Torts Committed Abroad

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The Scottish case of *M'Elroy* v. *M'Allister*,[1] which was decided in the Inner House of the Court of Sessions by seven judges, though in England of persuasive authority only, materially contributes to the clarification of a conflict of laws problem which, in England, Canada and the United States, has formed the subject matter of considerable controversy, *viz.* the conditions which have to be satisfied when it is intended to base an action on a tort committed abroad.

I

In English law, these conditions appear, at the first glance, well settled. Following the famous statement of Willes J. in *Phillips* v. *Eyre*,[2] which was approved by Lord Macnaghten and Lord Lindley in *Carr* v. *Fracis Times & Co.*,[3] the rule is often expressed as follows: the act complained of must be

(i) actionable according to the *lex fori*, and

(ii) not justifiable according to the *lex loci delicti*.

The meaning of the first part of the rule is hardly disputed. "Actionable according to the *lex fori*" means that, if the act complained of had been committed within the jurisdiction, an action in tort could be brought on it in the local courts. On this hypothesis, the first condition is not satisfied if, by the law of the *forum*, a technical legal defence is available against the claim, *e.g.* if the law of the *forum* admits a statutory exemption from liability[4] or by that law the remedy is compensation under the Workmen's Compensation Acts and not damages in tort. As regards the second part of the rule, two conflicting views have been expressed which may conveniently be referred to as the doctrines of *non-justifiability* and *actionability*. The sup-

[1] [1949] S.L.T. 139.
[2] (1870), 6 Q.B. 1, at pp. 28-29.
[3] [1902] A.C. 176, at pp. 182, 184.
[4] *The Halley* (1868), L.R. 2 P.C. 193.

porters of the former point out that Willes J. in *Phillips* v. *Eyre*[5] and Lord Macnaghten in *Carr* v. *Fracis Times & Co.*[6] used the term "non-justifiable" in the second part of the rule in pointed contradistinction to the term "actionable" in its first part. They further refer to the statement of Rigby L.J. in *Machado* v. *Fontes* that

> the change from 'actionable' in the first branch of the rule to 'justifiable' in the second branch of it was deliberate.[7]

According to the learned editors of the 6th edition of Dicey[8] the words "non-justifiable" "import a notion less precise than 'actionable as a tort', in the first part of the rule". The supporters of this school of thought are not agreed on the exact meaning of the phrase "non-justifiable". Some think that the act complained of satisfies this test already if, according to the standards prevailing at the place where it was done, it was a "wrong in itself",[9] *i.e.* an act which from the moral point of view was not innocent. Others do not go so far and contend that the act must at least be a legal wrong according to the *lex loci delicti*. Professor Graveson expresses this view as follows:

> This is a very wide requirement going far beyond the scope of tort, for an unjustifiable act may assume that character by reason of its tortious, criminal or other wrongful nature under a foreign law.[10]

The supporters of the doctrine of actionability reject *in limine* the notion that "non-justifiable" has a wider meaning than "actionable" in the first branch of the rule and contend that "non-justifiable" means, in fact, "actionable". The clearest statement of this view is found in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, where Brett L.J. referred to

> the well-known rule that for any tort committed in a foreign country within its own exclusive jurisdiction an action of tort cannot be maintained in this country unless the cause of action would be a cause of action in that country, and also would be a cause of action in this country. Both must combine if the tort alleged was committed within the exclusive jurisdiction of a foreign country.[11]

More recently Somervell L.J. said in *The Tolten:*

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[5] (1870), 6 Q.B. 1, at pp. 28-29.
[6] [1902] A.C. 176, at p. 182.
[7] [1897] 2 Q.B. 231, at p. 234.
[8] (6th ed., 1949), p. 801.
[8] *Per* Andrews J. in *Dupont* v. *Quebec S.S. Co.* (1897), Q.R. 11 S.C. 188, at p. 207.
[10] Conflict of Laws, p. 339.
[11] (1883), 10 Q.B.D. 521, at p. 537.

