

BOYS v. CHAPLIN IN THE ANTIPODES

By P. E. NYGH*

The decisions by the Australian courts since the House of Lords decided *Boys v. Chaplin*¹ have reinforced the view expressed in my article '*Boys v. Chaplin or the Maze of Malta*'² that the law in Australia in relation to foreign torts is developing along different lines from those applicable in England. Put very shortly, my submission in that article was that, following the reasoning of the majority of the High Court of Australia in *Anderson v. Eric Anderson Pty. Ltd.*,³ a plaintiff who brings an action in Australia in respect of a tort committed abroad (including, of course, another Australian state or territory) must first cross the jurisdictional 'threshold' by showing that the defendant's conduct is 'actionable' under both the law of the forum and the law of the place of wrong. Once he manages to cross the jurisdictional threshold the court will apply the *lex fori* to determine the extent of the defendant's liability.⁴

According to this view the relevance of the *lex loci delicti* is very limited. All the plaintiff has to show is that he would have had a civil cause of action against the defendant under the *lex loci delicti*; it is not necessary to show that the action would have resulted in a judgment against the defendant.

Assume for instance that an accident occurred through the fault of both plaintiff and defendant in a country where contributory negligence is still an absolute defence. The plaintiff sues in a forum where contributory negligence leads to apportionment of damages. Since under the *lex loci delicti* the defendant's conduct is 'actionable', despite the existence of the defence which would prevent that action from resulting in a judgment against the defendant,⁵ the forum can apply its own law to determine the existence and extent of the defendant's liability.⁶

Only one decision did not fit the Australian pattern, namely, the decision by Chamberlain J. in *Li Lian Tan v. Durham*.⁷ In that case

* Professor of Law, The University of Sydney.

1 [1971] A.C. 365.

2 (1970), 44 A.L.J. 160 and see also: '*Boys v. Chaplin — The fortuitous locus delicti or the fortuitous defendant*', (1970), A.C.L.R. 122.

3 (1965) 114 C.L.R. 20.

4 See also Nygh, *Conflict of Laws in Australia*, 2nd ed., at 418.

5 Per Windeyer J. in *Anderson v. Eric Anderson Pty. Ltd.* (1965) 114 C.L.R. 20, at 40, 41, with whom Barwick C.J. at 23 and Taylor J. at 34, 35 agreed; *contra* Kitto J. at 28.

6 *Hartley v. Venn* (1967) 10 F.L.R. 151.

7 [1966] S.A.S.R. 143.

the plaintiff's husband had been killed in a motor accident which took place in Victoria as a result of the defendant's negligence. The plaintiff and her husband were both Malaysian citizens temporarily resident in South Australia. The plaintiff's car was registered and insured in South Australia. The defendant's place of residence is not stated in the report. The plaintiff brought action in the Supreme Court of South Australia for the wrongful death of her husband. Under South Australian law a plaintiff in such an action can recover: (a) financial loss resulting from the death of the deceased, (b) funeral expenses and (c) 'such a sum not exceeding £700 as the court thinks just by way of solatium for the suffering caused to the wife or husband by such death'.⁸ Under the law of Victoria only financial loss was recoverable.

The learned Judge denied the plaintiff recovery for solatium. He classified solatium not as a 'head of damage but as a separate right which could be sued for by the surviving husband or wife independently of any such claim'.⁹ To determine whether that right was recoverable in the forum regard must be had to the *lex loci delicti*. Following the Scots' cases of *Naftalin v. London Midland and Scottish Railway Company*¹⁰ and *M'Elroy v. M'Allister*¹¹ his Honour held that an action could not lie in the forum for a right which was not available under the *lex loci delicti*. The claim for funeral expenses was allowed on the ground that this was merely 'an element to be considered in measuring the damages of the party or parties who have suffered loss by reason of the wrongful act'.¹²

In the first edition of my book *Conflict of Laws in Australia*¹³ I criticized this decision as being inconsistent with the reasoning of the High Court in *Anderson v. Eric Anderson Pty. Ltd.* which had been decided a year earlier but was not referred to by his Honour. The decision by Chamberlain J., however, does accord with the views subsequently expressed by Lord Wilberforce in *Boys v. Chaplin*. Assuming that the defendant Durham was not a resident of South Australia and did not drive a car registered and insured in that state there would have been no reason for the displacement of the general rule as stated by his Lordship in that case, namely, that there should be 'actionability as a tort according to English law, subject to the condition that civil liability in respect of the relevant claim exists as between the actual parties under the law of the foreign country where the act was done'.¹⁴

It has been alleged that the decision in *Boys v. Chaplin* has altered or clarified the law in four respects:

1. It has been made clear that the two conditions in *Phillips v. Eyre*

⁸ *South Australian Wrongs Act*, 1936-1959, s.23 (b).

⁹ [1966] S.A.S.R. 143, at 148.

¹⁰ [1933] S.C. 259.

¹¹ [1949] S.C. 110.

¹² [1966] S.A.S.R. 143, at 148.

¹³ At 361.

