CONTRIBUTORY NEGLIGENCE AND THE RULE IN PHILLIPS v. EYRE[1]

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Over the years much scholarship and energy have been spent[2] in attempts to rationalize the well-known rule of English and Canadian conflict of laws, the Rule in *Phillips* v. *Eyre*.[3] It has occurred

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[1] (1870) L.R. 6 Q.B. 1 (Ex. Ch.).

[2] Lorenzen, Tort Liability and the Conflict of Laws (1931), 47 L.Q. Rev. 483; Gutteridge, A New Approach to Private International Law (1938), 6 Camb. L.J. 16, at p. 20; Hancock, Torts in the Conflict of Laws: The First Rule in *Phillips* v. *Eyre* (1940), 3 U. of T. L.J. 400; Robertson, The Choice of Law for Tort Liability in the Conflict of Laws (1940), 4 Mod. L. Rev. 27; Hancock, A Problem in Damages for Tort in the Conflict of Laws (1944), 22 Can. Bar Rev. 843; Yntema, (1947), 27 Can. Bar Rev. 116, at pp. 118-121, with which *cf.* especially Willis, Two Approaches to the Conflict of Laws: A Comparative Study of the English Law and the Restatement of the American Law Institute (1936), 14 Can. Bar Rev. 1, at p. 20; Spence, Conflict of Laws in Automobile Negligence Cases (1949), 27 Can. Bar Rev. 661; Falconbridge, Conflict of Laws (2nd ed., 1954), Chs 44 and 46; J.A.C. Thomas, (1954), 3 Int. and Comp. L.Q. 651; Harper, Tort Cases in the Conflict of Laws (1955), 33 Can. Bar Rev. 1155; Carter, (1954-1956), 3 U. of W. Aust. Ann. L. Rev. 67, at pp. 75-76; Shuman and Prevezer, Torts in English and American Conflict of Laws: The Role of the Forum (1958), 56 Mich. L. Rev. 1067; Castel, Canadian Private International Law Rules in the Field of Civil Responsibility (1958), 18 R. du B. 465; Wortley, Dicey's Conflict of Laws (1960), 5 J.S.P.T.L. 148, at p. 149; Crépeau, De la responsabilité civile extra-contractuelle en droit international privé québecois (1961), 39 Can. Bar Rev. 3.

[3] For convenience, we hereafter refer to this as "The Rule". In the words of Rule 181 in Dicey, Conflict of Laws (7th ed., 1958), p. 940, the Rule is: "An Act done in a foreign country is a tort and actionable as such in England, only if it is both (1) actionable as a tort, according to English law, or in other words, is an act which, if done in England, would be a tort; and (2) not justifiable, according to the law of the foreign country where it was done." The Rule has been accepted by the Canadian Supreme Court as part of Canadian law: *O'Connor* v. *Wray*, [1930] 2 D.L.R. 899, [1930] S.C.R. 231. It has also recently been reiterated by the English Court of Appeal: *Re United Railways of the Havana and Regla Warehouses Ltd.*, [1960] Ch. 52, *per* Jenkins L.J., at p. 98, affirmed by the House of Lords without reference to the point in *Tomkinson* v. *First Pennsylvania Banking Trust Co.*, [1960] 2 All E.R. 332.

As to the application of the Rule in Scotland, see O'Riordan, Choice of Law in Actions *ex delicto* under Scots Law (1941), 4 Mod. L. Rev. 214; Schmitthoff, Torts Committed Abroad (1949), 27 Can. Bar Rev. 816; Morris (1949), 12 Mod. L. Rev. 248; Gow, (1949), 65 L.Q. Rev.

to us that extremely little is to be found, both in decided cases[4] and in academic writings,[5] on the subject of contributory negligence in cases concerning torts committed abroad. It accordingly seems not to be out of place to attempt to pursue the problem here.

As an essential aid to analysis, however, a brief examination of the nature of contributory negligence and the problems related to it is called for as a preliminary to our pursuit of the problem. In English common law the view commonly adopted was that contributory negligence raised questions of causation[6] and both in England and in some other jurisdictions, rather crude tests have been evolved as to whether it was the plaintiff or the defendant who "caused" the harm—in particular, there was the doctrine of "the last opportunity", as it was sometimes called, or "the last clear chance". Since the Law Reform (Contributory Negligence) Act, 1945,[7] apportionment of damages has been possible in England and, partly as a consequence of this, more emphasis has been placed on degrees of culpability. Nevertheless, the question whether the plaintiff has been contributorily negligent to any extent (leaving aside for the moment the problem of apportionment) has remained primarily one of causation. But it is important to realize that, once it is found as a question of fact that an act of a party is a contributing cause, a *causa sine qua non*, it may be a question of law whether,

313; Donaldson, (1954), 3 Int. & Comp. L.Q. 693; J.A.C. Smith, (1956), 5 Int. & Comp. L.Q. 466, and Torts in the Conflict of Laws (1957), 20 Mod. L. Rev. 447.

[4] These are discussed below.