> A foreigner defendant present in this country who has committed a wrong abroad against another foreigner may be sued here, if the act complained of is a wrong by the law of both countries.[12]

In view of these and similar[13] statements from the Bench, it has been suggested[14] that it appears justified to express the two branches of the rule in co-terminous phrases without reference to non-justifiability. This "theory of concurrent actionability"[15] has now received further powerful support by the decision in *M'Elroy's* case.[16]

II

The facts of *M'Elroy* v. *M'Allister*[16] were as follows. Joseph M'Elroy, a Scotsman, was at the date of his death employed by a company carrying on business at Glasgow. On March 4th, 1946, he proceeded to England on the instructions of his employers in a motor vehicle belonging to his employers, which was driven by the defendant, a co-employee. The motor vehicle, while proceeding along the Carlisle-Kendal road, Westmorland, England, collided with a twelve-ton sheep truck owing to the negligence of the defendant and Joseph M'Elroy was killed. On May 23rd, 1947, *i.e.* more than twelve months after the death of the deceased, his widow took out a summons in the Scottish Court of Session against the defendant whereby she claimed

(i) *solatium*,
(ii) damages for loss of support by her husband, and
(iii) as the personal representative of her husband, damages, funeral and other expenses.

The first claim was based on a right admitted by Scots law but not recognized by English law. The second claim was based on a cause of action known in both countries, in the former it was admitted by common law and in England under the Fatal Accidents Acts, 1846-1908, but since the action was not brought within twelve months of the death of the deceased, as provided by section 3 of the Act of 1846, it could not be pursued in England, whereas no limitation applied in Scotland. The third claim was made under the Law Reform (Miscellaneous Provisions) Act, 1934, and the only contentious item was here the claim for dam-

[12] [1946] P. 135, at p. 165.
[13] Pollock C.B. in *Scott* v. *Lord Seymour* (1862), 1 H. & C. 219, at p. 229; Selwyn L.J. in *The Halley* (1868), L.R. 2 P.C. 193, at p. 203; Mellish L.J. in *The Mary Moxham* (1876), L.R. 1 P.D. 107, at p. 111.
[14] C. M. Schmitthoff, English Conflict of Laws (2nd ed., 1948) p. 155.
[15] (1949), 93 Sol. J. 209.
[16] [1949] S.L.T. 139.

ages which would have vested in the deceased himself had he been alive, funeral expenses and other outlays having been admitted by the defendant; the contentious item was admissible in England where the Act of 1934 had abolished the rule *actio personalis moritur cum persona,* but was not admissible in Scotland[17] where the Act of 1934 does not apply. The following table indicates the remarkable permutation of the various claims:—

Satisfying the test of the:—	*Solatium*	Loss of support	Executrix's claim
lex fori, actionable	yes	yes	no
lex loci delicti, if "non-justifiable"	no	yes	yes
if "actionable"	no	no	yes

In the Outer House, Lord Stevenson dismissed the action and his judgment was affirmed by the Court of Seven Judges consisting of the Lord President (Lord Cooper), the Lord Justice-Clerk (Lord Thomson), Lords Mackay, Russell, Keith, Carmont and Jamieson. Of the three claims, the one which caused least difficulty to the eight judges was that for *solatium;* following *Naftalin* v. *L.M.S. Ry. Co.*[18] they held unanimously that *solatium* was a substantive right distinct and separate from the widow's claim for loss of support and, as such, at no time recognized by the law of England. It was, therefore, irrelevant whether, as regards the law of the place where the wrong was committed, the doctrine of non-justifiability or actionability was accepted because according to neither could that claim be sustained. With respect to the third claim of the plaintiff, *viz.* as personal representative of the deceased, there was also little doubt. All judges, with the exception of Lord Keith who, apart from his opinion on *solatium,* gave a dissenting judgment, agreed that this claim failed because it was not actionable in the courts of the *forum.* Lord Keith based his view on Professor Cheshire's statement that

[17] As it was not for "patrimonial loss", see *General Billposting Co.* v. *Youde* (1910), 47 S.L.R. 788; *Leigh's Executrix* v. *Caledonian Ry. Co.,* [1913] S.C. 838.