¹⁴ [1971] A.C. 356, at 389.

are rules of choice of law and not of jurisdiction.¹⁵

2. It has abrogated what may be called the first rule in *Machado v. Fontes*, that is to say, the rule that the reference in the second limb in *Phillips v. Eyre* to 'not justifiable' means 'wrongful' and substituted therefor the requirement that the defendant's conduct must at least be 'civilly actionable' under the law.¹⁶

3. It has abrogated what may be called the second rule in *Machado v. Fontes*, that is to say, the rule that the substantive law to be applied in determining the extent of the defendant's liability is the *lex fori* and substituted therefor the requirement that the head of damage which the plaintiff is seeking to enforce must exist under both the *lex fori* and the *lex loci delicti*.¹⁷

4. It has introduced a vaguely defined exception to the general rule in *Phillips v. Eyre* as interpreted above, to the effect that application of the *lex loci delicti* may be disregarded where the law of that place has no interest in applying its rule to the parties in the circumstances of the case.¹⁸

I have already stated my opinion that even as a matter of English law these conclusions are unsound, at any rate so far as 1, 3 and 4 are concerned.¹⁹ However, for the moment I am prepared to accept them at face value for the purpose of discovering whether Australian courts have shown any inclination to accept them. So far there have been six reported cases in Australia concerning interstate torts.

Joss v. Snowball

The first reported case in Australia in which the decision of the House of Lords was mentioned is the decision of the New South Wales Court of Appeal in *Joss v. Snowball*²⁰ which was rendered on 16th December, 1969, six months after the English decision. In that case the defendant Mr. Snowball was a resident of the New South Wales border town of Albury. He had obtained employment with William Cooper and Nephews (Australia) Pty. Ltd., a company which was incorporated in New South Wales and had its head office in that state. However, his position was that of the company's field representative in the Gippsland district of Victoria. The company maintained a substantial branch office in Melbourne from which the defendant's operations were controlled. It was the company's policy that the defendant should eventually move his residence to Melbourne, but at the time of the accident he had not

15 Cheshire, *Private International Law*, 8th ed., at 271; Morris, *The Conflict of Laws*, 1971, at 264; North and Webb, 'Foreign Torts and English Courts', (1970) 19 *I.C.L.Q.* 24, at 27.

16 Cheshire, *op. cit.*, at 271; Morris, *op. cit.*, at 271; North and Webb, *op. cit.*, at 28.

17 Cheshire, *op. cit.*, at 277.

18 Cheshire, *op. cit.*, at 274; Morris, *op. cit.*, at 271.

19 'Boys v. Chaplin or the Maze of Malta', (1970) 44 *A.L.J.* 160, at 164.

20 [1970] 1 *N.S.W.R.* 426.

yet done so. The company placed a car at his disposal. It is not stated in the report where the car was registered and insured.

The plaintiff was a relative of the defendant who resided in Albury, New South Wales. She was anxious to visit Melbourne and it was arranged (in Albury presumably) that he would give her a lift to that city. Just north of Euroa, within the state of Victoria, the plaintiff suffered personal injuries as the result of an accident caused by the defendant's negligence.

The major issue before the court was whether she could recover against Mr. Snowball's employer. One of her arguments in support of such liability was based on s.16 of the *New South Wales Motor Vehicles (Third Party Insurance) Act*, 1942 which 'deems' any driver of a motor vehicle, whether acting with or without the consent of the owner, to be the owner's agent for the purposes of the Act. At the time of the accident there was no such provision in Victoria.

The claim based on s.16 was disposed of by the majority of the court (Jacobs and Holmes J.J.A.) in a few lines:²¹

As we have said earlier, section 16 is substantive, not procedural law. The act sued on is therefore a wrong under the law of New South Wales. However, it is not a wrong by the *lex loci delicti* and even on the test of 'justifiability' the present defendant could justify under the common law which, on the view we have already expressed, is the law of Victoria. A necessary condition for actionability in New South Wales where the act or omission occurred in Victoria, as laid down in *Koop v. Bebb*²² and *Anderson v. Eric Anderson Pty. Ltd.*²³ is therefore not present.

The learned President of the Court (Wallace P.), who dissented on other grounds, made a short reference to the views of Lords Hodson and Wilberforce in *Boys v. Chaplin* in relation to the continued applicability of *Machado v. Fontes* but found it unnecessary to express further views on the matter.²⁴

It is obvious from the above that the conflict point was not strongly argued and did not receive the full consideration of the Court. It can only be said that the majority followed the traditional rules as interpreted by the High Court of Australia and that the impact of *Boys v. Chaplin* was nil. It is interesting to note that Wallace P., who would have allowed the plaintiff's action against the defendant's employer for other reasons not relevant here, considered the views of Lords Hodson and Wilberforce in *Boys v. Chaplin* only as placing a possible obstacle to that action, that is to say, in overruling *Machado v. Fontes*. He made no attempt to buttress his conclusion by referring to the 'flexibility' exception put forward by these Law Lords although *prima facie* this exception could have been applied on the facts of the case.

21 [1970] 1 N.S.W.R. 426, at 430.

22 (1951) 84 C.L.R. 629.

23 (1966) 114 C.L.R. 20.

24 [1970] 1 N.S.W.R. 426, at 430.