[5] Lorenzen, *op. cit.*, footnote 2, at p. 495; the same writer in Selected Articles on the Conflict of Laws (1947), p. 372, and in Cases and Materials on the Conflict of Laws, (6th ed., 1951), pp. 278-283; Robertson, Characterization in the Conflict of Laws (1940), pp. 259-264; Hancock, Torts in the Conflict of Laws (1942), pp. 110-113, 163-166; Morgan, Choice of Law Governing Proof (1944), 58 Harv. L. Rev. 153, at pp. 180-191; Rabel, The Conflict of Laws (1947), Vol. II, pp. 258-260; Spence, *op. cit.*, footnote 2, at pp. 682-683; Goodrich, Handbook of the Conflict of Laws (3rd ed., 1949), pp. 238-240; Wolff, Private International Law (2nd ed., 1950), p. 243; Note, Contributory Negligence in the Conflict of Laws: Substance or Procedure (1950), 10 La. L. Rev. 365; Stumberg, Principles of Conflict of Laws (2nd ed., 1951), pp. 139-141, 188-189; Glanville Williams, Joint Torts and Contributory Negligence (1951), pp. 339-340; Schmitthoff, The English Conflict of Laws (3rd ed., 1954), pp. 159-160; Cheatham, Goodrich, *et al.*, Cases and Materials on The Conflict of Laws (4th ed., 1957), pp. 383-385; Dicey, *op. cit.*, footnote 3, pp. 959-960; Leflar, The Law of the Conflict of Laws (1959), pp. 115-116, 222; Castel, Private International Law (1960), pp. 84-85, 226; Cheshire, Private International Law (5th ed., 1961), p. 690.

Most of these, it will be found make only a passing reference to the topic or relate to the problem of choice of law in relation to burden of proof.

[6] See, for instance, *per* Bowen L.J. in *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685.

[7] (1945), 8 & 9 Geo. 6, c. 52.

in a particular context, that party is liable for such an act and also whether his act must be a "substantial" cause—that is to say, one more significant than the other causes in that context. It still becomes necessary in negligence cases to decide for what consequences of the act the party concerned is to be made responsible. These are (to use the usual jargon) questions of "legal causation" and they are matters of responsibility, culpability or imputability.[8] It is correct, therefore, to regard causation as part and parcel of the basic question of responsibility and not as a distinct category requiring separate treatment. Indeed, recent English authorities,[9] as well as the decision of the Judicial Committee of the Privy Council in *The Wagon Mound*,[10] point to judicial recognition of the correctness of this approach.

These considerations strongly suggest that, in the context of private international law, causation should not be regarded as a mere question of procedure, as a peripheral matter necessarily to be governed by the law of the forum, but rather as a question to be decided by the law governing the existence of the obligation. Thus, Dr. Cheshire regards remoteness of damage in tort as governed by the *lex loci delicti*.[11] However, Dr. Cheshire's view meets—as he admits—with the difficulty that, according to the normal acceptation of the Rule in *Phillips* v. *Eyre*, the *lex fori* not only is of equal importance with the *lex loci* in determining the primary question of liability, but also has an equal claim to be heard on the question whether recovery may be had for a particular item of damage. In the context of contributory negligence a failure to apply the views of Dr. Cheshire will lead to allowing the *lex fori* a very close control over the action. In many cases, although the

[8] It is, of course, for the judge to decide whether the plaintiff's conduct could amount to contributory negligence; if he decides that it could, it is then for the jury to decide whether, on the facts of the particular case, there was contributory negligence. *Quaere:* does this rule still apply in a conflicts case if, for instance, the *lex loci*, unlike the *lex fori*, requires the judge to decide both these questions? On principle it seems right that the questions should be considered to be procedural ones and that the *lex fori* governs. *Cf. Missouri P.R. Co.* v. *Miller* (1931), 184 Ark. 61, 41 S.W. 2d 971 for a contrary view, and see Leflar, *op. cit.*, footnote 5, pp. 111-112.

[9] *Hay (or Bourhill)* v. *Young*, [1943] A.C. 92; *Woods* v. *Duncan*, [1946] A.C. 401, both House of Lords' decisions. See also *per* Denning L.J. in *Roe* v. *Minister of Health*, [1954] 2 Q.B. 66, at pp. 84-85; and Prosser, Handbook of the Law of Torts (2nd ed., 1955), Ch. 9, esp. pp. 252-253.

[10] [1961] A.C. 388, *per* Lord Simonds, at p. 425, and see *Watson* v. *Winget*, 1960 S.L.T. 321; Honoré, (1961), 39 Can. Bar Rev. 267; Fleming, The Passing of Polemis (1961), 39 Can. Bar Rev. 489.

[11] *Op. cit.*, footnote 5, pp. 706-707; *cf.* Graveson, The Conflict of Laws, (4th ed., 1960), p. 406, and J.A.C. Thomas, *op. cit.*, footnote 2. Dicey, *op. cit.*, footnote 3, pp. 962-965, 1090-1092 appears to agree with Dr. Cheshire.

plaintiff may have been in some degree negligent, his negligence may not have been sufficiently related in terms of time and place to the defendant's negligence to be "contributory"; in this sense the Rule in *Davies* v. *Mann*[12] may still be said to apply in England even after the passing of the Law Reform (Contributory Negligence) Act, 1945.[13] Yet these findings, which involve the fine distinction between the existence or non-existence of some degree of contributory negligence, have a very decisive effect on the outcome of the action as a result of the operation of the Rule in *Phillips* v. *Eyre*.[14] Similar problems arise when the English court decides that the plaintiff in a conflicts case was wholly to blame for his own injuries.