[18] [1933] S.C. 259.

> a liability recognised in the place of the wrong should be enforced unless to do so would be utterly repugnant to the distinctive policy of the *forum*.[19]

However, the observations of the Vinerian Professor are not a statement of law but merely a postulate of theory as is evident from the passage in his book immediately following that quoted by Lord Keith:

> English law has not taken this line. It has indeed combined the *lex fori* and the *lex loci delicti* but in such a way that the English Court is not the mere guardian of its own public policy, but is required to test the defendant's conduct by reference to the English as well as the foreign law of tort.[19]

As an explanation of the principle underlying the English rule, Professor Cheshire's view is helpful but it is respectfully submitted that it does not bear out the proposition of law advanced by the learned judge. Lord Keith's willingness to dispense with the first branch of the rule and to admit a claim based on a tort committed abroad which is not actionable by the *lex fori*, does not afford guidance to the English courts because it is out of harmony with firmly established principle.

The decision of the Court of Session on Mrs. M'Elroy's second claim, *viz.* that based on the Fatal Accidents Acts, 1848-1908, is the most important part of the judgment. The court had here to deal with a claim which was

(i) actionable by the *lex fori*,
(ii) but could not be maintained in the courts of the *lex loci delicti*.

The plaintiff's plea-in-law was that "the said Joseph M'Elroy having been killed by the fault of the defender the pursuer as an individual is entitled to damages under the Fatal Accidents Acts, 1846-1908".[20] That plea could only be interpreted as meaning that she had suffered a wrong by the law of England and claimed damages for it. She contended, in the words of Lord Keith,[21] that

> there was a *jus actionis*, for at least a period of twelve months, in respect of the deceased's death . . . and although the right of action which brought about his death would . . . remain a wrong or an unjustifiable act.

The defence that "the action, so far as laid under the Fatal Accidents Acts, 1846-1908, not being maintainable according to

[19] Private International Law (3rd ed.), p. 371.
[20] Taken from the Closed Record which, by courtesy of the Managing Editor of the Solicitors' Journal, was made available to me.
[21] [1949] S.L.T. 139, at p. 147.

the law of England, should be dismissed",[20] was merely directed to the actionability of the wrong in England but treated as irrelevant the plaintiff's allegation that by the law of England she had suffered a wrong. In other words, the plaintiff maintained that the act complained of was "non-justifiable" by the *lex loci delicti*, and that the decisive time was the date when the act was committed because, in the words of Lord Keith,

> the fact that by lapse of time any right of action emerging from an unjustifiable act is substantially lost or becomes unenforceable, is really irrelevant.[22]

The defendant, on the other hand, contended that the claim was not actionable by the *lex loci delicti*, and that the decisive moment was the date when the action was brought. If it was sufficient that the act complained of was a "non-justifiable" wrong, the plaintiff's claim for pecuniary loss was "relevant and sufficiently averred",[23] but if that test did not apply the plaintiff's averment was "of the most meagre character" and "the main intelligible issue of foreign law was not properly raised at all".[24]

This situation made it unavoidable for the court to examine the doctrine of "non-justifiability". The judges forming the majority rejected the view that an act which was merely "non-justifiable" by the *lex loci delicti* could be the cause of action in the *forum*, and thus disposed of the plaintiff's claim for pecuniary loss under the Fatal Accidents Acts. They agreed on the negative aspect of the case, *viz.* that it was not sufficient for the act complained of to be a "non-justifiable" wrong by the *lex loci delicti* at the time when it was committed, but were not all prepared to go further and, *obiter*, to state the positive requirements which a tort committed abroad had to satisfy under that law in order to be admissible as a cause of action in the *forum*.

