Conflict of Laws in Automobile Negligence Cases*

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No apology need be made, perhaps, to a group of insurance lawyers for venturing to examine yet again[1] some of the problems that arise out of the use (or, more accurately, the mis-use) of foreign motor cars within Ontario or, the reverse situation, the liability of Ontario owners or drivers for accidents in which they have become involved on the highways of foreign provinces or states. Unfortunately it is not possible to call in aid any extensive body of direct judicial authority on the subject and reliance must, therefore, be placed almost entirely upon the material that has been accumulated over a long period of years on the general topic of torts in the conflict of laws — a necessity that denies us the privilege of being dogmatic in our opinions or of asserting with confidence that a Canadian court is obliged, or even likely, to arrive at a particular conclusion in any given automobile case that may come before it.

But, first, a word in respect of method. Originally it was my intention to assume at the outset that an Ontario court, in determining liability for a tort committed abroad, would refer for guidance to the celebrated formula of Willes J. in the case of *Phillips* v. *Eyre*,[2] and to confine myself, therefore, to suggesting possible answers which might, on that basis, be given for hypothetical problems likely to be encountered in the course of day-to-day practice. On the other hand, the further I carried my analysis of the basic assumption which appears to have been made by the English and Canadian writers on the subject —

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[1] Cf. B. V. Richardson: Problems in Conflict of Laws Relating to Automobiles (1935), 13 Can. Bar Rev. 201; A. C. Heighington: Conflict of Laws in Automobile Negligence Cases (1936), 14 Can. Bar Rev. 389. To Mr. Heighington goes, moreover, the writer's grateful acknowledgement for the generous assistance and experienced counsel which he was good enough to provide in the preparation of the present paper.

[2] (1869), L.R. 4 Q.B. 225; aff. (1870), L.R. 6 Q.B. 1.

namely, that the formula in *Phillips* v. *Eyre* expresses a choice of law rule in favour of the *lex fori* rather than the *lex loci delicti*[3] — the less convinced I became that the judicial authorities did, in fact, warrant the making of such an assumption. Not that I would suggest that the formula as it stands is either incorrect or inapplicable; to do so would clearly not be justified in view of the respect with which it has been applied (rightly, it is submitted) for the past eighty years by the courts of England and the Dominions. All I wish to assert is the possibility that, accepting the *Phillips* v. *Eyre* formula as a rule for *choice of jurisdiction* (or, more accurately, as a rule for determining a particular tribunal's competence), it cannot be interpreted as laying down a rule for *choice of law* directing an English or Canadian court, given competence to adjudicate upon a foreign tort, to apply the local law of the forum for ascertaining the liability of a defendant. Such a doubt has never, so far as I have been able to ascertain, been raised before,[4] and it is for this reason that I propose to

[3] Cf. *Cheshire*, Private International Law (3rd ed.), p. 371: "English law has not taken this line [*i.e.*, that liability is determined solely by the *lex loci delicti*]. It has indeed combined the *lex fori* and the *lex loci delicti*, but in such a way that the English Court is not a mere guardian of its own public policy, but *is required to test the defendant's conduct* by a reference to the English as well as to the foreign law of tort. The rule on the matter is very far from satisfactory." (emphasis mine).

Falconbridge, Essays on the Conflict of Laws, p. 17: "The formula states two conflict rules of the law of the forum, referring respectively to the law of the forum and to the law of the place where the act was done." And again, at p. 687: "The formula itself, notwithstanding that it was expressed in its exact form by the very learned Mr. Justice Willes, and has been applied by the highest authority in England and in Canada, does not clearly indicate what is the fundamental theory as to the law that governs liability in tort, but seems to hesitate between two theories."

Hancock, Torts in the Conflict of Laws, p. 8: "In 1870 Mr. Justice Willes attempted [in *Phillips* v. *Eyre*] to restate the English *choice-of-law* theory for torts in terms somewhat more comprehensive than those of the seventeenth-century formula." (emphasis mine).

Wolff, Private International Law, p. 493: "Where such an action is brought the court applies English law, the *lex fori*, and not the law of the place where the tort was committed. But this application of the English rules depends on two conditions:" (citing thereafter the Willes formula). And at p. 499: "If the two conditions are fulfilled . . . the English conflict rule ordains the application of English municipal law, and not of the *lex loci delicti*."

Robertson, The Choice of Law for Tort Liability in the Conflict of Laws (1940), 4 Mod. L. Rev. 27: "The English rule on tort liability in the conflict of laws was stated as follows in the leading case of *Phillips* v. *Eyre*. . . . In order to undertake an examination of such *choice of law rules* as these, it is necessary to bear in mind certain fundamental principles of the conflict of laws . . ." (emphasis mine).

[4] Since writing the above it has come to the attention of the writer that yet another attack has been made very recently (by Professor Yntema in (1949), 27 Can. Bar Rev. 116 in a review of Falconbridge, Essays on the Conflict of Laws) upon the assumed English choice of law rule for determining liability for wrongs committed abroad. In certain paragraphs (notably those at p. 121) the learned reviewer would appear to have expressed opinions

examine the assertion in some detail in the first part of the paper, and to defer until a later stage a consideration of the specific problems suggested in the opening paragraph.

As I view it, a court, faced with an action for damages in respect of an automobile accident occurring abroad, must answer two separate and distinct questions:

(1) have we the jurisdiction or competence to hear *this* claim by *this* plaintiff against *this* defendant? and

(2) if so, what law are we to apply in ascertaining the respective rights of the parties?

These questions, involving a necessary distinction between a *conflict of jurisdiction* and a *conflict of laws*, are consciously (though, unfortunately, not constantly) argued and determined in other departments of private international law. In actions for dissolution of marriage, for instance, the first thing a plaintiff must satisfy (if foreign elements are present in the case) is the peculiarly restrictive English choice of jurisdiction rule which declares that only the courts of the husband's domicile are competent to entertain such an action; only when that rule for choice of jurisdiction has been satisfied is it necessary or material for the court to proceed to the further stage of choosing and applying a choice of law rule for determining whether, on the facts as proved, the plaintiff is entitled to the relief claimed. In the case of torts, however, where the distinction is no less important, it has for one reason or another become so obscured that a rule which could reasonably be accepted for choice of jurisdiction has now been assumed to express as well a rule for choice of law — with results, as we shall see, that fair-minded men are warranted in rejecting as clearly unjust. Nor is the situation improved by attempts to suggest how the courts, while retaining the principle as one of choice of law, could have avoided the unhappy practical consequences that its application is bound to entail. In doing so — and this I say with the greatest possible respect — the writers succeed only in complicating the matter further and rendering it difficult, if not impossible, for a practitioner to advise a client with any degree of confidence on the possible outcome of his case

very similar to those expressed in this paper; but the reasoning upon which that conclusion is based is, it would seem, a re-analysis of the terms used by Willes J. in formulating his conditions in *Phillips* v. *Eyre*, and not, as in this paper, upon the distinction which must necessarily be made between rules for choice of jurisdiction and rules for choice of law. As will be noted, it is the present writer's contention that the academic controversy over the meaning and propriety of the words "actionable" and "non-justifiable" is largely beside the point; it makes no substantial difference what words the court may use in justifying its assumption of jurisdiction so long as, having so assumed jurisdiction, it applies a proper rule for choice of law.

when it reaches the stage of argument before the court. Admittedly this is an embarrassment that is not infrequently encountered in conflict of laws cases, but, as anyone who has examined the subject will willingly admit, the tangle so far as torts are concerned has become critically complex. It is the argument of this paper that the difficulty is attributable solely to an unnecessary confusion between rules for choice of jurisdiction and rules for choice of law.