It is perhaps best to illustrate the possible complexities occasioned by the "double-barrelled" quality of the Rule in *Phillips* v. *Eyre* in the sphere of contributory negligence by posing a simple example and examining the possible "permutations". Suppose that D, whilst driving his car in Ontario, knocks down and injures P and that P now sues D in England in order to recover damages in respect of the injuries he sustained. Leaving aside for the moment questions of burden of proof, the English court might arrive at any one of the following conclusions:

1. P was solely to blame for his own injuries.
2. D was solely to blame for P's injuries.
3. P was contributorily negligent.

Again leaving aside for the moment questions of burden of proof, an Ontario court seized of the same facts might arrive at any of the following findings:

(a) P was solely to blame for his own injuries.
(b) D was solely to blame for P's injuries.
(c) P was contributorily negligent.

Upon the assumption that the *lex loci delicti* has been proved (and not assumed to be the same as the *lex fori*[15]) it is logically

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[12] (1842), 10 M. & W. 546, 152 E.R. 588.

[13] It is not disputed that insofar as the Rule in *Davies* v. *Mann*, *ibid.*, is synonymous with "the last opportunity rule", it no longer applies. However, it is very probable that, as some judges have expressly recognized, if the facts of *Davies* v. *Mann* were to occur again the case would be decided in the same way. See *per* Evershed L.J. in *Davies* v. *Swan Motor Co.*, [1949] 2 K.B. 291, at p. 318 and *cf. per* Asquith L.J. in *Henley* v. *Cameron*, [1949] L.J.R. 989, at p. 996, and, as Lord Asquith of Bishopstone, in *Stapley* v. *Gypsum Mines Ltd.*, [1953] A.C. 663, at p. 687. See further, Street, The Law of Torts (2nd ed., 1959), pp. 154-158; and literature cited in Winfield on Tort (6th ed., 1954), p. 513, note (r), and especially Goodhart, The "Last Opportunity" Rule (1949), 65 L.Q. Rev. 237, 318.

[14] See the "permutations" set out below.

[15] Whether it is the plaintiff or the defendant who has to show that the

possible for no less than nine "permutations" to arise. Certain of these permutations (all nine of which are set out below) may appear to make it worthwhile for one of the parties to rely on the argument that the foreign court, if it were seized of the facts, would reach a materially different conclusion on the question of the respective degrees of liability. This may give rise to the somewhat delicate task of asking the English court to decide how the foreign court would weigh the evidence—an operation which is appreciatively more speculative than that of determining questions of foreign law. It must be admitted at the outset of the inquiry that the party concerned might be deterred from raising the question precisely because of the element of speculation involved. Indeed, difficulties of this sort might well lead the English court to consider the question of *forum non conveniens*. However, in some jurisdictions, the existence of rules of law, which by their operation effectively and clearly determine material issues of fact, will make it possible for counsel to put forward arguments of the type under consideration. For instance, in some American jurisdictions, examples of such rules are to be seen in variations of the doctrine of the "last clear chance" such as the "Stop, look and listen rule".[16] The foregoing considerations coupled with the difficulties which will become clearer when the reader has considered the permutations may well cause him to wonder whether the Rule is an appropriate means of solving the problems on contributory negligence.

The permutations are as follows:

(i) 1 X (a), that is to say, both English and Ontario laws concur in holding P to blame for his own injuries. In this event, there is no contributory negligence problem; P cannot recover since he cannot satisfy either "arm" of the Rule.

(ii) 1 X (b), that is to say, the conclusions are diametrically opposed, the English court holding P to be the author of his own wrong, Ontario law taking the view that D is wholly to blame. Again, P cannot recover in England for, while he is able to satisfy the second "arm" of the Rule, he fails to fulfil the first requirement that the wrongful act would have been tortious had it been committed in England.

(iii) 1 X (c), whereunder the English court considers P to be wholly to blame for his own injuries while the Ontario view is that he

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conduct of the defendant is respectively unjustifiable or justifiable by the *lex loci* still seems to be in doubt: see Dicey, *op. cit.*, footnote 3, pp. 965-967.

[16] Harper and James, The Law of Torts (1956), Vol. II, pp. 1245-1255; Rabel, *op. cit.*, footnote 5, p. 282; Hancock, *op. cit.*, footnote 5, p. 112.

was contributorily negligent. P will fail again, since he has not satisfied the first "arm" of the Rule.

(iv) 2 X (a). This is the converse of (ii) above. The English conclusion is that D is wholly to blame; the Ontario view is that P is completely to blame, so once more the views are completely opposed. Again, P must fail; while he has satisfied the first "arm" of the Rule, he fails on the second. D's conduct is "justifiable" or "innocent" according to the *lex loci.*

(v) 2 X (b), where the courts in each country concur in holding D to be completely to blame. In such a case P must succeed; he is able to satisfy both "arms" of the Rule and, as in 1 X (a) above, no contributory negligence problem arises.