The only judges who expressed definite views on the positive aspects of the problem were Lords Thomson and Mackay;[25] they said plainly that in their opinion the plaintiff's claim under the Fatal Accidents Acts failed because it was not actionable by the *lex loci delicti;* Lord Thomson said:

> Insistence on the importance of the law of the forum has tended to lead both Scots and English law to the illogical conclusion that, whereas actionability in the forum is a *sine qua non*, a pursuer can invoke the Court of the forum without having to go so far as to establish actionability under the *lex delicti*. The persistent use of the word 'justifica-

[22] *Ibid.*, p. 147.
[23] *Per* Lord Keith, *ibid.*, p. 147.
[24] *Per* Lord Cooper, *ibid.*, p. 150.
[25] *Ibid.*, pp. 142 and 144 respectively.

> tion' in the English cases is symptomatic of this tendency. The high-water mark of this tendency in England is *Machado* v. *Fontes*,[26] while in Scotland *McLarty* v. *Steele*[27] seems to suggest that the commission of a moral wrong in the *locus delicti* is enough. In my view this tendency is wrong. Actionability under the *lex loci delicti* seems to me to be in principle a *sine qua non*. Otherwise a quite unjustifiable emphasis is given to the *lex fori*.

Lord Russell[28] stated the principle in similar terms:

> the law of England (as the *lex loci delicti*) must be shown to concur in recognising as legally valid her cause of action and in recognising as legally enforceable the defender's obligation to pay damages thereunder,

but, following the decision of Lord Shand in *Goodman* v. *L. and N.W. Ry. Co.*,[29] rejected the plaintiff's claim for two reasons, first that, upon the true construction of the Fatal Accidents Acts, 1846-1908, after the expiration of twelve months the claim was not merely statute-barred but "the right itself and the cause of action which it is designed to enforce both cease to exist", and further that it was unreasonable and contrary to natural justice to deny to the defendant the benefit of the limitation which the *lex loci delicti* provided. Lord Cooper, in whose judgment Lords Carmont and Jamieson concurred, refrained from postulating the positive requirements of the *lex loci delicti* and dismissed the claim under the Fatal Accidents Acts on the ground that the plaintiff had failed to aver and to offer proof that by section 3 of the Act of 1846 her claim was merely statute-barred and not extinguished, but indicated, *obiter*, general agreement with the views expressed by the other majority judges.

III

The effect of *M'Elroy* v. *M'Allister*,[30] so far as English law is concerned, is that it explodes the doctrine of non-justifiability and strongly reinforces the view of those who hold that torts committed abroad can be sued upon in the English courts only if actionable both by English law and the law of the place where they were committed.

At the same time, *M'Elroy's* case[31] raises a new problem which the judges in that case did not have to decide, in view of the lack of the plaintiff's averment of foreign law, but which is

[26] [1897] 2 Q.B. 231.
[27] (1881), 8 R. 435.
[28] [1949] S.L.T. 139, at p. 145.
[29] (1877), 14 S.L.R. 449.
[30] [1949] S.L.T. 139.
[31] *Ibid.*

likely to arise one day for the decision of the English courts, *viz.* what is the precise meaning of the term "actionable" as used in both branches of the rule? Can an action on a tort committed abroad be maintained in the *forum* only if at the time the action is commenced the *cause of action* "would be a cause of action in that country and also would be a cause of action in this country",[32] or must the tort at that time be *"legally enforceable"*[33] in both countries? In short, is "actionable" synonymous with "cause of action" or with "enforceable"?

The difference between these views may be illustrated by reference to *M'Elroy's* case.[30] If the correct view is that the tort sued upon must be a "cause of action" by both *leges*, and Mrs. M'Elroy had succeeded in satisfying the court that by section 3 her claim was merely statute-barred, she would have won her case because the English period of limitation would not have destroyed her cause of action though her claim would be unenforceable by action in the English courts. If on the other hand the true test is that the tort sued upon must be "enforceable" by both *leges*, Mrs. M'Elroy's offer to prove that section 3 affected the remedy only would have been irrelevant and she would have lost her case, so far as based on the Act, in any event. It is a pity that, owing to the omission of the plaintiff to offer evidence on that issue, we have no decision of the Court of Session on that point though the opinions of Lords Thomson, Mackay and Russell and the dicta of the other judges indicate that the court would probably have decided in favour of the latter view.