Kemp v. Piper

Boys v. Chaplin did secure the full attention of the South Australian court in *Kemp v. Piper*.²⁵ That case raised exactly the same conflict of laws as *Li Lian Tan v. Durham*. The factual situation, however, differed slightly. The plaintiff brought action in South Australia in respect of the death of her husband, who had been killed in a motor accident in Victoria as a result of the negligence of the defendant who was driving the car. At the time of the accident both deceased and defendant were residents of South Australia, although the defendant moved to Western Australia a year later. The plaintiff framed her action in terms of the South Australian *Wrongs Act* and included amongst her demands a claim for solatium in pursuance of s.23 (b) of that Act.

This, as the learned Chief Justice pointed out, raised the issues debated in *Chaplin v. Boys*. However, both the Chief Justice and Hogarth J. agreed that it was not necessary for them to make a choice between the contending views. If the view expressed in that case by Lords Donovan and Pearson were followed there was no doubt that the plaintiff should succeed on the *lex fori*. Even if the views of Lords Hodson and Wilberforce were accepted, the result on the facts of the case would be the same:

... though *prima facie* no head of damage should be recoverable in South Australia which would not be recoverable in Victoria yet, as the plaintiffs, the deceased and the defendant were all, at the relevant time, domiciled or resident in South Australia, there is no reason to suppose that Victoria has any interest in applying its own denial of these remedies to the parties and no reason why the South Australian court should renounce its own rules.²⁶

Such a conclusion of course conflicted with that of Chamberlain J. in *Li Lian Tan v. Durham*. If the views expressed by Lords Donovan and Pearson were correct that case was wrongly decided. But as the Chief Justice pointed out, if the views of Lords Hodson and Wilberforce were to prevail the decision could be distinguished 'because it may well be that there was in that case no sufficient nexus between South Australia and the parties'.²⁷

There was no need then for the Court to determine whether the extent of the liability of the defendant should be 'co-determined' by the *lex loci delicti* or not. What the Court did decide, however, was that it would not accept the peculiar head-counting proposed by some English commentators with the suggested result that both *Machado v. Fontes* and the proper law exception have been rejected by the majority of the House of Lords.²⁸ The Court saw the choice very simply between the

25 [1971] S.A.S.R. 25.

26 [1971] S.A.S.R. 25, at 29.

27 [1971] S.A.S.R. 25, at 30.

28 Cheshire, *op. cit.*, at 262-263, Webb and North, *op. cit.*, at 25; *contra*, Morris, *op. cit.*, at 270.

views of Lords Donovan and Pearson on the one hand and those of Lords Hodson and Wilberforce on the other. It did not accept as the *ratio decidendi* the view which only Lord Guest would have accepted. Indeed the view of Lord Guest was put aside by the Chief Justice as being 'clearly a minority one'.²⁹

If it had been necessary to make the choice, how would the Court have decided? There is little doubt that it would have preferred the views of Lords Donovan and Pearson. The Chief Justice described those views as 'more consistent with the view adopted by the High Court'.³⁰ Hogarth J. considered³¹ that the preponderance of authority supported the view expressed by Windeyer J. in *Anderson's* case that:

under our system of private international law as it stands at present, a court that entertains an action based upon a foreign tort must (unless there be a statute to the contrary) decide the rights of the parties as it would in an action based on a similar event occurring within its own domain.³²

Kolsky v. Mayne Nickless Ltd.

Almost simultaneously with *Kemp v. Piper* the New South Wales Court of Appeal considered the effect of *Boys v. Chaplin* in *Kolsky v. Mayne Nickless Ltd.*³³ Here also the action was one for wrongful death. The accident causing the death of the deceased had occurred in Victoria. The deceased, although domiciled in New South Wales, where his dependants continued to be resident, was resident in Victoria at the time of the accident for the purposes of his employment and the defendant was a company incorporated in Victoria with its head office in that state. It did business in New South Wales and was registered there as a foreign company. Both vehicles involved in the collision were registered and insured in Victoria.

The conflict of laws arose out of a difference between New South Wales and Victorian law relating to the consequence of contributory negligence on the part of the deceased. Under the law of New South Wales, the forum, it is provided in s.10 (4) of the *Law Reform (Miscellaneous Provisions) Act* 1965 that as regards accidents occurring after 1st January, 1966: 'No action for damages for the benefit of dependants of a deceased person under the Compensation of Relatives Act 1897-1953 shall be defeated by the fault or breach of statutory duty of the deceased person, nor shall the damages recoverable in such an action be reduced by reason of such fault or of such breach of statutory duty'.

The Victorian legislation providing for apportionment in the case of contributory negligence is specifically extended, in relation to an action under Part III of the *Wrongs Act*, 1958 which deals with fatal accident

29 [1966] S.A.S.R. 25, at 30.

30 [1966] S.A.S.R. 25, at 30.

31 [1966] S.A.S.R. 25, at 37.

32 (1966), 114 C.L.R. 20, at 42.

33 [1970] 3 N.S.W.R. 511.

claims, to the fault of the deceased.³⁴ Assuming that the deceased had been guilty of contributory negligence, could the plaintiff recover the whole of the damages suffered, as New South Wales permitted, or should the damages be apportioned as Victorian law demanded?