Let us examine, then, the background against which *Phillips* v. *Eyre* was decided. In the first place, as long ago as 1774, Lord Mansfield was faced, in the case of *Mostyn* v. *Fabrigas*,[5] with the now fairly common situation of a plaintiff asking an English court to enforce a penalty, by way of damages, for an act committed abroad, for which, according to the defence, the law of the place in which it was done (the *lex loci delicti*) would impose no liability whatever. Lord Mansfield made it quite plain[6] that

> . . . the Court will take care that justice is done to the defendant as well as to the plaintiff,

and that

> . . . whatever is a justification in the place where the thing is done, ought to be a justification where the cause is tried,

implying thereby that, provided it is found that the act was justified by the law of the place of alleged wrong, the court will not assume jurisdiction to grant the remedy the plaintiff would have had if the act had been done in England.[7] In other words, no wrongful or unjustifiable act had been committed abroad and thus no question arose as to what law should be applied to ascertain liability therefor.

Ninety years later, in the case of *The Halley*,[8] a claim was made by a plaintiff in respect of an act which, if it had taken place in England, would not have given rise to any right of action by the local law. In that case, suit was brought against the owners of an English ship for damages occasioned through a collision in Belgian waters at a time when, as required by that law, the master had relinquished all control to a compulsory pilot. Under Belgian law, the shipowners were nevertheless liable

[5] (1774), 1 Cowp. 161.
[6] At p. 175.
[7] Any other result would mean that a plaintiff, by choosing a favourable forum, could demand that the court exercise its jurisdiction so as to award damages for an act which was innocent, justifiable, excusable — call it what you will — in the place in which it was committed.
[8] *The Liverpool, Brazil, & River Plate Steam Navigation Co. Ltd.* v. *Henry Benham et al.* (1868), L.R. 2 P.C. 193.

in damages to the plaintiff; under English law, as it then stood, no action could be brought against them since, having been obliged by law to relinquish control, they could no longer be held responsible for the negligent manner in which the ship had been handled. The court, exercising a protective restraint quite inconsistent with its practice in other types of action,[9] held nevertheless (*per* Selwyn L.J.) that:

> It is, in their Lordships' opinion, alike contrary to principle and to authority to hold, that an English Court of Justice will enforce a Foreign Municipal law, will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed.[10]

The moral necessity of such a rule may well be questioned, but undoubtedly it is the law and has been (and must be) accepted as such. Indeed, it might be said in reply to an objection by the plaintiff whose action is, for that reason, not entertained, that, whereas a defendant must answer in whatever court the plaintiff chooses to sue him, he, the plaintiff, is not denied all recourse whatever since it is still open to him to sue alternatively in the place where the alleged wrong was committed. In any event, it must be noted, as in *Mostyn* v. *Fabrigas*,[11] that yet again there was no occasion for the court to rule upon the question of what law should be applied to the ascertainment of liability, as, of course, it would have been obliged to do if in the circumstances of the case as presented it had not been prevented by a rule of jurisdiction from entertaining the action. In *The Halley* the court simply refused to hear the action since the operation of a local conflict of jurisdiction rule denied it the competence to do so.

Against this background arose, little more than a year later, the case of *Phillips* v. *Eyre*.[12] In that case an action was brought in England against the sometime Governor of Jamaica for an allegedly false imprisonment of the plaintiff in Jamaica. In defence, the Governor pleaded that although the detention might have been unlawful in Jamaica at the time it was ordered, never-

[9] Cf. Cheshire, *op. cit.*, at p. 373: "But it is pertinent to ask why a tenderness, which is withheld in other branches of the law, should be shown so generously to the defendant in a case of tort. It is, no doubt, prejudicial to an Englishman, who has made and lost a bet in Monte Carlo, that he should be liable for the amount due if sued in England. Yet his liability is clear. An obligation arises from contract as well as from tort, and it is well established that a foreign contract is enforceable in England, notwithstandingthat it is not actionable by English municipal law." Citing *In re Bonacina*, [1912] 2 Ch. 394.

[10] At p. 204.

[11] (1774), 1 Cowp. 161.

[12] (1869), L.R. 4 Q.B. 225; aff. (1870), L.R. 6 Q.B. 1.

theless, before the action was brought, the local legislature had passed a retroactive Act of Indemnity which relieved the governing authorities from any liability for the commission of wrongful acts during the course of the rebellion out of which the incident arose. The court, having to determine its competence to hear the action before considering whether or not any law, local or foreign, should be applied to ascertain liability, recited, through the judgment of Willes J., the rules which earlier and unquestioned authorities indicated as applicable to the issue in question, that is, the issue of jurisdiction. Let us, then, consider carefully the words used:

> 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.[13]

This, it is clear, is a statement of the rule laid down by Selwyn L.J. in *The Halley*[14] — a rule, as we have seen, that goes exclusively to the competence of a particular court to hear a particular cause of action: if it would not, as a factual situation occurring in England, have been actionable in England, then no action can be entertained by an English court in respect of it, merely because the accident occurred in a foreign country under the laws of which a right of action would have been given to the plaintiff.

> Secondly [continued Willes J.] the act must not have been justifiable by the law of the place where it was done.

This, again, is a statement of the other English choice of jurisdiction rule which had, with as much clarity as fairness, been expressed by Lord Mansfield in *Mostyn* v. *Fabrigas*,[15] that is to say, if the act could only, under the law of the place where it was done, be characterized as justifiable (or innocent, or valid, or unquestionable, to adopt some of the later expressions) then there again the English court must decline to entertain the action.

Applying these words to the facts as presented to the court in *Phillips* v. *Eyre*, it is plain that the plaintiff could not satisfy the two rules which the authorities declared to be requisite "in order [in Mr. Justice Willes' words] to *found* a suit in England".[16] Regardless, that is, of what the result might have been

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[13] At p. 28.
[14] (1868), L.R. 2 P.C. 193.
[15] (1774), 1 Cowp. 161.
[16] Emphasis mine.

if the rules *had* been satisfied and the court enabled thereby to entertain the action (the only stage at which a choice of law rule could become relevant) this plaintiff, on these facts, could not invoke the assistance of an English court since the act was, according to the law of the place where it was committed, clearly justifiable. Many times since, the words of Willes J. have been cited and examined, sometimes with approval and sometimes with disapproval (*e.g.*, for the judge's failure to use the same word in both branches of the rule) but when, as was the case, he expressed in the exact terms of previous authority the conditions upon which alone the jurisdiction of an English court could be founded, it is difficult to see how issue can be taken with him for having failed to express himself differently. If, as had not occurred up to that time, the court had been faced with a claim that satisfied the two conditions — *i.e.*, that it would have been actionable in England if it had been committed there, and that it was, according to the law of the place of wrong, unjustifiable, or wrongful, or punishable, or otherwise not innocent — then, and then alone, would it have been necessary for the court to proceed to the consequent stage of formulating the English rule for naming that law which should be applied to the question of the existence and extent of liability. Such a rule being unnecessary in *Phillips* v. *Eyre* itself, Willes J. declined to formulate its terms, but he did, however, indicate what he thought the rule should be if, in the future, the need for formulation should arise. At page 28 he said:

> This objection [that the Jamaican statute cannot be given extra-territorial effect] is founded upon a misconception of the true character of a civil or legal obligation and the corresponding right of action. The obligation is the principal to which a right of action in whatever court is only an accessory, and such accessory, according to the maxim of law, follows the principal, and must stand or fall therewith . . . 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.

