

## Choice of Law in Tort Under the Private International Law (Miscellaneous Provisions) Act 1995

### Aim:

To focus on the choice of law in tort under the provisions of the **Private International Law (Miscellaneous Provisions) Act 1995**.

### Objectives.

After carefully reading the following notes & other prescribed readings for this lecture you should be able to:

1. Discuss the merits of each of the theoretical models for the choice of law in tort;
2. Critically evaluate the development and interpretation of elements of the double actionability rule; &
3. Discuss the provisions of the **Private International Law (Miscellaneous Provisions) Act 1995** that have replaced the common law (*apart from the law relating to defamation, in relation to the choice of law in tort*).

## Choice of Law in Tort: Theoretical Models

The three theoretical models that have been considered in respect of the choice of law in tort have been:

- (i) **the *lex loci delicti*** - the law of the place where the tort was committed - a place that might be entirely fortuitous, having no close connection with law of the injured parties, e.g., an aircraft crash in Germany involving an aircraft made in America, which is operated by an American company and has British passengers as victims;
- (ii) **the *lex fori*** - the law of the place where the tort is litigated - a model that might encourage forum shopping, i.e., seeking to litigate in the country having jurisdiction and the most favorable laws as far as the plaintiff is concerned; and
- (iii) **the *proper law of the tort***, i.e., litigating in the country having the closest and most real connection with the tort.

When the tort was committed in England, a consistent line of authority<sup>1</sup> established that English law, alone, applied. However, where the tort was committed abroad, a '**double actionability**' test evolved from *Phillips v. Eyre* (1870) LR 6 QB 1. This requirement for '**double actionability**' meant that to be actionable the act (tort) had to be unlawful both in the country where the act was committed and under English law. This lecture focuses on the development of the choice of law in tort when the tort has been committed abroad.

### Choice of Law in Tort at Common Law When the Tort was Committed Abroad:

#### (i) 1870-1971

In *Phillips v. Eyre* (1870), *Willes J* stated that: "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. Secondly, the act must not have been justifiable by the law of the place where it was done."

However, there was no consistency in the meaning of a '*wrong*' alleged to have been committed abroad.

#### (ii) 1971 (following *Boys v. Chaplin*) - April 1996 for all torts other than Defamation

### Summary of the Perceived Need for Reform of the Choice of Law rules in Tort

At common law, none of the theoretical models for the choice of law in tort was free of criticism. Moreover, the double actionability rule, as actually employed from the time *Phillips v. Eyre* was decided up to the time of its modification by the House of Lords in *Boys v. Chaplin*, and the later interpretations of the modified rule, was the subject of far greater criticism. Central to this criticism was that an action in the English courts in respect of a tort committed abroad could fail if the defendant wasn't liable under English law (as required under the first limb of *Phillips v. Eyre* as modified) even if it involved parties none of whom had any connection with England other than the fact that the case was litigated there. Nevertheless, the undue prominence of the parochial nature of the double actionability rule persisted for more than 125 years from the date of the decision in *Phillips v. Eyre* until its displacement by the provisions of **Part III** of the **Private International Law (Miscellaneous Provisions) Act 1995** for most choice of law situations in tort, defamation being the specific exception. The 1995 Act was, in fact, the outcome of a Law Commission Working Paper dating back to 1984 and a further report in 1990. The provisions of Part III of the Act came into force on the 1<sup>st</sup> May 1996.

<sup>1</sup> from *Szalatnay-Stacho v. Fink* [1947] 1 KB 1; through *Metall und Rohstoff AG v. Donaldson, Lufkin and Jenerette Inc.* [1990] 1 QB 391; to *Arab Monetary Fund v. Hashim* (1996) 1 LR 589

## PRIVATE INTERNATIONAL LAW : CONFLICT OF LAWS

### Purpose and Scope of Part III of the 1995 Act

The provisions of *Part III* of the *Act* are specified in **s.9(1)** as applying to 'issues relating to tort' and **s.9(2)** relates to characterisation and provides that as to what constitutes a tort remains a matter for the courts of the forum. **S.10** then expressly abolishes the common law double actionability rule and the exception to it. The statutory replacements for the abolished common law rules commence in **s.11** which provides for the general rule being that the applicable law is the law of the country in which the events (or the most significant events) constituting the tort occurred. *Exceptions to the general rule* are then provided for by **s.12** which permits the law arising from the general rule to be displaced by the law of another country if it is substantially more appropriate to do so. Defamation is specifically excluded from the new statutory regime by **ss.9(3)** and **13**; and **s.9(5)** follows the common law and excludes *renvoi* from issues relating to tort. **S.14** provides for the exclusion of matters decided by the *lex loci delicti* that conflict with principles of public policy or which are not otherwise enforceable under the law of the forum.