(vi) 2 X (c), namely, where the English view is that D is completely to blame, and the Ontario finding is that P was guilty of contributory negligence. One cannot say at the outset here whether P will recover. Clearly, he can show that the first "arm" of the Rule is satisfied; as to the second "arm", the conduct of D may be described as "not justifiable", "not innocent" or whatever other not very apposite term comes to mind. Provided that there is no rule in the *lex loci* which denies recovery to a plaintiff who has been guilty of any degree of contributory negligence—however slight—P can succeed. But if the Ontario law should happen completely to bar recovery by a plaintiff guilty of contributory negligence, P would fail to recover anything.[17]

(vii) 3 X (a). Here the English finding is that P was guilty of contributory negligence, while the Ontario conclusion is that he was sole author of the harm he suffered. P cannot recover; he fails under the second "arm" of the Rule.

(viii) 3 X (b), where the English view is that P was contributorily negligent and the Ontario view is that D was completely to blame for P's injuries. Clearly, the first "arm" of the Rule is satisfied since D is still guilty of tortious conduct in the eyes of the English court, P's contributory negligence notwithstanding. Equally clearly, under the second "arm", D's conduct is not "justifiable", but the question arises as to the amount of damages to which P is entitled. This will be discussed below.

(ix) 3 X (c). Both views concur—this time in holding that P is contributorily negligent. This situation is, however, not as simple as it might seem at first sight, for, while both courts might concur on the extent to which P was to blame—for instance, each might

[17] In fact this is not the case; see the Negligence Act, R.S.O., 1960, c. 261, set out in Wright, Cases on the Law of Torts (2nd ed., 1958), pp. 486-487.

consider that P was one-third to blame—they might, on the other hand, disagree on this matter—for instance, the English court might regard P to be one-third to blame, the Ontario court that he was two-thirds to blame. As in (viii) above, a problem of damages arises for discussion later. But it can be said with confidence that, whatever the proportion of blame, D's conduct satisfies both "arms" of the Rule.

A common ground of criticism of the Rule is that it is too favourable to plaintiffs and that it encourages "forum-shopping". An examination of the above permutations, however, shows the reverse to be the case in the present context: in situations 1 X (a), 1 X (b), 1 X (c), 2 X (a) and 3 X (a) the plaintiff cannot possibly recover anything; under 2 X (c), it is possible that he might not recover anything: otherwise, his only chances of recovery lie in 2 X (b), 2 X (c), 3 X (b) and 3 X (c).

It is perhaps surprising that we should have nearly arrived at the centenary year of Willes J.'s famous judgment without having had more cases upon these comparatively homely problems. There is, however, a thought-provoking decision of the Supreme Court of Alberta, *Brown* v. *Poland and Emerson Motors Ltd.*[18] The action arose out of a collision between the plaintiff's Buick and trailer and a bus owned by the second defendant and driven in the opposite direction by the first defendant in the course of his employment with the second defendant. The accident happened in the American State of Montana, at a point where the road narrowed at a bridge, in circumstances which the judge found to be caused by the contributory negligence of both drivers. There was no contributory negligence statute in Montana; the doctrine of "the last clear chance" applied and if a plaintiff was guilty of contributory negligence, his recovery of damages was barred. It appeared also that Poland had failed to drive his vehicle to the right of the centre line of the road as he was trying to pass the plaintiff's car and trailer and that this conduct constituted an offence against the criminal law of Montana. The plaintiff claimed damages in respect of loss of his wages, storage for the trailer until it was repaired and for the damage done to it; the defendant company in turn claimed damages from the plaintiff in respect of the harm done to their bus. With regard to the plaintiff's claim, Macdonald J. considered that both "arms" of the Rule were satisfied: "The plaintiff has established the fulfilment of the two conditions . . . . The acts of negligence proved against the defendant Poland are acts for

[18] (1952), 6 W.W.R. (N.S.) 368.

which the plaintiff could recover damages, if such acts had been committed in Alberta. The plaintiff has proved that the act of the defendant Poland in failing to keep to the right of the centre line in attempting to pass the plaintiff's vehicle was "wrongful" in Montana because such act is a violation of the Penal code of Montana. . . ."[19] He proceeded to hold the plaintiff entitled to recover the damages he had incurred and apportioned the percentage of negligence—apparently in accordance with the *lex fori*—at fifty:fifty.

The defendants' claim was very summarily dismissed as they had "failed to establish that the plaintiff was driving his automobile in a manner that would make him subject to punishment by the penal laws of Montana, so the contributory negligence of the defendant Poland will be a bar to their recovery against the plaintiff for the damages to the defendant company's bus".[20]

So far as the plaintiff's claim was concerned, this case seems at first sight to present permutation 3 X (c), at any rate if it is assumed that a Montana court seized of the dispute would have agreed with Macdonald J. that Brown had been contributorily negligent. The decision is a puzzling one, although upon one view it is easy enough to follow. Although *Machado* v. *Fontes*[21] does not seem to have been cited to the Supreme Court (or by the court in its judgment) in this case, the two cases are on all fours in that they both demonstrate that, once a plaintiff can show the criminality of the defendant's conduct by the *lex loci*, damages can be recovered in an action in tort on just the same basis as if the conduct had occurred within the jurisdiction of the forum. If an English court were to follow the line of approach of Macdonald J., it would, subject to what is said later, presumably regard the 1945 Act[22] as remedial or procedural and thus applicable to contributory negligence wherever committed. By the same token, it would ignore the proportion of the plaintiff's blame according to the views of the *lex loci* if proved and regard its own assessment as final and conclusive on the matter. Viewed from another angle,