Presumably, then, if the court had found, by the application of its choice of jurisdiction principle, that the action in *Phillips* v. *Eyre* was maintainable before an English tribunal, Willes J. would have had no hesitation in applying the law of Jamaica to the determination of whether or not that law would allow the plaintiff damages for the wrong of which he complained. To interpret the clear words of this choice of jurisdiction rule as meaning that, given competence, the court must apply the law of England to the ascertainment of liability is, it is submitted, to strain the language beyond all reasonable limits and to impute

to Willes J. a rule which it seems clear he never intended to express.

And so it is (with certain very notable exceptions) with all the subsequent cases, both in England and Canada. Never in the majority of those cases has it been necessary to go beyond the question of jurisdiction, and yet we find writers consistently speaking of the *Phillips* v. *Eyre* formula as a choice of law rule pointing to the application of the *lex fori*,[17] and basing that conclusion upon cases in which choice of law was never at any time in issue. Those cases can, it is submitted, be conveniently divided between the *Mostyn* v. *Fabrigas* branch (that is, justifiable by the *lex loci delicti*) and *The Halley* branch (that is, not actionable in the forum) of Mr. Justice Willes' formula. In respect of the first, the following cases may be cited.

In *The Mary Moxham*[18] the owners of a ship were sued in England for damage occasioned to a pier in a Spanish port through negligent navigation by the shipowners' servants. In Spain no liability, criminal or civil, would attach to the owners in such circumstances but only to the master and mariners themselves, and the English court, rightly holding that the act was justifiable by the law of the place where it was committed (so far as the named defendants were concerned), declined to entertain the plaintiff's suit. Nowhere in the judgment is there a suggestion that if the act had not, in one way or another, been justifiable by the *lex loci delicti*, the court would have applied English rather than Spanish law to the determination of the defendants' liability; no rule regarding choice of law was stated since the need for applying one never arose.

Similarly, in *Carr* v. *Fracis Times & Co.*,[19] an action for allegedly wrongful seizure of goods on board a ship in Muscat, the defendant was able to deny the competence of the English court to hear the action since he succeeded in proving that, according to the law of the place of wrong, the act was, in the circumstances, justifiable.

More recently the same result was reached by the Privy Council in the much-discussed cases of *Walpole* v. *Canadian Northern Railway*[20] and *McMillan* v. *Canadian Northern Railway*,[21] in both of which actions were brought by employees in Saskatchewan courts for injuries sustained in the course of employ-

[17] Cf. footnote 3 *supra*.
[18] (1876), 1 P.D. 107.
[19] [1902] A.C. 176.
[20] [1923] A.C. 113.
[21] [1923] A.C. 120.

ment by the defendant company in Ontario and British Columbia respectively. Putting aside all discussion of the propriety of saying that an injury is "justifiable" by reason of its being actionable in neither the civil nor criminal courts,[22] the fact remains that in both cases the courts were concerned with their competence to hear the plaintiffs' actions and, deciding against such competence (by reason of the acts being justifiable by the *lex loci delicti*), they had no alternative but to dismiss them. As in *The Mary Moxham* and *Carr* v. *Fracis Times & Co.*,[23] no indication was given by the court of the rule for choice of law it would have applied if, in fact, the choice of jurisdiction rule of *Phillips* v. *Eyre* had been satisfied. In all these cases the court, in declining jurisdiction, was simply giving recognition to the just and reasonable English rule for choice of jurisdiction that if no liability of any kind attaches to the defendant in the place of wrong, no English court is justified in allowing its process to be used for the recovery of damages for the act in question.

Coming to the other branch of the *Phillips* v. *Eyre* rule — that the act must be one that would be actionable if it had occurred in England — the case of *O'Connor* v. *Wray* in the Supreme Court of Canada is a useful illustration.[24] In this connection I can do no better than quote the admirable summary of the case which Mr. Heighington set out in his earlier treatment of the subject:[25]

> In that case, the owner of the motor car lived in Quebec and lent his car to another resident of Quebec for use in Ontario. Due to negligent driving, an accident happened in Ontario, and residents of Ontario were injured while walking on a highway in Ontario. The Supreme Court of Canada held that the owner was not liable. There was in existence an Ontario statute making the owner liable for damages caused by the negligence of the person in possession of the car with the owner's consent, but the court held that no Quebec statute imposed any liability for damages on the owner. Under Quebec law, the owner was only liable where he, himself, was at fault, or where there was negligence for which he was responsible on ordinary agency principles. In other words the present action was not maintainable under the *lex fori*.

Thus, again, the court had no occasion to consider which law — that of Ontario (*lex loci delicti*) or that of Quebec (*lex fori*) — it would have referred to if it had found, on applying the *Phillips*

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[22] As to which see Hancock, Torts in the Conflict of Laws, at p. 20; Cheshire, *op. cit.*, at p. 382.

[23] *Supra.*

[24] [1930] S.C.R. 231; [1930] 2 D.L.R. 899.

[25] A. C. Heighington: Conflict of Laws in Automobile Negligence Cases (1936), 14 Can. Bar Rev. 389, at p. 398.

v. *Eyre* formula, that it had jurisdiction to hear the action. It is difficult to see, therefore, as it is difficult to see from the cases already noted, how an alleged rule for choice of law pointing to the application of the *lex fori* can be derived from a consideration of the Supreme Court's decision. Indeed, as Mr. Heighington himself subsequently pointed out:

> There is no direct finding that the Ontario Statute has no effect in considering the existence of a right of action in the country of happening, and it would seem that it need not have been considered. . . . The finding that no action would lie in Quebec [the forum] sufficiently disposed of the case.[26]

In other words, the court in that case was not called upon to determine whether the Ontario statute imposing liability or the Quebec statute denying liability would be, or on English choice of law rules should be, applied; the court, on the reasonable and authoritative *Phillips* v. *Eyre* formula, was without competence to carry the case that far.

Up to this point, therefore, we would be entitled to say that, given jurdisiction, no clear statement has been made in the cases on the vexed yet all-important question of what law should determine liability for a tort committed abroad; all the cases proceeded only to the stage of denying jurisdiction and leaving the plaintiff to seek relief in some other court if, in fact, such relief could be had.

In 1897, however, in the famous case of *Machado* v. *Fontes*,[27] the problem of choice of law was squarely raised: that is to say, the court, under the *Phillips* v. *Eyre* formula, *had* jurisdiction to adjudicate upon the defendant's conduct (since the alleged wrong was both actionable in England and unjustifiable, in a criminal though not civil sense, by the law of the place in which it was committed),[28] and the problem remained, therefore, of choosing which law should be applied in determining the defendant's liability. Yet on examining the judgments of Lopes and Rigby L.JJ. we see the major portions confined to settling the problem of jurisdiction (with the result of which there can, it is submitted, be no quarrel) and the choice of law problem being resolved on the curious reasoning that from satisfaction of two separate and distinct choice of jurisdiction rules follows, as of

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[26] At p. 400.

[27] [1897] 2 Q.B. 231 (C.A.).