### Issues Relating to Tort

#### Precisely what constitutes a tort for the purposes of the conflict of laws?

Whilst it is clear that the Act applies to acts which are regarded as torts in English domestic law and, quite likely, to those wrongs which are not torts under the domestic law but may be classified as such 'for the purposes of private international law', - e.g., invasion of privacy or infringement of an intellectual property right.<sup>2</sup> It is uncertain whether acts which may be regarded as having a legal basis in equity would come within the scope of the 1995 Act; e.g., given that confidentiality may have equity or tort or implied contract as a legal basis, it's uncertain whether a breach of confidentiality would amount to an issue relating to tort and thus come within the scope of the 1995 Act. It isn't in doubt, however, that, just as at common law, if an act amounts to a tort a plaintiff may sue in respect of such an action even if he is in a contractual relationship with the defendant.<sup>3</sup>

#### Substance, Procedure and Issues Relating to Tort Under the 1995 Act

Clearly, the issue of central importance is the basis on which the court of the forum determines whether the issue is to be characterised as a tort 'for the purposes of private international law' with *Morse* advocating, *inter alia*, that "the issue of the standard of liability required of a defendant should be treated as an 'issue in tort'. And, probably, the question of capacity to commit a tort should, normally, be similarly regarded". The issue will be one of substantive law given that nothing in Part III of the 1995 Act "authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum." **S14(3)9b**).

Problems may arise, however, when an English court first recognises as an action relating to tort an action previously unknown to English law but one that has been recognised as such by the *lex loci*. Given that a successful substantive action may be, e.g., one relating to a claim for damages for distress or injured feelings but that the quantum of damages is a procedural matter and, so, one for the *lex fori*, there will be nothing in the form of a guideline in English law on which the English court can base its decision to award damages. Either a new rule has to be devised or the procedure of the *lex loci* adopted, if practicable. The Act is silent on this point: and *what is actually a matter of substance as opposed to procedure remains to be classified at common law; Boys v. Chaplin*.

#### Likely Application of English Law Applying to a tort Committed in England

Whereas the relationship between **ss.9(6)** - providing that Part III of the Act '... applies in relation to events occurring in the forum as it applies in relation to events occurring in any other country' - and **14** - which provides that nothing in Part III '... affects any rules of law (including rules of private international law) except those abolished by **s.10**' - is not clear, it would appear that if a tort involving a foreign element was committed in England then the principle established at common law, that, in the circumstances, English law was invariably the applicable law,<sup>4</sup> would apply also under the new statutory regime.

<sup>2</sup> See, for example, (1996) 45 ICLQ 888 @ 894.

<sup>3</sup> *Coupland v. Arabian Gulf Oil* [1983] 3 All ER 226.

<sup>4</sup> The most notorious example being the case of *Szalatnay-Stacho v Fink* [1947] KB1

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### Lack of Justification for Excluding Defamation From the 1995 Act (?)

That defamation has been excluded from the 1995 Act may be the result of an over-reaction by newspaper publishers. The fear of an English newspaper circulating abroad and publishing an article considered defamatory by the foreign law but not by English law but, nevertheless, leading to the application of a foreign law, may well have been unfounded given that the newspaper would have been produced in England and so the most significant elements of the allegedly tortious act would also have taken place in England. Moreover, given that the newspaper publishers would be able to plead justification and fair comment and that s.14(3)(a)(i) specifically provides for the exclusion of a foreign law that conflicts with the principles of public policy, it becomes difficult to provide a rational explanation for the exclusion of defamation from the 1995 Act.

**The General Rule Under the 1995 Act.** The replacement for the common law double actionability rule is contained in s.11 of the 1995 Act.

#### s.11: The Choice of Applicable Law Act 1995

- (1) *The general rule is that the applicable law is the law of the country in which the events constituting the tort ... in question occur.*
- (2) *Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being -*
  - (a) *for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;*
  - (b) *for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and*
  - (c) *in any other case, the law of the country in which the most significant element or elements of those events occurred.*
- (3) *In this section "personal injury" includes disease or any impairment of physical or mental condition*

#### Analysis of s.11

Whereas sub-section (1) provides for the events which constitute the tort when the tort occurs in one country, sub-section (2) provides for those situations where the events constituting the tort occur in two or more countries.

In essence, where the tort occurs in one country, the law of that country, the *lex loci delicti*, is the applicable law. However, where the events constituting the tort occur in two or more countries, either a rigid rule or a more flexible rule will apply, depending on the nature of the tort. A rigid rule applies in relation to s.11(2)(a) and (b) (personal injury and damage to property, respectively), the rule in relation to (a) being that the applicable law is 'the law of the country where the individual was when he sustained the injury'; and, in relation to (b), being the law of the country where the property was when it was damaged.