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[19] *Ibid.*, at p. 370. This reasoning is unexceptionable, provided one agrees with the English Court of Appeal's decision in *Machado* v. *Fontes*, [1897] 2 Q.B. 231, and that of the Canadian Supreme Court in *McLean* v. *Pettigrew*, [1945] 2 D.L.R. 65, [1945] S.C.R. 62; Hancock, (1945), 23 Can. Bar Rev. 348; Falconbridge, *op. cit.*, footnote 2, pp. 829-832. *Cf.* however, the Privy Council's approach in *C.P.R.* v. *Parent*, [1917] A.C. 195 and *McMillan* v. *C.N.R.*, [1923] A.C. 120, and that of the Australian High Court in *Koop* v. *Bebb* (1952), 84 C.L.R. 629, at pp. 643-644.

[20] *Ibid.*, at p. 371.

[21] *Supra*, footnote 19.

[22] In which case, the situation is still a 3 X (c) one.

however, the case seems, with respect, to be wrongly decided. It will be recalled that the learned judge found the accident to have been caused by the contributory negligence of both drivers and that the Montana law held (i) that any degree of contributory negligence on a plaintiff's part completely bars recovery of damages by him and (ii) that he is liable who has "the last clear chance" of avoiding the accident and fails to take it. When one takes these points into consideration, it ceases to be clear whether the case was regarded as a 3 X (c) permutation after all. One might have expected the defendants to have argued that Poland's conduct was, for the purposes of the second "arm" of the Rule, "justifiable", "innocent" or "excusable" or not such as to give rise to any civil liability in Montana, because either (i) by the law of that State, Brown was guilty of contributory negligence or,[23] (which seems, on the facts, unlikely to have been successful) (ii) that Brown failed to avail himself of "the last clear chance" to avoid the accident in the eyes of Montana law.[24] It is no doubt possible that the defendants did not argue along these lines; if, in fact, this was the case, they would appear to have thrown away an excellent defence.

The decision of Macdonald J. that the defendants could not recover for the damage done to their bus by Brown implies that he regarded that situation also as a 3 X (c) one. The decision, it is submitted, is correct insofar as he held that Poland's contributory negligence barred recovery in Alberta because it barred recovery in the courts of the *lex loci*. On the other hand, an unhappy impression is conveyed that matters might have been different had the defendants established that Brown had been driving in a manner that would have subjected him as well to punishment by the Montana laws.[25] Had this been the case, both drivers would have been, as it were, *in pari delicto*, and, on the approach taken by Macdonald J. over the plaintiff's claim, it would seem that the defendants could have claimed in respect of fifty per cent of the damage done to the bus.

Our examination of the "permutations" arising from the application of the Rule in *Phillips* v. *Eyre* to a contributory negligence problem leaves two other problems to be considered, each of which pertains very closely to questions of substance, although at first sight they appear to belong to the realm of procedure.

The first of these concerns the legal or persuasive burden of proving contributory negligence. In a simple case, the English

[23] *Supra*, footnote 7.
[24] In which case, the situation becomes a 3 X (a) one.
[25] *Supra*, footnote 18, at p. 371.

court, applying the English rule that it is the defendant who has the burden in respect of proof of contributory negligence on the plaintiff's part, might find that the defendant was the sole author of the damage, whilst a court of the *locus delicti*, applying a rule that the plaintiff has to prove affirmatively that he was free from contributory negligence might hold that there was contributory negligence on his part.[26] Two questions arise. First, is the question one of procedure falling to be decided according to the *lex fori*? Secondly, if it is a question of substance, what law is to govern? The general view taken by the American authorities, both judicial and academic, is that the question is one of substance to be determined by the *lex loci delicti*.[27] As a matter of principle and policy, an assumption that the question is one of substance seems to be a more correct view[28] for the reasons stated by the Supreme Court of New Hampshire in *Precourt* v. *Driscoll*:[29]

> It appears that the procedural rule in Vermont [the place of the wrong] as to the burden of proof of contributory negligence is indispensable to the enforcement of the substantive rule, and is established in conformity with it. The procedural rule is incidental to it, effectuates it, and in a real sense is part and parcel of it. The substantive rule in an exceptional way embraces the procedural rule as an inseparable corollary of it.
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> The usual distinctions are so merged that, if they were made, the substantive rule would become invalid in the alteration of its character which the observance of the distinction would impose. An element of the cause of action would be destroyed, and the allowance of the non-existence of the element as a defence would not restore it. Whatever technical comparisons may be made, the practical result of the

[26] That is to say, the situation is a 1 X (c) one.

[27] *Morrisette* v. *C.P.R.* (1904), 76 Vt. 267, 56 A. 1102; *Southern Ry.* v. *Robertson* (1909), 7 Ga. App. 154, 66 S.E. 535; *Gregory* v. *Maine Central Ry. Co.* (1945), 317 Mass. 636, 59 N.E. 2d 471, 159 A.L.R. 714; *Fitzpatrick* v. *International Ry.* (1929), 252 N.Y. 127, 169 N.E. 112, 68 A.L.R. 801; *Precourt* v. *Driscoll* (1931), 85 N.H. 280, 157 A. 525, 78 A.L.R. 874; *Buhler* v. *Maddison* (1947), 109 Utah 267, 176 P. 2d 118, 168 A.L.R. 177. Not in accord: *Johnson* v. *Chicago & Northwestern Ry. Co.* (1894), 91 Iowa 248, 59 N.W. 66; *Levy* v. *Steiger* (1919), 233 Mass. 600, 124 N.E. 477. See also Stumberg, *op. cit.*, footnote 5, pp. 139-141; Goodrich, *op. cit.*, footnote 5, pp. 238-240; *Cf.*, for a different view of the authorities, Leflar, *op. cit.*, footnote 5, pp. 115-116; Beale, Treatise on the Conflict of Laws (1935), Vol. II, pp. 1300-1301.