[28] The defendant there was charged in a civil action in England with having published a libel of the plaintiff in Brazil, by the law of which the defendant would be exposed to penal liability at the suit of the state but to no civil liability at the suit of the plaintiff.

logical necessity, a single choice of law rule in favour of the *lex fori*. In the words of Lopes L.J.: [29]

> The act was committed abroad, and was actionable here, and not justifiable by the law of the place where it was committed. Both those conditions are complied with; and, therefore, the publication in Brazil is *actionable* here.[30]

With this, of course, we can agree; but it is difficult to see how, having established the competence of the English court by satisfying the cited authorities of *Phillips* v. *Eyre* and *The Mary Moxham*,[31] Lord Justice Lopes could go on to say immediately thereafter:

> It then follows, directly the right of action is established in this country, that the ordinary incidents of that action and the appropriate remedies ensue. Therefore, in this case, in my opinion, damages would flow from the wrong committed just as they would in any action brought in respect of a libel published in this country.[32]

To see, however, that the clear and necessary distinction between rules for choice of jurisdiction and rules for choice of law was overlooked in that case, we need only refer to the last paragraph of Lord Justice Lopes' judgment where, in answer to the suggestion that, assuming competence in the English courts, the nature and extent of liability should be determined by Brazilian law, the possibility was dismissed with a curt:

> If our view is correct, it seems to me that that would be a great waste of time and money, because, *having regard to the authorities I have mentioned* [i.e., *Phillips* v. *Eyre* and *The Mary Moxham*, both of which clearly related to jurisdiction and not to choice of law once jurisdiction had been established] this plea is absolutely bad and ought be struck to out.[33]

In the result, therefore, we have the first occasion for formulation of an English choice of law rule being utilized to give the

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[29] At p. 234.

[30] Emphasis mine.

[31] *Supra*.

[32] Cf. Hancock, *op. cit.*, at p. 121, where he points out that so far, in any event, as the measure of damages was concerned, the court in England had "no alternative but to follow the law of the forum in computing damages, since the law of the place of wrong gave no civil remedy at all".

[33] Emphasis mine. To the same effect is Rigby L.J. (at p. 235): after citing the same two authorities, he arrives at the reasonable conclusion that

> "We start, then, from this: that the act in question is prima facie actionable here, and the only thing we have to do is to see whether there is any peremptory bar to our jurisdiction arising from the fact that the act we are dealing with is authorized, or innocent or excusable, in the country where it was committed."

It is not, though, exactly clear how, as a matter of logical necessity, we are carried from that choice of jurisdiction rule to the choice of law rule which follows immediately thereafter:

> ". . . If we cannot see that [peremptory bar to our jurisdiction] we must act according to our own rules in the damages (if any) which we may choose to give."

plaintiff a remedy for an act, although wrongful, for which the defendant would have suffered no civil liability whatever in the place of wrong — a result which offends our most ordinary conceptions of justice and which gives to a plaintiff the power to lie in wait and attack a defendant, whenever he happens to come within the jurisdiction or acquire assets there, for an act for which, at the time and in the place where it was done, he would be, so far as that plaintiff was concerned, entirely blameless. It is submitted, however, that the only reasonable reaction to the decision is not to attempt to square its reasoning with that of the court in *Phillips* v. *Eyre*,[34] but rather to concede that, so far as jurisdiction is concerned, it shows a perfectly proper application of the *Phillips* v. *Eyre* formula, but that, so far as choice of law is concerned, the case, being the first in which the necessity for such a rule arose, is clearly opposed to both principle and justice and need not, therefore, be followed by the higher courts.

Since the decision in *Machado* v. *Fontes*, four cases have come before the courts in which, the jurisdiction being established, the need arose to apply the English choice of law rule there assumed. In two of them — *Naftalin* v. *L. M. S.*[35] and *Lieff* v. *Palmer*[36] — the courts refused to follow the *Machado* v. *Fontes* choice of law rule. In *Lieff* v. *Palmer*, an Ontario guest, being driven by an Ontario host, was injured in an accident which also took place in Ontario. Following the precedent suggested to him by *Machado* v. *Fontes*, the guest plaintiff, who had no right of action by the *lex loci delicti*,[37] sued the host in Quebec and con-

Certainly, it is submitted, there is nothing in the language of the judges in *Phillips* v. *Eyre* or *The Mary Moxham* to indicate that such a rule follows from the accepted formula in respect of jurisdiction; indeed, there was no prior authority whatever to indicate what choice of law rule an English court was bound to adopt. It is, with respect, most regrettable that of the two alternatives available to the Court of Appeal in this case it should have chosen the one least suitable to either necessity or justice and the one which has been rejected by the legal systems of the United States and continental Europe.

[34] Cf. Cheshire, *op. cit.*, at p. 378, where he says: "*Machado* v. *Fontes* has been commended, reprobated, reconciled with doctrine, explained, doubted, followed by some Courts, repudiated by others". It is submitted that there is no possibility of "explaining" it or "reconciling it with doctrine" since, at the time of its decision, such explanation or reconciliation could only be with an unrelated principle concerned with choice of jurisdiction, not choice of law, and for which, as noted, no earlier authority whatever existed.

[35] [1933] Sess. Cas. 259. See too the recent Scottish case of *McElroy* v. *McAllister*, [1949] Sess. Cas.; [1949] Scot. L. T. 139 (where the *Naftalin* case was applied) and a note on it by J. H. C. Morris in (1949), 12 Mod. L. Rev. 248.

[36] (1937), 63 Que. K.B. 278.

[37] Ontario Highway Traffic Act, R.S.O., 1937, c. 288, s. 47(2): "Notwithstanding the provisions of subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, shall not be liable for any loss or damage resulting from

tended that, the *Phillips* v. *Eyre* formula having been satisfied (actionable in Quebec and punishable, though not actionable, in Ontario), the Quebec court was therefore obliged to give him judgment for a wrong for which he, as against this defendant, would have no right of action in the place of wrong. The court, admitting its jurisdiction to hear the case (by reason of a provision of the Quebec Civil Code, though, even on the *Phillips* v. *Eyre* formula, as interpreted in the jurisdictional portion of *Machado* v. *Fontes*, as it would have been obliged to do under the English choice of jurisdiction rule), refused nevertheless to give judgment for the plaintiff.[38]

In the two other cases (both Canadian) in which the conditions of jurisdiction were satisfied the courts, inferentially in one and specifically in the other, adopted and enforced the choice of law rule laid down in *Machado* v. *Fontes*. In neither, however, was any attempt made to point out that the *Phillips* v. *Eyre* formula and the *Machado* v. *Fontes* direction were dealing with two entirely different problems. It is submitted that if such a distinction had been made the courts might well have adopted the *Phillips* v. *Eyre* formula (as would have been proper) to determine their competence to hear the plaintiff's claim, and

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bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from such motor vehicle."

[38] The basic reasoning of the Quebec Court of Appeal is so admirably expressed in the judgment of Rivard J. (at p. 285) that it would seem to justify quotation *in extenso:*

"Il est, en effet, universellement reconnu que le caractère délictuel d'un fait doit être déterminé par la *lex loci delicti commissi*; car il appartient à chaque Etat de régler ce qui, dans les limites de son territoire, constitue une violation de l'ordre public. Pour découvrir si un acte est licite ou illicite, c'est donc à la loi territoriale qu'il faut avoir recours; et c'est justement que la demanderesse en appelle à la loi d'Ontario pour qualifier l'acte par lequel les défendeurs auraient occasionné le dommage. Mais elle voudrait ensuite que la responsabilité civile découlant de cet acte soit réglée, non plus par la *lex loci*, mais par la *lex fori*, c'est-à-dire par la loi du pays, où, par une sorte de subterfuge, elle a réussi à amener les défendeurs en justice. Nous ne pouvons la suivre jusque-là.

