisfies the reasonable expectations of the parties. In the United States where the courts, having rejected the view that the law of the place of the tort should invariably govern the availability of relief for the tort, regard the law of the place of the tort as the basic or *prima facie* law to be applied, the governing law is the local law of the state which had the most significant relationship with the parties (see *Babcock v Jackson* (1963) Law Rep 286).

In the present case there was ample connection between the Northern Territory and the parties and their accident in the Northern Territory. As *Mason* CJ said: '... there is simply no reason to depart from the *lex loci delicti* as the primary or basic rule to be applied'.

Although feeling himself bound by authority, *Dawson* J would also have preferred to apply the Northern Territory law but not for the reasons suggested by the American authorities which impressed *Mason* CJ. *Dawson* J said:

> ... I am conscious of the cogency of the arguments contained in the dissenting judgment of Diplock LJ in the Court of Appeal in *Chaplin v Boys* [1968] 2 QB 1. Were I not constrained by authority, there would, I think, be much to be said for the view that it is the second condition of the rule in *Phillips v Eyre* ... which effects a choice of law, namely the *lex delicti*. Upon this view, it is the *lex loci delicti* which determines the nature and extent of the wrong leaving it to the *lex fori* alone to determine the measure of compensation according to its own procedure.

Toohey J appreciated that 'the law of this country is not so well settled as to be beyond reconsideration by this Court' and said:

> It is appropriate for this Court to recognise the developments in the common law, especially as reflected in the judgments in *Chaplin v Boys* and to accept that the flexible approach enunciated by Lord Wilberforce is less parochial and can be applied to give significance to the *lex loci delicti* and the *lex fori* in all circumstances.

Wilson and Gaudron JJ observed in a joint judgment, however, that '*Chaplin v Boys* is a case which presents some difficulty' and noted that the Supreme Courts of New South Wales, Victoria, Queensland and South Australia had come to different conclusions as to the nature and effect of *Chaplin v Boys*.

However, whilst not providing a consistent view as to the appropriate choice of law rule relating to tort, the High Court agreed with the alternative submission of the respondents (based upon ss 106, 107 and 118 of the *Constitution* and s 18 of the *State and Territorial Laws and Records Recognition Act* 1901) that the Northern Territory law should be applied to determine the appellant's entitlement to damages.

In conclusion, can we remember the words of *Mason* CJ in *Breavington v Godleman and Others* (speaking of *Chaplin v Boys*) when considering the value of *Breavington*'s case:

> It is an unsatisfactory decision if only because, by reason of division of opinion, it does not authoritatively state the law upon the point?

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