The facts of this case did compel the Court to make a choice between the various views presented in *Boys v. Chaplin*. For, unlike the situation in *Kemp v. Piper*, it was impossible to invoke here the exception propounded by Lords Hodson and Wilberforce. New South Wales admittedly had an interest in applying its own law in favour of dependants who were resident and domiciled there. But Victoria too had an interest in protecting a defendant who was incorporated under its law and had its head office within that state and whose car was registered and insured in accordance with its laws.

Nevertheless the Court of Appeal held in a unanimous judgment (Sugerman P., Asprey and Moffitt JJ.A.) that the law of New South Wales should be applied. Although their Honours could have side-stepped the issues raised by *Boys v. Chaplin* by holding that the difference in the laws of New South Wales and Victoria as to the effect of contributory negligence was not one of substance but of procedure only, they appear to have treated the difference, and rightly in my opinion, as one of substantive law.³⁵

The Court proceeded by first looking to see whether the two limbs of the rule in *Phillips v. Eyre* had been satisfied. It had little trouble in coming to the conclusion that the wrong complained of was 'not justifiable' under the law of Victoria. Since under the law of Victoria contributory negligence was only ground for apportionment and did not defeat the cause of action, there was no need for the Court to determine whether 'not justifiable' merely meant 'wrongful' as was held in *Machado v. Fontes* or 'actionable' as has been suggested since.³⁶

Once this conclusion was reached the action was 'well founded' as the Court termed it.³⁷ It did not like to use the term 'within jurisdiction' or 'over the threshold', since it considered the question of whether the rule in *Phillips v. Eyre* was satisfied to be 'one of substantive law — whether in given circumstances an action lies'.³⁸

With respect this is a semantic quibble: the important point is that the Court treated the rule in *Phillips v. Eyre* as a preliminary point which had to be decided before the question of the applicable law was reached. Thus the Court perpetuated what has been called by an Eng-

34 *Wrongs Act*, 1958, s.26 (4).

35 [1970] 3 N.S.W.R. 511, at 521. The statement is admittedly somewhat ambiguous. What their Honours mean, it seems, is that whilst apportionment is a matter of substantive law, its existence or non-existence does not make the cause of action in negligence a different one. For the relevance of this point see n. 49 *infra*.

36 [1970] 3 N.S.W.R. 511, at 516.

37 [1970] 3 N.S.W.R. 511, at 517.

38 [1970] 3 N.S.W.R. 511, at 516.

lish commentator the 'Australian heresy'.³⁹ Of course it is not heresy at all but orthodoxy initiated by Willes J. himself. But if it has to be given a handle it should be called 'colonial' since Canadian judges and text-writers share it.⁴⁰

The Court went on to say:

It also follows, in our opinion, from the decision of the majority in *Anderson's* case that once reference to Victorian law has fulfilled its purpose in this case of enabling it to be decided whether this action is well founded in the Supreme Court of this State, it is no longer relevant. It further follows, in our opinion, from the decision of the majority in that case, affirming the decision in that respect of this Court, that from that point on this action must be tried and determined in accordance with the law of this State.⁴¹

The Court disposed of the whole question in two simple paragraphs. It decided the issue on what it regarded as established principles of Australian law as enunciated by the High Court in *Anderson's* case. It can be argued that *Anderson's* case was not on all fours with *Kolsky's* case. In *Anderson's* case the *lex fori* gave less than the *lex loci delicti* (indeed nothing). Even Lord Wilberforce, who expressly approved of the decision in *Anderson's* case, would not grant a plaintiff a greater recovery than he could obtain under the *lex fori*. In *Kolsky's* case the position was reversed. The issue in *Kolsky's* case, as it was in *Boys v. Chaplin*, was whether the plaintiff can recover more in the forum than he could have recovered in the *locus delicti*.

Nonetheless the Court of Appeal was justified in holding that the reasoning of the majority in the High Court in *Anderson's* case was decisive of the matter. In my opinion the views of Lord Wilberforce are not compatible with the basis upon which the majority of the High Court approached the matter. True it is, Lord Wilberforce was in agreement with the High Court when he said 'actions on foreign torts are brought in English courts in accordance with English laws'.⁴² But he then went on to say 'the broad principle should surely be that a person should not be permitted to claim in England in respect of a matter for which civil liability does not exist, or is excluded, under the law of the place where the wrong was committed'.⁴³

This statement is subject to two possible interpretations. One is that Lord Wilberforce was introducing a preliminary qualification to the action in England being 'well founded', to adopt the terminology of the New South Wales Court of Appeal. That is to say, an English court cannot entertain a claim for a particular head of damages put forward by the plaintiff unless it is satisfied that he could have brought a claim

39 D. McClean, 'Torts in the Conflict of Laws', (1969) 43 *A.L.J.* 183, at 183-185.

40 Spence, 'Conflict of Laws in Automobile Negligence Cases', (1949) 27. *Can. Bar Rev.* 161 at 168.

41 [1970] 3 N.S.W.R. 511, at 517.

42 [1971] A.C. 356, at 385.