"Des juristes de la *common law* paraissent, il est vrai, favorables à cette théorie de l'appellante [citing Dicey], et des tribunaux de droit anglais l'ont appliquée [citing Wharton], avec certain accommodements. Elle n'est pas moins contraire à la doctrine la plus généralement admise. Dans de certaines conditions exceptionnelles, la question donne lieu à des distinctions sur lesquelles les jurisconsultes peuvent encore disputer; mais, dans le développement de la jurisprudence le plus logique et le plus conforme aux principes de notre droit, la règle générale est qu'en matière de délit ou de quasi-délit, la loi compétente est celle du lieu où l'acte a été commis, non seulement pour la qualification de cet acte, mais aussi pour la détermination de la responsabilité civile qui en découle [citing Bard and Laurent]."

See Falconbridge, *op. cit.*, at p. 687; (1939), 17 Can. Bar Rev. 546, at p. 548, for examination of the effect of *Canadian National Steamships Co.* v. *Watson*, [1939] S.C.R. 11, [1939] 1 D.L.R. 273, in holding that Quebec courts, like those of the other Canadian provinces, are bound by the English conflicts rule laid down in *Phillips* v. *Eyre*.

have rejected the *Machado* v. *Fontes* direction (as would have been desirable) in determining the defendants' liability.

In *Williams* v. *Tang and Mitchell*[39] an action was brought in British Columbia by a guest passenger against a host driver, both residents of British Columbia (in which province host drivers were liable in ordinary negligence for injuries sustained by guests) in respect of an accident occuring in the State of Washington (by the laws of which hosts were liable only in the event of gross or wanton negligence). The court, finding that the act was both wrongful by the *lex loci delicti* (clearly gross negligence under the law of Washington) and actionable, *a fortiori,* in British Columbia, held, without any direct reference to a rule for choice of law, that the defendants were liable. The case, therefore, is of little assistance as a precedent for the situation where, assuming jurisdiction, the defendant would be exonerated by the *lex loci delicti* but liable by the *lex fori.*[40]

In *McLean* v. *Pettigrew,*[41] however, we are given a most striking illustration of the injustice that can result from a confusion of the *Phillips* v. *Eyre* and *Machado* v. *Fontes* formulae. In that case a guest passenger brought action in Quebec against a host driver, both residents of Quebec, in respect of an accident which had occurred on an Ontario highway (the same situation as existed in *Lieff* v. *Palmer,* save that the parties in this case were residents of the Quebec forum). The court, as in the earlier case, decided in favour of its competence by virtue of the *Phillips* v. *Eyre* formula (as applied in *Machado* v. *Fontes*), yet even here it would seem to have gone further than the authorities warranted since, conceding that the cause was actionable in Quebec, it was extremely doubtful whether the act was not justifiable in Ontario. Clearly the Ontario Highway Traffic Act negatived any civil liability,[42] but, going even further than *Machado* v. *Fontes,* the possible criminal liability (the only other ground of delictual fault) had been denied by an Ontario magistrates court's acquittal of the defendant on a charge of careless driving under the provisions of the Ontario statute. Nevertheless, authority was cited[43] to show that the Quebec

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[39] [1933] 2 W.W.R. 113.

[40] Indeed, the main arguments were directed, first, to the competence of the British Columbia court (which objections were properly overruled) and, secondly, assuming competence, to the defences of joint adventure and contributory negligence, both of which were on the facts also overruled.

[41] [1945] S.C.R. 62.

[42] See footnote 37 *supra.*

[43] *La Foncière Compagnie d'Assurance de France* v. *Perras,* [1943] S.C.R. 165.

court was justified in ignoring the acquittal and in holding, as it proceeded to do, that the defendant's conduct *was* a violation of the careless driving provisions of the Ontario statute, and thus not justifiable by the *lex loci delicti*. In other words, both branches of the rule in *Phillips* v. *Eyre* were satisfied and the court, therefore, could assume jurisdiction.

Accepting this rather surprising accommodation of the plaintiff's case, it was not necessary, it is submitted, for the court to have worked upon the defendant the further injustice of testing his liability by the law of the forum, under which the plaintiff could recover damages, rather than by the law of the place of wrong, under which the defendant was subject to no civil (or, for that matter, criminal) liability whatever. If excuse were wanted for such a course, reference could easily have been made to the choice of law rule laid down in *Machado* v. *Fontes*, but this, as examination will show, was not done. On the contrary, *Machado* v. *Fontes* was cited for the jurisdictional point only, and the choice of law conclusion was reached, without any citation of authority, in the last line and a half of the sixteen-page leading judgment of Taschereau J. where, after reiterating that

> . . . the respondent has satisfied the two conditions necessary to engage the responsibility of the appellant,

he concluded, quite simply, that

> . . . the appellant cannot be exonerated and the appeal must be dismissed with costs.[44]

This, therefore, must mean that for the Supreme Court of Canada the words "no action can be founded unless" mean the same thing as "if the action can be founded, then the *lex fori* must be applied to ascertain liability". It is submitted that such synonymity is neither necessary, nor, by any manner of interpretation, justified.[45]

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[44] Translation my own.

[45] Falconbridge, in (1945), 23 Can. Bar Rev. 315, in Essays on the Conflict of Laws at p. 701, and in a review in (1949), 27 Can. Bar Rev. at p. 376, suggests that the justice of the *McLean* v. *Pettigrew* decision may be maintained on the basis that, all parties being residents of Quebec, it is not unreasonable for them to be held subject to the provisions of Quebec law, regardless of where the accident took place. It is, however, submitted with the greatest respect that such an explanation is not entirely satisfactory. If it is suggested that such a condition should be accepted as the governing choice of law principle, it not only leaves unanswered the question of what law is to be applied if the parties reside in different jurisdictions, but also opens the door to the application of yet a third law, as would be the case if the parties resided in Province *X* and brought action in Province *Y* in respect of an accident which occurred in Province *Z*.