It should be noted that, if the act complained of has to be *enforceable* by both *leges*, the term "actionable" in the two branches of the rule is given a procedural meaning, which it does not possess if interpreted as denoting *cause of action*. As the result of the former interpretation, the same weight is attributed to the procedural incidents of the *locus delicti* as to those of the *forum*, and the requirements which the act has to satisfy by both *leges* are strictly collateral. If, on the other hand, "actionable" refers to the substantive provisions of both *leges*, the practical effect produced by the application of the two *leges* is different because the act must satisfy the requirements of

(i) the substantive law *and* procedure of the *forum*,

(ii) but only of the substantive law of the *locus*.

The interpretation of "actionable" as relating to substantive

[32] *Per* Brett L.J. in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521, at p. 537.

[33] *Per* Lord Russell in *M'Elroy* v. *M'Allister*, [1949] S.L.T. 139, at p. 145.

law would be in harmony with the general technique of the Anglo-American conflict of laws according to which normally the incidents of substantive law are separated from matters of procedure which are regarded as superimposed upon the latter. The procedural interpretation, which results in the combination of matters of substantive law and procedure in one rule, does not conform with that technique and can only be justified by overriding considerations of public policy.

If the principles underlying these two schools of thought are analysed, it is evident that their supporters join issue on the relative weight of the public policy of the *forum* in the province of the conflict rules relating to foreign torts, and that their difference concerns ultra-legal matters of policy rather than the construction of a rule of law. Those who, like Lords Thomson, Mackay and Russell, hold that the tort must be enforceable by both *leges*, hold, in effect, that it would be undesirable that a plaintiff when suing in the *forum* should be in a better position than if he sued in the *locus delicti*. Those who regard it as sufficient that there is, at the date of the action, a cause of action in tort according to both *leges*, apply more liberal standards of public policy and view with equanimity the possibility that a plaintiff might deliberately try to improve his position by electing a *forum* that provides a better remedy than the *locus*, because the choice is limited by the rules of procedure of the *forum* which will admit an action against the defendant only if he is present in the jurisdiction or in cases of assumed jurisdiction;[34] they are further guided by the consideration that in the law of contractual, matrimonial and other relations the position of a suitor is sometimes improved or reduced by the rules of procedure prevailing in the *forum* where he elects, or is compelled, to sue, as is illustrated by cases such as *Huber* v. *Steiner*[35] and *Leroux* v. *Brown*.[36] In the last resort, the answer depends on the juridical concept of tortious liability; if it is closer to criminal liability, the stricter view of public policy is appropriate; but if it is closer to contractual liability, no objection can be raised to the more liberal interpretation. In view of the long common history of tort and contract in English law, it is suggested that in English law the latter interpretation is apposite. This view is in accordance with the general principle that a right which in the eyes of the English conflict of laws is vested in the *de cuius* by a foreign legal

[34] See O. 11 r. 1(f).
[35] (1835), 2 Bing. N.C. 202.
[36] (1852), 12 C.B. 801.

system, should prima facie be protected.[37] These considerations strongly militate in favour of the view that the requirement of actionability pertains to the substantive law of both *leges*.