43 [1971] A.C. 356, at 389.

for the same head of damages under the *lex loci delicti*. Once this has been established, however, the *lex fori* is solely determinative of the extent of the obligation. It would follow that, if the same head of damages is available in both countries, such as damages for personal injuries as a result of the defendant's negligence, the plaintiff should secure full damages according to the *lex fori* even though recovery for that head of damages is subject to some restriction under the *lex loci delicti* (for instance, by a law providing for apportionment in the case of contributory negligence).

If this is the correct interpretation of Lord Wilberforce's views, there is no decision of the High Court of Australia which stands in its way; for the High Court has not so far decided what the exact meaning of the second limb of the rule in *Phillips v. Eyre* is. Of course, in that case also the decision of the New South Wales Court of Appeal is in accordance with those views. For as the Court of Appeal pointed out: 'Negligence remains the same cause of action, however differently contributory negligence may be treated'.⁴⁴

I must hasten to point out, however, that such an interpretation, whilst not formally in conflict with the High Court's views, would be difficult to reconcile with the views expressed by Windeyer J. in *Ander-son's* case. In that case the learned Judge posited the issue before the Court in the following questions:

But when the two conditions are fulfilled — when the act is wrongful by the law of the forum and in the place where it occurred, what then? Is it to deal with it as if everything that in fact happened outside the country of the forum happened within it? Or is it in determining *whether the defendant is liable* and what is the measure of his liability to have regard to the law of the place where those things actually happened? Saying that a New South Wales court will entertain an action on a foreign tort because it is of a character actionable in New South Wales does not necessarily mean that it must determine it in accordance with the municipal law of New South Wales. Assumption of jurisdiction and choice of law are logically distinct.⁴⁵

Subsequently he answered that question by saying:

... authority that we should follow does, I think, show, that under our system of private international law as it stands at present a court that entertains an action based upon a foreign tort must (unless there be a statute to the contrary) decide the rights of the parties as it would in an action based on a similar event occurring within its own domain.⁴⁶

It is quite clear from these remarks that the learned Judge considers the question of 'whether the defendant is liable' as a question of 'choice of law' governed by the *lex fori* and not one of 'jurisdiction' (or 'threshold' or 'founding of the action').

44 [1970] 3 N.S.W.R. 511, at 521.

45 (1966) 114 C.L.R. 20, at 41. My italics.

46 (1966) 114 C.L.R. 20, at 42.

I doubt whether Lord Wilberforce saw in the second limb of the rule in *Phillips v. Eyre* merely a preliminary qualification which has no bearing on determining the extent of the defendant's liability. For he said specifically:

... provisions of the *lex delicti*, denying, or limiting, or qualifying recovery of damages because of some relationship of the defendant to the plaintiff, or in respect of some interest of the plaintiff (such as loss of consortium) or some head of damage (such as pain and suffering) should be given effect to.⁴⁷

What his Lordship really meant therefore is that so far as the substantive law relating to the defendant's liability is concerned, that is to say, questions of heads of damages recoverable and any substantive limitation thereof, there must be a coincidence of the *lex fori* and the *lex loci delicti*. This has been the interpretation of his remarks by several English commentators.⁴⁸ In that case, however, his views are certainly in conflict with the established view of the High Court of Australia, namely that the law solely applicable to determine liability of the defendant is the *lex fori*.

Some discussion took place in the Court of Appeal in *Kolsky's* case as to whether the 'flexible' approach suggested by most of the Law Lords in *Boys v. Chaplin* in varying degrees should be adopted. This was obviously influenced by an argument put forward by the learned editors of the eighth edition of Cheshire's *Private International Law* that by a 'counting of heads' majority support could be found in the House for at least a limited degree of flexibility which would be enough to deal with 'forum-shopping'.⁴⁹

It would have been difficult to argue that the plaintiff in *Kolsky's* case was 'forum-shopping' since he brought suit in the state where the deceased's dependants lived and where the wrongful death had its financial impact. To say that Victoria was the only proper forum would be to introduce choice-of-law rules in the form of jurisdictional rules.

Nevertheless the Court considered the argument that some exception to the general principle should be introduced to deal with 'forum-shopping' and despite some attraction to the idea, felt bound to reject it: since 'the established law of this country in the present respect is on the side of certainty rather than flexibility'.⁵⁰

In so doing the Court rejected not only the 'proper law of the issue' test propounded by Lords Wilberforce and Hodson which had after all been given some consideration by the South Australian Full Court in *Kemp v. Piper*, but also the more limited suggestions put forward by Lords Hodson, Donovan and Pearson to prevent forum-shopping.

47 [1971] A.C. 356, at 389.

48 Cheshire, *op. cit.*, at 275-277, North and Webb, *op. cit.*, at 27-29.

49 Cheshire, *op. cit.*, at 274; see also North and Webb, *op. cit.*, at 29-31.

50 [1970] 3 N.S.W.R. 511, at 520.