If, on the other hand, it is proposed as an exception to the general rule that the rights of the parties are, in cases of tort, to be determined by the

To sum up the burden of the argument already set out:

(1) the formula in *Phillips* v. *Eyre* cannot, by facts, language or intendment, be interpreted as a choice of law rule; it relates only to determination of an English or Canadian court's jurisdiction to hear a claim for a tort committed abroad, and, moreover, can readily be accepted as such;

(2) that most of the leading cases cited in support of its laying down a choice of law rule were, like *Phillips* v. *Eyre* itself, carried no further than the issue of jurisdiction and cannot, therefore, be cited in support of an assumed choice of law rule for cases where jurisdiction is in fact established;

(3) that *Machado* v. *Fontes* and *McLean* v. *Pettigrew* are the only leading cases where the necessity arose for applying a choice of law rule, and that the courts, in choosing the application of the *lex fori* rather than the *lex loci delicti*, did so without reason or authority;

(4) that it is unnecessary to square the decisions in those two cases with the formula in *Phillips* v. *Eyre* since, so far as *Phillips* v. *Eyre* was relevant, no objection can be taken to them; so far, however, as they relate to principles for the choice of law, *Phillips* v. *Eyre* is immaterial since that case deals with an entirely different issue;

(5) that, having regard to the principle of uniformity and the requirements of justice, the choice of law rule implied in the decisions of *Machado* v. *Fontes* and *McLean* v. *Pettigrew* is indefensible;[46]

(6) that it is still open to superior appellate courts such as the House of Lords, the Privy Council, the Supreme Court of Canada and the English Court of Appeal to formulate an English choice of law rule pointing to the *lex loci delicti* since, whereas the judgments of one English and one Canadian court have de-

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lex loci delicti, then liability will rest, not upon legal principle, but upon the fortuitous circumstance of the residence of the guests a host driver may carry in his car. It would, it is submitted, be highly undesirable if a host, sued by two guest passengers residing in different provinces, should be mulcted in damages in one case and completely exonerated in the other merely because the justice of an individual (and otherwise doubtful) decision can be defended by acknowledging an unnecessary exception to the general rule. It might, of course, be said (as, indeed, does Dr. Falconbridge) that the presence of those Quebec residents in Ontario was purely temporary, but whereas the residence of the host is not so easily altered, the guest can always, if doubtful about his rights under foreign motor laws, decline to accept the offer of gratuitous transportation within the territory to which those laws apply; if he does not decline, then he must take those laws as he finds them.

[46] Cf. Falconbridge, Essays, at p. 702, where the learned author concludes that although the *lex fori* choice of law principle has the advantage of simplicity of application, its value, from the point of view of justice, may well be doubted in all circumstances.

clared in favour of the *lex fori*,[47] the judgments of the Scottish Court of Sessions and the Quebec Court of Appeal have declared in favour of the alternative rule,[48] and no higher authority exists in which the problem has been clearly and decisively settled.

Coming, then, to a consideration of the manner in which concrete problems of automobiles in the conflict of laws are affected by the Canadian and English law on the subject, it will be seen that in many cases two different answers may be given to the same question, depending upon whether we accept the decision in *Machado* v. *Fontes* as laying down an obligatory choice of law rule, or whether, as is submitted, the question should be considered as still open and the way clear for adopting a choice of law rule in favour of the *lex loci delicti*.

It should be noted in the first place that the problem, so far as gratuitous passengers are concerned, would not seem likely to arise in Ontario, since, in view of the *Phillips* v. *Eyre* formula (with which no issue is taken), it is doubtful whether the courts here are competent to entertain actions by guest passengers against host drivers, regardless of where the accidents may have taken place. If, for instance, the factual situation were that set out in paragraph (1) of the Agenda Notice [Owner-driver and gratuitous passenger, both domiciled in Ontario (where passengers cannot recover) have accident in New York (where passengers may recover)], the claim would not come within the first branch of the formula since clearly, if the accident had occurred in Ontario, the guest passenger would have no right of action against the host driver and the action would therefore have to be dismissed before the need arose of applying a choice of law principle. Similarly, if the factual situation were reversed in all respects save the locality of the forum (*i.e.*, New York residents injured while driving in Ontario and action brought in Ontario) the same result would follow, not only because the court would disclaim jurisdiction on the *Phillips* v. *Eyre* formula, but also because, the *lex fori* and the *lex loci delicti* being the same, it would be immaterial, so far as the result were concerned, whether the *Machado* v. *Fontes* rule or the *lex loci delicti* rule for choice of law were applied.

The issue is, however, most important if action is brought in one of those provinces — for example, Quebec — where there are no legislative provisions on host-guest relationships and the

[47] *Machado* v. *Fontes* (*supra*), and *McLean* v. *Pettigrew* (*supra*).

[48] *Naftalin* v. *L.M.S.*, [1933] Sess. Cas. 259; *Lieff* v. *Palmer* (1937), 63 Que. K.B. 278; *McElroy* v. *McAllister*, [1949] Sess. Cas.; [1949] Scot. L. T. 139.

law of the place where the accident occurs contains provisions similar to those of our Highway Traffic Act, section 47(2),[49] or by which recovery is allowed only in the event of gross or wanton negligence on the part of the host driver.[50] In such a case the court, applying the *Phillips* v. *Eyre* formula, might well find, as it did in *McLean* v. *Pettigrew*, that the Quebec court had jurisdiction, and then, by applying the *lex fori* rather than the *lex loci delicti*, hold that although the defendant was not liable in civil damages by the law of the place of wrong (or, in any event, guilty of a degree of fault sufficient to warrant a finding of actionable fault), the plaintiff should nevertheless be able to recover heavy damages against him.

That this situation has most practical consequences for Ontario residents is shown by the statement of facts in *Monast* v. *Provincial Insurance Co. Ltd. of England:*[51]

> At about 1 o'clock in the morning of the 25th May, 1936, an automobile accident occurred in the vicinity of Massena in New York State. One Ranger was driving the car which was involved in the accident in which the plaintiff, Miss Monast, a passenger in Ranger's car, was injured. Ranger was insured under a policy issued by the defendant company. The plaintiff being a passenger in Ranger's car apparently assumed that she could not sue in Ontario and sued in the State of New York where the accident happened. Ranger was served in the State of New York where the accident happened. Plaintiff recovered a default judgment of $2,913.75 damages. Plaintiff then filed the judgment here and sued on the judgment in Ontario and obtained a judgment on the specially endorsed writ by default. Plaintiff has not been paid her judgment by Ranger, whom she says is not capable of paying it, and therefore she has sued the company by which Ranger is insured.

This case is interesting for three reasons. In the first place, it shows the method by which a plaintiff, who has no right of action in Ontario against his host driver can, by taking advantage of the combined rules set out in *Phillips* v. *Eyre* and *Machado* v. *Fontes*, obtain relief from a Quebec court and then, through the simple process of obtaining an Ontario judgment by the issue of a specially endorsed writ, enforce that judgment against the defendant. If, of course, he should happen to get a Quebec court such as that which decided *Lieff* v. *Palmer*[52] (which, in effect, would apply a choice of law rule in favour of the *lex*

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[49] R.S.O., 1937, *c.* 288; quoted in footnote 37 *supra*.
[50] Cf. the sample clause to this effect in Heighington, *op. cit.*, at p. 397.
[51] [1939] O.W.N. 113.
[52] (1937), 63 Que. K.B. 278. It may, however, be the regrettable fact that the Quebec courts are no longer free, in view of the combined effect of *Canadian National Steamships Co.* v. *Watson*, [1939] S.C.R. 11, and *McLean* v. *Pettigrew*, to follow *Lieff* v. *Palmer*.

loci delicti), he could not recover in that court, despite its competence to hear the action in the first instance. It would be wise, therefore, for a plaintiff in such circumstances to choose his forum with the greatest of care.[53]

In the second place, the case is interesting through its implication of a problem that has frequently arisen in the United States but never before, so far as I have been able to discover, in Canada: that is to say, the propriety of a court of the forum allowing direct recourse against the defendant's insurer by virtue of local legislation (which may not exist in the place of wrong) allowing such direct action. For insurance companies, the judgment in the *Monast* case is heartening since there advantage was not allowed to be taken of the Ontario statute[54] by reason of the claim against the company being one, not for damages, but, through the judgment, for debt. The problem is, however, material in those cases in which a local insurance company is sued under similar legislation in another province for an accident that took place here. In such a case it would, it is submitted, be open to the company to contend that the liability of the insured is not to be tested by the law of the forum (as suggested by *McLean* v. *Pettigrew*) but rather by the law of the place of wrong under which (if that place were Ontario) no recovery could be had against the insured.