On the importance of distinguishing between different types of burden of proof, see Morgan, *op. cit.*, footnote 5, and Cross, Evidence (1958), pp. 62-73. See further, Robertson, *op. cit.*, footnote 2, pp. 259-263.

[28] Cheshire, *op. cit.*, footnote 5, p. 690; Dicey, *op. cit.*, footnote 3, pp. 960, 1097; Hancock, *op. cit.*, footnote 5, p. 164; Rabel, *op. cit.*, footnote 5, pp. 283-286; Stumberg, *op. cit.*, footnote 5, pp. 139-141; Goodrich, *op. cit.*, footnote 5, p. 239. *Cf.* Wolff, *op. cit.*, footnote 5, pp. 228-229, and Robertson, *op. cit.*, footnote 2, p. 261. For another view: Castel, *op. cit.*, footnote 5, p. 84.

[29] *Supra*, footnote 27.

enforcement of the local burden of proof rule would be to substitute a domestic cause of action for that sought to be enforced.

Assuming the matter to be one of substantive and not of procedural quality, what law is to be applied by an English court? The tort rules deriving from *Phillips* v. *Eyre* obviously provide no clear-cut answer since the point was not at issue in that case. It might be inferred from the rules propounded by Willes J. that the law of the forum was to be dominant[30] and that therefore the English rule was to apply to the exclusion of that of the *lex loci.* On the other hand, this is a weak inference and writers of eminence have professed to find an emphasis on the *lex loci* in the judgment.[31] Another, perhaps safer, approach is to regard the question as an open one in point of judicial authority and to suggest that the courts should apply the rule on the matter which prevails in the *lex loci delicti.* This suggestion rests on an assumption that, apart from the obvious limitations resulting from what was expressed in *Phillips* v. *Eyre,* the appropriate law to which reference should be made is the *lex loci delicti.*[32]

In some of the permutations recorded above, it becomes necessary to decide by which law the amount recoverable is to be assessed, for instance, in 2 X (c)—where the English court holds D to be completely to blame and the finding of the court of the *lex loci* would be that P was contributorily negligent. Assuming that both "arms" of the Rule have been satisfied, is P to recover in full or is there to be apportionment? The same is true in the converse case of 3 X (b). Three preliminary questions call for some discussion. First, can the English rule, involving apportionment of the damages under the 1945 Act,[33] ever be applied? In other words, on a proper construction of that Act, does it apply only to torts committed in England? Dr. Glanville Williams takes the view that it can only so apply and that the *lex loci delicti* must govern assessment of damages.[34] With respect, it may be doubted whether this is a view which has much cogency. There is nothing in the Act which affirmatively limits its application to torts committed in

[30] See his judgment in (1870), L.R. 6 Q.B., at p. 28, (the passage treated as the *locus classicus* of the rule), and Willis, *op. cit.,* footnote 2.

[31] Cheshire, *op. cit.,* footnote 5, pp. 290-291; Yntema, *op. cit.,* footnote 2.

[32] See Dicey, *op. cit.,* footnote 3, pp. 960, 1104 (Illustration 13); Cheshire, *op. cit.,* footnote 5, p. 690. (*semble,* from his reference to American practice.)

[33] *Supra,* footnote 7.

[34] *Op. cit.,* footnote 5, pp. 339-340; Dicey, *op. cit.,* footnote 3, makes the contrary assumption p. 959. Expressly to the contrary is Schmitthoff, *op. cit.,* footnote 5, pp. 159-160.

England: the only limits expressed are that it does not apply in Northern Ireland or to claims to which section 1 of the Maritime Conventions Act, 1911,[35] applies. It is to be admitted, however, that there is a very slight inference from the absence of any affirmative intrinsic evidence of its application to foreign torts that it was not intended to apply to such torts, but this can be countered by pointing to the result of such an assumed limitation, namely, the non-availability of English law as the applicable law, a legal vacuum. It could, of course, be said that no problem arises because Willes J. propounded the first "arm" of the Rule in the form of the hypothesis that the conduct must have been tortious *if committed in England.* Moreover, there is no justification for "parochialism" in the present context as there may be in regard to the terms appearing in English statutes dealing with rights of succession, adoption and the like. Without being dogmatic, we prefer to regard the English Act as applicable to foreign torts and the discussion will proceed on that footing.[36]

The second matter to be disposed of is an obvious result of *Machado* v. *Fontes.*[37] If the second "arm" of the Rule in *Phillips* v. *Eyre* is satisfied by a criminal liability only under the *lex loci,* then any assessment of damages must necessarily be made in accordance with the *lex fori.*[38] A third proposition which calls for notice is the inference from *Machado* v. *Fontes*[39] that, where the defendant is civilly liable under the *lex loci delicti,* the plaintiff can recover damages beyond the maximum allowed by that law. This view was propounded in the Ontario case of *Story* v. *Stratford Mill Building Co.*[40] in which Riddell J. said:

> Were the matter *res integra,* it might not unreasonably be held that the plaintiff, by suing in another jurisdiction, cannot put himself in a better position than if he had sued in the country *delicti commissi.*
>
> Speaking for myself, I should have hesitated to hold that a man injured in Quebec could put himself in better position by coming into Ontario, and suing in our courts, than if he had sued where he received his injury. But authority binding upon us has decided otherwise in cases not dissimilar.[41]

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[35] (1911), 1 & 2 Geo. 5, c. 57.