Kerr v. Palfrey

Mention must also be made of the decision by Gillard J. in the Supreme Court of Victoria in *Kerr v. Palfrey*.⁵¹ In that case Messrs. Kerr and Palfrey, who were both resident and domiciled in Victoria, went in January 1966 on a visit to Tasmania in a motor vehicle driven by Palfrey. In Tasmania the motor vehicle was involved in a collision as a result of which Palfrey died and Kerr was severely injured. In April 1966 letters of administration of the estate of the deceased were granted by the Supreme Court of Victoria to the defendant, a relative of the deceased. No representation was taken out in Tasmania. In September 1967 the plaintiff brought action against the legal personal representative of the deceased in pursuance of s.29 of the *Administration and Probate Act* 1958 (Victoria) which provides for the survival against his estate of a cause of action which was subsisting against a deceased person at the time of this death. The Tasmanian *Administration and Probate Act*, 1936 provides similarly for a survival of actions in s.27 (1), but subject to the proviso in sub-s.5 that proceedings for such a cause of action shall not be maintainable unless taken not later than six months after the grant of letters of administration.

The defendant argued that he was not liable in Victoria since under the law of Tasmania he was not liable to the plaintiff at the time of institution of proceedings: (a) because no letters of administration had been granted to him in that state and (b) because no liability attaches to the legal personal representative unless proceedings are taken within the time specified by s.27 (5) of the Tasmanian Act. The fact that the deceased would have been liable under Tasmanian law had he survived was not relevant for, as Lord Wilberforce had pointed out in *Boys v. Chaplin*, the liability had to exist 'as between the actual parties' under the *lex fori* and the *lex loci delicti*.⁵²

Had Gillard J. accepted the views of Lord Wilberforce in *Boys v. Chaplin in toto*, he could have held that the Tasmanian law was inapplicable in the circumstances of the case. All the parties were connected with Victoria and Tasmania had little or no interest in denying recovery to a Victorian plaintiff against a Victorian estate.⁵³ The learned Judge, however, although he made some passing references to *Boys v. Chaplin*, left that decision and its complexities severely alone. He achieved the same result nonetheless.

Gillard J. pointed out that the Victorian *Administration and Probate Act* provided for the survival of 'all causes of action subsisting against the deceased'. The action in question most certainly would have been

51 [1970] V.R. 825.

52 [1971] A.C. 356, at 389, see also *M'Elroy v. M'Allister* [1949] S.C. 110. North and Webb, *op. cit.*, at 29, say that this requirement is 'put very strictly: if the cause of action vests in different persons according to the two laws or if liability attaches to different persons, then no action can be brought in England'.

53 Compare the Californian case of *Grant v. McAuliffe* (1953), 264 P. 2d 944.

enforceable against the deceased had he survived since it was actionable against him under both Victorian and Tasmanian law. Since the precondition had been fulfilled, the Victorian statute enables that liability to be enforced in an action brought in a Victorian court against the Victorian administrators of the estate.⁵⁴

Alternatively the learned Judge justified his conclusion by very sensibly seeing the identity of the defendant in both states in the estate of the deceased rather than in the persons who happened to be its representatives. He pointed out that in Tasmania it would have been possible to sue the estate provided an administrator *ad litem* had been appointed there. The appointment of such an administrator would have been purely a procedural step. The plaintiff thus did have a right of action under the law of Tasmania against the estate. He could have enforced that right in Tasmania but for a procedural step he failed to take. But that failure was one of procedure, which was not relevant in the forum.⁵⁵

This left the question of the time limit imposed by Tasmanian law. Normally such a time limit would be treated as a matter of procedure. In *Pedersen v. Young*⁵⁶ Windeyer J. suggested that, where a liability newly created by statute was qualified by a limitation of time directed specifically at that new liability, the limitation should be treated as a substantive part of the liability. Similarly in *Boys v. Chaplin* Lord Wilberforce stated his view that limitations on the recovery of damages imposed by the *lex loci delicti* should be observed in the forum.⁵⁷

Gillard J. disposed of these objections on the very simple ground that at the time of the hearing in Victoria no application for letters of administration had yet been made in Tasmania. Until letters of administration were granted in that state the time did not begin to run. Thus the liability against the estate still existed in Tasmania, inchoate, but enforceable if certain procedural steps were taken.⁵⁸ The decision therefore proceeds on the assumption that there must be 'actionability' against the defendant under the *lex loci delicti*.

Warren v. Warren

The only decision to give unqualified support to the Wilberforce doctrine is the decision of Matthews J. of the Queensland Supreme Court in *Warren v. Warren*.⁵⁹ In that case a married couple normally resident and domiciled in Queensland went travelling in New South Wales in a motorcar, registered and insured under Queensland law, which was owned by the husband. In New South Wales the car was

54 [1970] V.R. 825, at 828 following remarks made by the High Court in *Koop v. Bebb* (1951) 84 C.L.R. 629, at 641.

55 [1970] V.R. 825, at 830.

56 (1964) 110 C.L.R. 162, at 169. See also *M'Elroy v. M'Allister* [1949] S.C. 110.

57 [1971] A.C. 356, at 389.

58 [1970] V.R. 825, at 831.

59 [1972] Qd. R. 386.

involved in a collision as the result, it was alleged, of the negligence of the husband who was driving the car. In consequence the wife suffered injury and brought action in Queensland to recover damages from her husband.