In this connection reference might be made to two recent American cases which involved this point (though not in respect of gratuitous passengers) and which might well become most material for an Ontario court. In *Burkett* v. *Globe Indemnity Co.*,[55] an interesting multiple-contact case (to use Hancock's descriptive phrase), *A*, having had his car repaired by *B* in Alabama — where direct action was allowed against *B's* insurer — drove into Mississippi and, in consequence of the repairs having been done negligently, injured *C*. *C* sued *B's* insurers in Mississippi (where no direct right was allowed against insurers) and it was held he was entitled to recover on the ground that the Alabama statute, being substantive rather than procedural in nature, was a part of the *lex loci delicti* and thus, under the American choice of law rule, applicable by the forum in Mississippi. Very shortly afterwards, however, the decision was overruled,

[53] Cf. the Ontario Reciprocal Enforcement of Judgments Act, R.S.O., 1937, c. 124, providing for filing in Ontario of judgments recovered in other Canadian provinces. It is not clear by what authority the court in the *Monast* case allowed filing of the New York judgment, since the Act refers only to judgments of the courts of other Canadian provinces.

[54] Ontario Insurance Act, R.S.O., 1937, c. 256, s. 205(1).

[55] (1938), 182 Miss. 423; 181 So. 316.

with a strong dissent by the Chief Justice of Mississippi, in *McArthur* v. *Maryland Casualty Co.*[56] on the ground that the Alabama statute was purely precedural and thus not a relevant element in the Mississippi court's consideration of the case. This problem might well have to be faced by a Canadian court if action were brought against an insurer, in a province that had no provision similar to our section 205(1), in respect of an accident occurring in Ontario.[57]

Lastly, the *Monast* case is interesting as indicating the manner in which the conflicts problem may affect the unsatisfied judgments provisions of the Ontario Highway Traffic Act[58] and the right of holders of foreign judgments to claim over against the fund established under that statute. As already noted, the

> Plaintiff has not been paid her judgment by Ranger, whom she says is not capable of paying it, and therefore she has sued the company by which Ranger is insured.

If, therefore, the plaintiff in that case could not, by filing an extra-provincial judgment in the Ontario courts, obtain the advantage of an Ontario legislative provision allowing recourse against an insurance company (since that claim was necessarily one in respect of debt and not of tort), it would seem, on the authority of *Baker* v. *Gray Coach Lines, Ltd.*,[59] that the same prohibition would obtain for a claim by a foreign plaintiff against the unsatisfied judgment fund. If, of course, the accident occurred in Ontario and suit were brought by a guest passenger here, the problem, as already explained, would not arise since, on the basis of *Phillips* v. *Eyre*, the action, regardless of the domicile or residence of the parties, would not be maintainable in the local courts. If, on the other hand, the action was not one involving a guest-host relationship but was, for example, by a pedestrian who had been knocked down in Ontario by a penniless foreign driver, the answer, if judgment were recovered

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[56] (1939), 184 Miss. 663; 186 So. 305; on these two Mississippi cases see Hancock, *op. cit.*, at pp. 174, 241 and 242.

[57] No attempt will be made here to examine the interesting and important significance of the substance-procedure distinction in the conflict of laws. See too, *Myers* v. *Ocean &c. Corp.* (1938), 99F. (2d) 485; and *Farrell* v. *Employer's &c. Corp.* (1933), 54 R.I. 18; 168 Atl. 911, where it was argued that in such cases the factual situation, as between the company and the plaintiff, should be characterized, not as a matter of tort, but as one of contract, with, of course, the consequent application of correspondingly different choice of law rules. See, too, *Canadian Pacific Ry.* v. *Parent*, [1917] A.C. 195, for Canadian authority on the contract-tort problem in the conflict of laws.

[58] R.S.O., 1937, c. 288, s. 93a, as enacted by 1947, c. 45, s. 16.

[59] [1949] O.W.N. 129 (C.A.).

[60] Martin Wolff: Private International Law (1945).

in New York, would probably again be in the negative since, as already noted, the filing of the judgment here would convert the claim from one for damages to one for debt and take it, therefore, beyond the language of the unsatisfied judgments legislation.

Moving, then, from the field of liability for the carriage of gratuitous passengers to that of ordinary damage caused to persons or property through the negligent operation of automobiles, we meet at the outset a number of problems of both a procedural and substantive nature which are vital for Ontario courts but for which, in many instances, there is little or no binding judicial precedent. Martin Wolff, assuming in his recent survey of English conflicts case law[60] that the *Phillips* v. *Eyre* and *Machado* v. *Fontes* combination decides in favour of the application of the *lex fori* to the fundamental issue of liability, dismisses the subsidiary problems with the terse statement that:

> It follows from this that under the English conflict rule English municipal law, and not the law of the place of the wrongful act, decides whether reparation must be made for *dommage moral* as well as material damage, whether contributory negligence merely diminishes or entirely destroys the claim, whether lost profits have to be taken into consideration, whether the causal nexus between the act and the damage is to be denied on the ground of remoteness, and the like.[61]

With respect, it is submitted that that conclusion can be justified only if one interprets the authorities as pointing to the *lex fori* for determining liability in the first instance, and that if one doubts, as has been done in this paper, that the choice of law rule is as well settled as most writers on the subject appear to believe, it may still be an open question what law applies in determining such problems as the effect of contributory negligence, the application of presumptions and the rules regarding burden of proof, the individuals who should properly be made parties to the action, the scope of causation conceptions, and the measure of damages that should be granted for conduct found by the court to be tortious.

No attempt will be made to deal with these problems in detail or to discuss the very limited jurisprudence that has been evolved in this regard by the English and Canadian courts. Reference, however, might usefully be made to a case decided in the New York courts to show how material rules such as those relating to contributory negligence and burden of proof may be in assessing the rights of the parties. In *Fitzpatrick* v. *Inter-*

[61] At p. 499.

national Railroad Co.[62] the place of wrong was Ontario, the forum was New York, and the chief defence was that of contributory negligence, which, under New York law, was a complete bar to action, but which, under Ontario law, involved only a possible reduction of damages. The problem, therefore, was as follows: was the New York court to dismiss the action on the ground that by the *lex fori* such a defence was a complete bar to action, or could it adopt the Ontario law (the *lex loci delicti*) and allow the plaintiff to sue at the risk of recovering only a portion of the total damage suffered? If the plea were determined as a mere matter of procedure, then the court would be entitled to ignore the Ontario law, but if it was held that the plea went directly to the substance of the claim, then the court, under the prevailing American choice of law principle, would adopt the Ontario law and allow the action to proceed and be decided accordingly. The court, holding the defence to be substantive in nature, adopted the Ontario rule and allowed the action to be maintained.