The applicable law in any other case, however, is far more flexible and, therefore, much more likely to be problematical given that, under paragraph (c), it requires, first, the most significant element or elements of the tort to be ascertained and then, second, it involves the application of the law of the country in which the most significant element, or those elements of the events constituting the tort, occurred, subject, of course, to there being no 'conflict with principles of public policy' or the giving 'effect to such penal, revenue or other public law as would not otherwise be enforceable under the law of the forum': s.14(3)(a)(i) & (ii). Unless any new rule is formulated, presumably the locus of the tort will be ascertained by applying the common law test of 'where in substance did the cause of action arise.'<sup>5</sup>

Circumstances may dictate that the general rule be displaced, however. S.12 provides for this. s.12 is the statutory equivalent of the common law exception to the double actionability rule

#### S.12 - Choice of Applicable Law: displacement of the General Rule

- (1) *if it appears, in all the circumstances, from a comparison of -*
  - (a) *the significance of the factors which connect a tort ... with the country whose law would be the applicable law under the general rule; and*
  - (b) *the significance of any factors connecting the tort ... with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.*

<sup>5</sup> *Distillers Co v. Thompson* [1971] AC 458.

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- (2) *The factors that may be taken into account as connecting a tort ... with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort ... in question or to any of the circumstances or consequences of those events.*

**Morse**<sup>6</sup> contends that:

"The central feature of section 12 is the comparison, taking account of all the circumstances, of the significance of the factors connecting the tort with the country whose law would be the applicable law under the general rule and the significance of the factors which connect it with another country and the determination, in the light of that comparison, whether it is 'substantially more appropriate' for the applicable law to be the law of that other country. Relevant factors, for these purposes, are identified in section 12(2), but that provision does not exclude reference to other factors which are not specifically identified. ... The insertion of the expression 'substantially' is intended to establish a threshold requirement below which the rule of displacement in section 12 is not to operate; ..."

It is uncertain from sub-section (1) whether the exception would apply only to one or more of the factors in an issue relating to tort, so leaving the other factors to be governed by the general rule, or whether the application of the s.12 exception would entirely displace the general rule. It is, however, likely that the applicable law under the general rule will, perhaps, be displaced only in two cases, viz; (i) where both parties are foreigners to the country where the tort is committed and they come from the same country - as was the case in *Boys v. Chaplin*; and (ii) whereas both parties are foreigners to the country where the tort is committed, and each is from a separate country, the laws of their countries are in agreement on the issue in question.

It is highly likely that it will be easier to displace the general rule when it is determined by **s.11(2)(a) or (b)** rather than when it is determined by reference to **s.11(1)**; and it will be much more difficult to displace when it is determined by reference to **s.11(2)(c)**.

### **Exclusion on the Grounds of Public Policy or by Virtue of not Otherwise Being Enforceable Under the Law of the Forum: s.14.**

"Sections 11 and 12 of the 1995 Act give, in contrast to the common law, a potentially more generous role to the application of foreign law so .. it [is] necessary to adopt a public policy safeguard to enable an English court to refuse to apply a foreign law which genuinely infringes the public policy of England. This is achieved by section 14(3)(a)(i) of the 1995 Act."

Accordingly, and by contrast with the common law, a cause of action that is unknown to English law should not, *per se*, invoke the provisions of s.14 and so exclude the foreign law.<sup>7</sup> In essence, the provisions excluding foreign penal, revenue and other public laws that '*would not otherwise be enforceable under the law of the forum*' is a reflection of the situation at common law.

Moreover, **s.14(4)** provides for the application of mandatory rules but does not confine the application to the mandatory rules of the law of the forum - "*irrespective of the degree of connection between the claim and the country to the law of which the mandatory rule belongs. This gives an unacceptably sweeping scope to mandatory rules and supplies no clear guidance to the courts as to when such rules should be applied.*"<sup>8</sup>

### **Proof and Exclusion of Foreign Law**

In essence, foreign law is proved as 'a matter of fact' via the evidence of expert witnesses. A foreign law may be excluded if it is a penal, revenue or other public law.

### **References**

- Clarkson & Hill, Jaffey on the Conflict of Laws*. London: Butterworths, 1997, Ch.6 (esp. pp256-270); and Ch.12;  
*Briggs, Choice of law in tort and delict*. [1995] LMCLQ 519;  
*Morse, Torts in Private International Law: A New Statutory Framework*. (1996) 45 ICLQ 888;  
*O'Brien, J. Smith's Conflict of Laws*, 2/e. London: Cavendish, 1999, Ch.17;  
*Rodger, Ascertaining the Statutory Lex Loci Delicti: Certain Difficulties Under the Private International Law (Miscellaneous Provisions) Act 1995*. (1998) 47 ICLQ 205.  
*Stone, The Conflict of Laws*. London: Longman, 1995, Ch.s 13 and 16.

<sup>6</sup> (1996) 45 ICLQ 888 @ 899

<sup>7</sup> see, e.g., *Phrantzes v. Argenti* [1960] 2 QB 19.

<sup>8</sup> *Per Morse*, (1996) 45 ICLQ 888 @ 901