S.2 of the *Law Reform (Husband and Wife) Act*, 1968 of Queensland provides that '... each of the parties to a marriage shall have the like right of action in tort against the other as if they were not married'. On the other hand it is provided in s.16 of the *Married Persons (Property and Torts) Act*, 1901 of New South Wales that: '... no husband or wife shall be entitled to sue the other for a tort except as provided in s.16A or s.16B of this Act'.

S.16A is not relevant to the present discussion, but s.16B provides as follows:

(1) An action for damages against any person may be commenced and maintained and judgment may be obtained and enforced in respect of bodily injury to, or the death of, any other person caused by or arising out of the use of a registered motor vehicle, notwithstanding that at the date of the bodily injury or of the injury resulting in the death or at any later date such persons were husband and wife.

In this sub-section, 'registered motor vehicle' means a motor vehicle registered or required to be registered under the Motor Traffic Act, 1909, as amended by subsequent Acts, or the Transport Act, 1930, as amended by subsequent Acts...

The New South Wales Court of Appeal has already held that s.16B could not be applied to a spouse where the injuries arose out of the use of a motor vehicle registered and insured in Queensland since such a vehicle when used on a temporary visit to New South Wales is not required under regulations made in pursuance of the *Motor Traffic Act*, 1909 of New South Wales to be registered under that Act.⁶⁰ Thus had the plaintiff brought her action in New South Wales, the *locus delicti*, she clearly would have failed in her action because of the provisions of s.16 of the *Married Persons (Property and Torts) Act*, 1901.

Matthews J. rejected the easy way out which he could have adopted by characterising the issue of inter-spousal immunity as a question of procedure despite the very cogent reasoning of Denning L.J. in *Broom v. Morgan*⁶¹ to that effect. Nor did he accept the argument based on the reasoning of Kerr J. in *Hartley v. Venn*⁶² that the action of the husband in injuring the wife was 'not justifiable' in the sense that it constituted a wrongful act under the law of New South Wales though in the circumstances not one which could be enforced by legal action. Instead he accepted the remarks of the High Court in *Koop v. Bebb*⁶³ as authoritative of the proposition that 'not justifiable' should be read as meaning 'actionable' or 'creating civil liability'.

⁶⁰ *Zussino v. Zussino* [1969] 2 N.S.W.R. 227.

⁶¹ [1953] 1 Q.B. 597, at 609-610.

⁶² *Hartley v. Venn* (1967) 10 F.L.R. 151.

⁶³ (1951) 84 C.L.R. 629, at 643.

On the dual liability test which Lord Wilberforce favoured as the main rule, this should have led to the dismissal of the wife's claim in Queensland. His Honour avoided this distasteful result for two reasons. In the first place he held the issue of inter-spousal immunity to be a separate one from that of tortious liability and subject to a different choice-of-law rule.⁶⁴ Following United States authority and in particular the decision of Currie J. of the Wisconsin Supreme Court in *Haumschild v. Continental Casualty Co.*⁶⁵ he held that inter-spousal immunity was a question affecting marital status and as such governed by the law of the domicile, in this case the law of Queensland. On that view, which approximates to an opinion I have expressed elsewhere,⁶⁶ the rule in *Phillips v. Eyre* was irrelevant.⁶⁷

However, his Honour in buttressing his conclusion also invoked Lord Wilberforce's exception in *Boys v. Chaplin*. If the issue of inter-spousal immunity was to be treated as one of tortious liability, he found that 'clear and satisfying grounds' existed for submitting the resolution on that issue to the law of Queensland.⁶⁸ Unfortunately he did not carry out Lord Wilberforce's instruction 'to identify the policy of the rule, to enquire to what situations, with what contacts, it was intended to apply, whether not to apply it, in the circumstances of the instant case, would serve any interest which the rule was devised to meet'.⁶⁹

If his Honour had done this, he would have found that as a Queensland judge he was faced with a simple case of statutory interpretation: to what situations was the Queensland statute intended to apply? As the High Court has indicated in another Queensland case, *Freehold Land Investments Ltd. v. Queensland Estates Pty. Ltd.*,⁷⁰ this is the question which a court must first enquire into before it becomes enmeshed in the intricacies of the common law conflict rules. But there is no denying that, however unnecessarily, his Honour clearly accepted as the law of Queensland the views expressed by Lord Wilberforce in *Boys v. Chaplin*.

Schmidt v. Government Insurance Office of New South Wales

A year after *Warren v. Warren*, and without any reference in the decision or in the argument to the Queensland case, the New South Wales Court of Appeal made its decision on very similar facts in *Schmidt v. Government Insurance Office of New South Wales*.⁷¹ In that case the plaintiff wife brought action in New South Wales in respect of injuries which she had received in Victoria as a result of the negligent driving of her husband.

64 [1972] Qd. R. 386, at 388.

65 (1959) 7 Wis. (2d) 130.

66 Nygh, *Conflict of Laws in Australia*, 2nd ed., at 128, 129, although there I urged that the law of the matrimonial residence should be looked at rather than the outmoded and technical concept of domicile.

67 *Warren v. Warren* [1972] Qd. R. 386, at 390, 391.