It is remarkable that this interpretation of the rule of double liability coincides with the result obtained when the problem is approached unencumbered by authority and in the light of modern research. If the question under consideration arose *de novo*, it would first present a problem of characterisation, *viz.* whether the act complained of is a tort according to the *lex loci delicti*. From this point of view the act must give rise to an action in tort and it would be insufficient if it were merely a "non-justifiable" wrong by that law. The next question would be whether on grounds of public policy of the *forum* there is an objection to the admissibility of the cause of action which the plaintiff acquired by the foreign *lex loci;* it evidently is an elementary requirement of public policy that no foreign tort should be admitted as a cause of action which is not likewise actionable in the *forum*, but whether beyond that the public policy of the *forum* demands that the act should likewise be enforceable by the *lex loci delicti* at the time when the action is brought raises precisely the same difference of opinion as has been discussed earlier when the different interpretations of the rule of double actionability were examined. The rule governing torts committed abroad, as evolved by the courts in the usual empirical manner, is not a vague and crude test[38] but, if interpreted in the modern spirit indicated in *M'Elroy* v. *M'Allister*,[39] a finely balanced compound formula which exactly corresponds to *a priori* considerations of theory.[40] The changed conception of the rule of double liability has its parallel in the changed interpretation of the notion of *lex loci contractus* which is described by Dicey[41] in the following passage:

> This change of doctrine was, as often happens in the case of judicial legislation, combined with verbal adherence to an old formula not really consistent with the new theory. The expression *lex loci contractus* was retained, but was re-interpreted so as to mean 'not the law of the

[37] See Professor Yntema's analysis of English case law in (1949), 27 Can. Bar Rev. 116; see also Donald B. Spence, Conflict of Laws in Automobile Negligence Cases, in (1949), 27 Can. Bar Rev. 661.

[38] Dr. Falconbridge used this description in (1940), 18 Can. Bar Rev. 308, but stated in (1945), 23 Can. Bar Rev. 311 that he was inclined to admit that these adjectives were somewhat too strong. Professor Cheshire, *loc. cit.*, p. 371, expresses a preference for Dr. Falconbridge's first thoughts.

[39] [1949] S.L.T. 139.

[40] *Contra* J.H.C. Morris, in (1949), 12 Mod. Law Rev. 248 who advances an "admittedly heterodox" view.

[41] (5th ed.), p. 885.

country where a contract was made', but the 'law of the country with a view to the law whereof a contract was made'.

The re-interpretation of the rule of double liability is an illustration of Lord Wright's statement that, within certain limits, "the common law is flexible and progressive".[42] The old doctrine of non-justifiability reflects the jurisprudence of *laissez faire*, the modern rule of double actionability the stricter concepts of the welfare state of our days. The gulf that separates the views of Rigby L.J.[43] and Lord Thomson [44] is as wide as that which, in the law of common employment, divided the views of Lord Abinger [45] and Lord Wright,[42] and, in the law relating to the abuse of rights, separates those of Lord Macnaghten [46] and his learned son.[47]

IV

In the result, the effect of *M'Elroy* v. *M'Allister* [39] on the English conflict of laws may be summed up as follows:—

(a) The view that the words "non-justifiable" in the second branch of Willes J.'s rule in *Phillips* v. *Eyre*[48] "import a notion less precise than 'actionable as a tort', in the first part of the rule",[49] does not appear to be correct.

(b) The two branches of the rule of double liability should be stated in co-terminous phrases.

(c) It is suggested that the rule should be stated as follows: An action for a tort committed abroad can be maintained in the English courts if, at the time the action is brought, the act complained of is actionable as a tort according to both English law and the law of the place where it was committed.

(d) In addition, the plaintiff's claim has to satisfy the procedural requirements of English law.

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[42] *Radcliffe* v. *Ribble Motor Services Ltd.*, [1939] A.C. 215, at p. 245.
[43] In *Machado* v. *Fontes*, [1897] 2 Q.B. 231, at p. 234.
[44] In *M'Elroy* v. *M'Allister*, [1949] S.L.T. 139, at p. 142.
[45] In *Priestley* v. *Fowler* (1837), 3 M. & W. 1. The doctrine of common employment was eventually abolished by the Law Reform (Personal Injuries) Act, 1948, s. 1.
[46] In *Bradford Corporation* v. *Pickles*, [1895] A.C. 587.
[47] Macnaghten J. in *Hollywood Silver Fox Farm* v. *Emmett*, [1936] 2 K.B. 468.
[48] (1870), 6 Q.B. 1.
[49] Dicey (6th ed., 1949), p. 801.