[36] As would seem to be the case with the English Fatal Accidents Acts, 1846-1959: see Webb, The Conflict of Laws and the English Fatal Accidents Acts (1961), 24 Mod. L. Rev. 467; Webb and Brown, A Casebook on the Conflict of Laws (1960), pp. 365-367.

[37] *Supra,* footnote 19.

[38] See Dicey, *op. cit.,* footnote 3, p. 964; *cf. Brown* v. *Poland and Emerson Motors Ltd. supra,* footnote 18.

[39] *Supra,* footnote 19.

[40] (1913), 30 O.L.R. 271, 11 D.L.R. 49.

[41] *Ibid.,* at pp. 285-286 (O.L.R.), citing *Scott* v. *Low Seymour* (1862), 1 H. & C. 219, 158 E.R. 865; *Machado* v. *Fontes, supra,* footnote 19. The

This conclusion has been rightly criticized[42] and, indeed Riddell J. himself obviously considered that in principle, the plaintiff ought not to be able to benefit by choosing a jurisdiction other than that of the *locus delicti.*

Assuming that the 1945 Act[43] does apply to foreign torts, and leaving aside the case in which there is only criminal liability under the *lex loci,* what law should govern the assessment of damages? If *Phillips* v. *Eyre* is regarded as an instrument for the maintenance of English ideas and remedies, then the *lex fori* ought to govern as a matter of course.[44] This view is, however, objectionable on a number of grounds. On the assumption that the Rule is excessively protectionist in any case, there should be no need to extend the control of the forum. Moreover, this encourages "forum-shopping" on slender grounds. Lastly, both principle and relevant authority point to reference to the *lex loci delicti.* This provides the best applicable law in the absence of any likelihood of the English courts accepting a theory of the proper law of a tort.[45] Authority for this can be found in the judgment of Willes J. in *Phillips* v. *Eyre* where he says that "the civil liability arising out of a wrong derives its birth from the law of the place and its character is determined by that law".[46] The assessment of damages in this context is closely integrated with the question of liability and, as has been suggested above, it is to be classified as a matter of substance.[47] American authority[48] supports reference to the *lex loci delicti* and the majority of writers favour this solution.[49] What has

English decision in *Kohnke* v. *Karger,* [1951] 2 K.B. 670 continues this tradition, with which Graveson, *op. cit.,* footnote 11, p. 406, agrees. *Cf.* the view taken by Duff J. in *Livesley* v. *Horst,* [1924] S.C.R. 605, at p. 611.

[42] Dicey, *op. cit.,* footnote 3, p. 964; Hancock, *op. cit.,* footnote 5, at p. 122; *cf. M'Elroy* v. *M'Alister,* 1949 S.L.T. 139, *per* Lord Justice Clerk Thompson, at p. 142. Goodrich in Public Policy in the Conflict of Laws (1936), 36 West Va. L. Q. 156, at p. 164 remarks: "Fairness to the parties requires that the obligations created between them remain unchanged by fortuitous changes in the geographical location of either until such obligations are settled or otherwise discharged."

[43] *Supra,* footnote 7.

[44] *Cf. Phrantzes* v. *Argenti,* [1960] 2 Q.B. 19; Webb, (1960), 23 Mod. L. Rev. 446.

[45] See Morris, The Proper Law of a Tort (1951), 64 Harv. L. Rev. 881; Falconbridge, *op. cit.,* footnote 2, pp. 820-821.

[46] *Supra,* footnote 1, at p. 28. This statement precedes the *locus classicus* of the rule.

[47] *Contra,* Schmitthoff, *op. cit.,* footnote 5, pp. 160, n. 45, 407; Graveson, *op. cit.,* footnote 11, p. 406.

[48] See *Fitzpatrick* v. *International Ry. Co., supra,* footnote 27; Hancock, *op. cit.,* footnote 5, pp. 111-113; Beale, *op. cit.,* footnote 27, pp. 1298-1299; Leflar, *op. cit.,* footnote 5, p. 222; Castel, *op. cit.,* footnote 5, p. 226, esp. n. 40; Stumberg, *op. cit.,* footnote 5, p. 188.