That, however, did not entirely dispose of the court's difficulty since it was still necessary to answer the question: How was contributory negligence to be proved — by the defendant showing that the plaintiff was negligent (as he would have had to do if the suit were before an Ontario court) or by the plaintiff showing he was not negligent (as he would have to do in a New York court if he were to show that the defence of contributory negligence could not be sustained so as effectively to bar the action)? On this question as well the court adopted the Ontario principle and directed that the burden of proof should lie, as it would in Ontario, on the defendant.[63]

Consider, then, how the case might have gone if the facts were reversed, that is, an accident in New York and action brought in Ontario. Under the *Phillips* v. *Eyre* formula (as applied in *McLean* v. *Pettigrew, supra*) the court would probably be competent to try the issue since the alleged wrong was actionable in Ontario and, though not actionable in New York,

[62] (1929), 252 N.Y. 127; 169 N.E. 112; and see Hancock's treatment of the case *op. cit.*, at p. 158.

[63] If, however, the basic rule as to whether contributory negligence is or is not a compltee bar had been the same in both Ontario and New York, it might well have been that the New York court would then have adopted its own rules on burden of proof, since these, like other rules of that nature, are fundamentally a matter of procedure. In that case, however, the basic rules were different and thus the court was obliged to adopt the Ontario rule in respect of burden of proof since New York law, where contributory negligence is a complete bar to action, understandably had no rule for the trial of a case where, as in Ontario, it was not.

at least (probably) not entirely justifiable by that law. The next thing, then, is to decide whether, contributory negligence having been proved according to the Ontario rule as to burden of proof (there being no rule on the subject in New York law) the court should apply the Ontario law and allow the plaintiff to recover part at least of his damages, or should apply the law of New York, the place of wrong, and dismiss the action. If we adopt the *Machado* v. *Fontes* rule we would have to concede a remedy to the plaintiff merely because he was astute enough to sue in an Ontario court. If, on the other hand, we refuse to accept *Machado* v. *Fontes* as laying down the authoritative English choice of law principle, and contend that the court is free to adopt the more reasonable and just alternative of applying the *lex loci delicti*, we avoid the undesirable consequence of giving the plaintiff damages for an act which, by the law of the place in which it was done, entailed no civil liability so far as that particular defendant was concerned.

And so, too, in the case of damages: are these, it must be asked, a merely procedural aspect of the matter (and thus assessable by the machinery and to the extent permitted by the *lex fori*) or are they a substantive part of the defendant's liability (and thus assessable according to the law and principles of the *lex loci delicti*)? So far as Canadian courts are concerned, the position is not clear. Against a finding by the Ontario Court of Appeal in *Story* v. *Stratford Mill Building Co.*[64] that this is a question for the *lex fori*, we must set the dictum of Duff. J. (as he then was) in *Livesley* v. *Horst*[65] that the English case of *Cope* v. *Doherty*[66] is

> . . . authority, both unmistakable in effect, and of a high order, for the proposition that the measure of damages in an action for reparation in respect of a tort in a foreign country is not a matter of procedure, but matter of the substance of liability.

The recent case of *Lister* v. *McAnulty*[67] is not especially helpful in this regard since, in respect of a special type of damage, a conflicts provision of the Quebec Civil Code pointed to the law that was to be applied, and, in respect of ordinary damages (with which alone we are concerned) the problem of choice of law rules did not arise since the *lex fori* and the *lex loci delicti* were the same.[68]

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[64] (1913), 30 O.L.R. 271.
[65] [1924] S.C.R. 605; [1925] 1 D.L.R. 159.
[66] (1858), 2 DeG. & J. 614.
[67] [1944] S.C.R. 317; [1944] 3 D.L.R. 673.
[68] On this case see Hancock's article in (1944), 22 Can. Bar Rev. 843; Falconbridge, Essays, p. 83.

Lastly, reference might be made to the interesting problem suggested by the recent case of *Non-Marine Underwriters* v. *Dusablon* in the Supreme Court of Canada.[69] That case, though primarily concerned with the right of an insurance company under Quebec law, when sued directly by the injured plaintiff, to claim the benefit of all defences it would have against the insured, is nonetheless relevant to our discussion since the defence against the insured was that, contrary to a term of the policy, the automobile was being driven at the time by a person "under the age limit fixed by law, or, in any event, under the age of 16 years". It might be, therefore, that the company only issued the policy on the understanding that it would not be liable for injuries caused by the car under the control of someone under the permissible age fixed by Quebec law, that is, 18 years.[70] Suppose that, as in this case, the insured's car was being driven in Ontario (where the permissible limit is 16 years) by a 17-year old boy, and the injured person brought action against the insurance company under the Quebec (or Ontario) statute allowing direct recourse against the insurer: could the company raise the defence of violation of a term of the policy, even though, by the law of the place where the car was being driven, the driver was not under age? If it is treated as a matter of tort, the answer should, it is submitted, be "no", but if it is based in contract it might well be argued that the company only contracted, in that instance, to cover drivers over 18 years of age, and should not be made liable under the policy by reason of the fortuitous circumstance, over which it had no control, that the car was being driven in Ontario. A similar problem would, of course, arise if it were an Ontario policy in similar terms and the company claimed, as a defence in respect of an accident within Quebec, that it was being driven by a person under age. It should, it is submitted, be governed by the same reasoning as before, that is, liability under the policy to be determined by the proper law of the contract, not by the *lex loci delicti*, with, however, this one important qualification, that it is obviously a strong policy of the *lex loci delicti* (as such provisions always are) that people under a certain age shall not drive cars on the local highways, and the mere fact that this boy was driving in that province constituted, in effect, an illegal act from which no right of indemnity should arise.[17]

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[69] [1944] 2 D.L.R. 737; (1944), 11 I.L.R. 86 (not reported in the Supreme Court reports).

[70] Quebec Motor Vehicle Act, s. 15(1).

[71] Cf. Stat. Con. 2(b), Ontario Insurance Act, R.S.O., 1937, c. 256, s. 188; and see *Wesley* v. *Toronto General Insurance Company*, [1939] O.W.N. 380;

As in so many other cases, however, it is difficult to give a final answer to problems such as those indicated in the *Dusablon*[72] case. Upon the authoritative choice of law rule for tort liability depends, of course, the answers one would give in determining the respective rights of the parties, and if, as has been suggested, the courts are free to declare themselves in favour of the *lex loci delicti* rather than, as has been assumed, the *lex fori*, a very different approach could be — and would have to be — taken to the solution of specific problems as they arise in the course of day-to-day practice.

The Artifice of the Bar

We talked of the practice of the Law. Sir William Forbes said, he thought an honest lawyer should never undertake a cause which he was satisfied was not a just one. 'Sir, (said Mr. Johnson,) a lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge. Consider, sir; what is the purpose of courts of justice? It is that every man may have his cause fairly tried, by men appointed to try causes. A lawyer is not to tell what he knows to be a lie; he is not to produce what he knows to be a false deed; but he is not to usurp the province of the judge and of the judge, and determine what shall be the effect of evidence,— what shall be the result of legal argument. As it rarely happens that a man is fit to plead his own cause, lawyers are a class of the community, who, by study and experience, have acquired the art and power of arranging evidence, and of applying to the points at issue what the law has settled. A lawyer is to do for his client all that his client might fairly do for himself, if he could. If, by a superiority of attention, of knowledge, of skill, and a better method of communication, he has the advantage of his adversary, it is an advantage to which he is entitled. There must always be some advantage, on one side or other; and it is better that advantage should be had by talents than by chance. If lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though, were it judicially examined, it might be found a very just claim.' (Samuel Johnson, from Boswell's Life of Johnson)

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6 I.L.R. 142, for the Ontario view of a defence by the company of intoxication of the insured.

[72] *Supra.*