68 [1972] Qd. R. 386, at 392, 393.

69 *Boys v. Chaplin* [1971] A.C. 356, at 391.

70 (1970) 44 A.L.J.R. 329.

71 [1973] 1 N.S.W.L.R. 59.

The motor vehicle was registered and insured in New South Wales. At the time of the accident there was no legislation in Victoria which permitted a spouse to bring an action in tort against the other spouse. The Court by a majority (Moffitt J.A. with whom Reynolds J.A. agreed, Hardie J.A. dissenting) held that the wife could bring her action in New South Wales. The reasoning of the majority was based on two alternative grounds.

The first strand of reasoning assumed that s.16B of the New South Wales Act was applicable only to situations to which under the common law rules of private international law the law of New South Wales extended. This led the Court to the celebrated rule in *Phillips v. Eyre* and the question of whether the conduct of the husband was 'not justifiable' under the law of Victoria. Moffitt J.A. held that the conduct was 'not justifiable' in Victoria 'because negligence between persons not under disability is actionable in Victoria and New South Wales'.⁷²

Since his Honour did not consider it relevant to discuss whether at common law there was an absence of liability between spouses it must be assumed that he was looking not for liability under Victorian law, but for 'wrongfulness' in the *Machado v. Fontes* sense. It was on this point that Hardie J.A. dissented. He felt bound by the previous High Court decisions to hold that 'not justifiable' meant 'fully actionable'.⁷³

None of their Honours referred to *Boys v. Chaplin* and in the light of the previous decision of the Court of Appeal in *Kolsky's* case no doubt they considered that case irrelevant to the Australian situation. Their decision can therefore, negatively, be treated as a simple rejection by both the majority and the dissenting Judge of the 'flexibility' approach of Lord Wilberforce and, admittedly *per incuriam*, of the alternative reasoning of Matthews J. in the identical fact situation in *Warren v. Warren*.

By way of alternative Moffitt J.A. in effect observed the instruction of Lord Wilberforce to 'identify the policy' of s.16B even though he did not refer to it. And that policy as he discovered it was that:

Section 16B is a law which puts the wife or husband in the same position as any other person. Subject to appropriate proof of negligence under the general law, the section, as does the insurance policy, extends to injuries sustained in other parts of Australia. It leaves to the legislators of those other parts of Australia to do likewise regarding spouse disability in respect of their vehicles if they visit New South Wales covered by their insurance policies.⁷⁴

Consequently the section should be interpreted to apply to accidents in parts of Australia other than New South Wales arising out of use of a motor vehicle registered in New South Wales. The simplicity of this alternative approach has much to recommend it.

⁷² *Ibid.*, at 64.

⁷³ *Ibid.*, at 71.

⁷⁴ *Ibid.*, at 69.

Conclusions

What conclusions can one draw from all this? It would appear that most Australian judges are not prepared to accept as yet the various interpretations put forward by the House of Lords in *Boys v. Chaplin*. Instead, with the notable exception of Matthews J., they have preferred to follow traditional lines of authority as laid down by the decisions of the High Court of Australia, particularly in *Koop v. Bebb* and *Anderson's case*. The High Court may well decide to change its views but this would be a considerable departure from more or less settled attitudes.

It is submitted that Australian law differs from what is now considered to be the law in England in the following respects:

1. The rule in *Phillips v. Eyre* constitutes a preliminary test which must be met before the question of applicable law is reached. This is the effect of *Anderson's case* and was accepted in essence by the New South Wales Court of Appeal in *Kolsky's case*. It matters not whether one describes it as a question of jurisdiction *ratione materiae*, or as a 'threshold question' as Windeyer J. suggested in the High Court, or as a question of determining whether the question is 'well founded' which was the term preferred by the New South Wales Court of Appeal.

2. Despite the reasoning of Moffitt J.A. in *Schmidt's case* it is now likely that the words 'not justifiable' will be interpreted by Australian courts as meaning 'actionable' in the sense in which that term, when used in the first limb of *Phillips v. Eyre*, was interpreted by Windeyer J. in *Anderson's case*; that is to say, it must be established that under the *lex loci delicti* the plaintiff had a good cause of action against the defendant even though under that law some matter existed which would answer or defeat that cause of action.⁷⁵

3. Whatever may be the meaning of 'not justifiable', the decision by the English Court of Appeal in *Machado v. Fontes* that once the court has jurisdiction it determines the liability of the defendant according to its own law (the 'second' aspect of *Machado v. Fontes*) is still good law in Australia. It is noteworthy in this connexion that in all the Australian cases discussed in this article, the court finished up by applying the *lex fori*.

4. Despite the alternative grounds for the decisions in *Kemp v. Piper* and *Warren v. Warren*, any 'flexibility', whether widely or narrowly defined, is inconsistent with the decisions of the High Court of Australia. Furthermore a denial of jurisdiction in relation to a tort committed abroad on the ground of *forum non conveniens* is not permissible under the decisions of the High Court as they now stand.

⁷⁵ See Windeyer J. in *Anderson v. Eric Anderson Radio and TV Pty. Ltd.* (1965) 114 C.L.R. 20, at 43, 44.