[49] Rabel, *op. cit.,* footnote 5, p. 259; Stumberg, *op. cit.,* footnote 5, p. 189; Wolff, *op. cit.,* footnote 5, p. 243 (tentatively, and contrast the

been said will apply also to the case in which the English court and the court of the *lex loci* concur in holding the plaintiff to have been contributorily negligent and in using a system of apportioning damages, but differ in the actual mode of apportionment. Thus the *lex loci* may take a more mechanical view of the causal contributions, whilst the English court takes into account both the degree of fault and the causal contribution.[50] Even if this problem is classified as "remoteness of damage" it is still correct to apply the *lex loci delicti*.[51]

Problems as to the place of a tort may complicate the situation for an English court, though, happily perhaps, they have not yet done so. Thus, machinery manufactured in Italy might be gratuitously loaned for use in a research institute in Ontario. Because of negligence in manufacture, the mounting and supports of the machinery have serious flaws in them and are weak. Suppose one of the operators employed in the establishment uses the machinery in a way which is contrary to the usual practice and places some unusual stress upon a part of the machinery and, as a result, a large part of it collapses and the installation becomes a total loss. The Italian owners might choose to bring an action in negligence against the research institute in an English court.[52] Assuming that there are no jurisdictional difficulties and that both "arms" of the Rule are satisfied, the English court is faced with the following problem: If the defendants allege contributory negligence, it is arguable that, although the *locus* of the tort committed by them (the defendants) is unquestionably Ontario, the *locus* of the contributory negligence is Italy, the place of the negligent manufacture, and that, as a consequence, novel questions of choice of law arise. In support of the suggestion is the decision of the English Court of Appeal in the *Cynamid*[53] case and also, perhaps, the view of the

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first edition at p. 499); Castel, *op. cit.*, footnote 5; Glanville Williams, *op. cit.*, footnote 5; Spence, *op. cit.*, footnote 2, at p. 683; Leflar, *op. cit.*, footnote 5. *Cf.* Johnson, The Conflict of Laws with Special Reference to the Province of Quebec, Vol. III, (1937), p. 395, and see Lorenzen, *op. cit.*, footnote 2., p. 495.

[50] In *Stapley* v. *Gypsum Mines Ltd.*, [1953] A.C. 663, Lord Reid said, at p. 682: "A court must deal broadly with the problem of apportionment, and, in considering what is just and equitable, must have regard to the blameworthiness of each party, but the claimant's share in the responsibility for the damage cannot, I think, be assessed without considering the relevant importance of the acts in causing the damage apart from his blameworthiness." See also Street, *op. cit.*, footnote 13, p. 161.

[51] On the assumption that remoteness of damage is an aspect of the obligation itself: see the cases cited in footnotes 8 and 9 *supra*.

[52] *Cf. Anderson* v. *Nobels Explosive Co.* (1906), 12 O.L.R. 644, though there was no contributory negligence problem here.

[53] *George Monro Ltd.* v. *American Cyanamid and Chemical Corp.*, [1944]

Privy Council in *Nance* v. *British Columbia Electric Railway*,[54] namely, that the plaintiff's contributory negligence consists in a failure to take care for his own safety. However, the *Cyanamid*[55] case has been criticized and important recent decisions support the view that the occurrence of the damage is part and parcel of the liability—in other words, the place of the damage is the place of the tort.[56] Of course, it might be said that these recent decisions do not close any questions of contributory negligence, but, even so, the principle of *Nance's* case[57] may be thought to be only appropriate to claims for personal injuries. In our example, the damage resulting from the contributory negligence occurs in Ontario and it is hardly justifiable to refer to Italy as a point of contact. In other words, any questions relating to the contributory negligence, which are to be settled by a law other than that of the forum, will be referred to the *lex loci delicti*, that is, of Ontario. Arguments based on *Nance's* case[58] may, however, have more cogency in the infrequent type of case where a car approaching a state line is being negligently driven and collides with another car, also negligently driven, just over the state line. In any case, it is inconvenient to attach various aspects of a claim to the laws of different points of contact.

In conclusion, we would state that we make no claims to have provided any definitive solutions to the problems; rather we hope to have shown more clearly what is the exact nature of the problems surrounding contributory negligence and the *Phillips* v. *Eyre* Rule. If nothing else is clear, it is obvious that that Rule must not be treated as inviolable dogma. The ultimate solution by the courts of the types of problem we have raised will necessarily depend upon the respective weights accorded to the first and second "arms" of the Rule and more particularly on the continued existence of (and the inferences drawn from) *Machado* v. *Fontes*,[59] *McLean* v. *Pettigrew*[60] and *Brown* v. *Poland & Emerson Motors Ltd.*[61] It is unfortunate that the "double-barrelled" aspect of the Rule in *Phillips* v. *Eyre*[62] and the ambiguities inherent in Willes J.'s judgment prevent a more direct approach to the difficult problems

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1 K.B. 432, the result of which was foreseen in *Anderson* v. *Nobels Explosive Co.*, *ibid.*

[54] [1951] A.C. 601. *Cf.* the problems discussed by Street, Estoppel and the Law of Negligence (1957), 73 L.Q.Rev. 358.

[55] *Supra*, footnote 53.

[56] See the cases cited in footnotes 8 and 9 *supra*.

[57] *Supra*, footnote 54.

[58] *Ibid.*

[59] *Supra*, footnote 19.

[60] *Ibid.*

[61] *Supra*, footnote 18.

[62] *Supra*, footnote 1.

considered in this article. It is, of course, conceivable that an English court might think fit to divest itself of the whole problem on the ground *forum non conveniens*,[63] but it is thought that such a course should be avoided.

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[63] As in *Phrantzes* v. *Argenti*, *supra*, footnote 44.