CASE NOTES

THE STRANGE FATE OF A FOREIGN TORT IN A MALAYSIAN COURT

CHAN KWON FONG & ANOR. v. CHAN WAH[1]

An interesting appeal was heard in the Federal Court last year, concerning a tort committed in Indonesia. The plaintiff (the respondent on appeal) was employed by the defendants as a lorry driver, and worked in their logging operations in Samarinda, Kalimantan. The facts are not as clear as they might be, but it appears that in the course of loading his lorry a log slipped and injured the plaintiff, fracturing his spine, destroying one of his kidneys, and incapacitating him from work for about fifteen months. He sued his employers, and in the trial court was successful, being awarded $19,000 general damages and $8,000 special damages. The defendants appealed; the appeal was heard by Ali Ag. C.J. (Malaya), Wan Suleiman F.J. and Raja Azlan Shah F.J.; and the judgment of the court was delivered by Raja Azlan Shah F.J.

In the course of his judgment, Raja Azlan Shah F.J. found it "necessary . . . to ascertain the rule of private international law which defines the conditions of civil liability in (Malaysia) for an act done abroad." He continued:

> As the law stands it must be accepted that an action of tort will lie in Malaysia for a wrong alleged to be committed in a country outside Malaysia if two conditions are fulfilled. Firstly, the wrong must be of such a character that it would have been actionable if it had been committed in Malaysia. Secondly, it must not have been justifiable by the law of the country where it was committed.

The learned judge then briefly commented on *The Halley*, *Phillips* v. *Eyre*, *Machado* v. *Fontes* and, naturally enough, *Boys* v. *Chaplin*, with particular reference to Lord Hodson's judgment therein, quoting an extract in which that judge observed that:

> If the decision in *Machado* v. *Fontes* could be supported on the ground that actionability is not essential the respondent must succeed but, in my opinion, that decision is wrong and should be overruled.

In consequence of this rejection of *Machado* v. *Fontes*, the learned judge then offered a significant variation of his exposition of the law in Malaysia, by observing:

[1] [1977] 1 M.L.J. 232.

> In my opinion, with regard to the choice of law the generally accepted rule is that an act committed abroad is a tort and actionable as such, only if it is both actionable as a tort in this country as well as in the country where it was done.

These words echo those of Rule 178(1) of *Dicey and Morris* (Ninth ed., p. 938), a work referred to later in the judgment.

Then followed an excursion into the question whether the High Court had had jurisdiction over the defendants (resolved affirmatively); after which, noted the learned judge, "(t)he trouble starts when we consider the choice of law" – a curious comment, in the context of an action whose basic issues seemed already to have been defined, either by reference to the rule of double actionability or to that of Willes J. (actionability here, non-justifiability there). "It is here," comments the judge, "that the respondent has to establish both the conditions laid down in *Phillips* v. *Eyre*": so presumably, at this point, double actionability was not the test. This brings us to the penultimate paragraph of the judgment, *viz.*

> I now turn to the present case. There is no doubt that the wrong done to the respondent is actionable here, but there is doubt that an actionable wrong by Indonesian law was committed in Samarinda, Kalimantan, Indonesia. No evidence was led to this point, and, indeed, there is not a scintilla of evidence directed to this issue. As it is, since the person who wishes to establish a claim in respect of a foreign tort must also show that it is actionable in the foreign country, he must fail in his claim if he leads no evidence on the point. The speech of Lord Hodson in *Boys* v. *Chaplin* [1971] A.C. 356, 379 is in point:
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> > If it were clear that there existed in Malta in this case civil liability for the wrong done there would be no obstacle in the respondent's way, for in principle a person should in such circumstances be permitted to claim in this country for the wrong committed in Malta. This is to state the general rule as generally accepted which takes no account of circumstances peculiar to the parties on the occurrence. The existence of the relevant civil liability is, however, not clear in this case.

At this point, then, the seesaw tilts back to the double actionability test; and unless the plaintiff leads evidence to prove that the tort is actionable in the foreign country, he fails. Apparently in *Boys* v. *Chaplin* – despite the fact that the issue of "the relevant civil liability" in Malta was "not clear" (*pace* Lord Hodson) – the plaintiff still succeeded: which is more than the lorry driver did in the Federal Court.

The appeal therefore raises two issues of some considerable importance, first, what does the plaintiff in an action on a foreign tort in Malaysia really have to establish, and second, what is the exact nature of the burden of proof resting upon him? On the first issue, it is difficult to determine

which of the two views (actionability/non-justifiability; double actionability) is now favoured by the Federal Court; both seem in high standing; but the lorry driver lost, it seems, on the basis that he produced "not a *scintilla* of evidence" to prove that "an actionable wrong by Indonesian law was committed in Samarinda, Kalimantan, Indonesia." So we can, I suggest, accept the judgment as, in the end, opting for the double actionability rule, decisively rejecting *Machado* v. *Fontes* and the second proposition of Willes J., that "the act must not have been justifiable by the law of the place where it was done" (a test some of us older lawyers prefer). Actionability by the *lex fori* and the *lex loci* seems, therefore, the test of the foreign tort, in the Malaysian courts: although this double test may impose a heavier burden upon a plaintiff, then the older requirement of non-justifiability.

This brings us to the second issue, that relating to the burden of proof, and the question whether a plaintiff must prove that an actionable wrong by foreign law was committed. Let us ask ourselves whether this is the requirement of the law: using for this purpose the same (1973) edition of *Dicey and Morris* as that referred to by the learned judge.

In commenting on "Allegation and proof of the *lex loci delicti*" (pp. 967–68) *Dicey and Morris* state:

> A party who relies on foreign law must plead, and, if necessary, prove it. In the absence of an allegation that foreign law is applicable, the court will apply English law. It follows that a plaintiff suing for damages by reason of a tort committed abroad can rely on English domestic law, and leave it to the defendant to allege that foreign law applies and to prove how it differs to his advantages from English law. Under Rule 178 (1) it cannot be in the plaintiff's interest to refer to the *lex loci delicti* at all. Hence, in accordance with general principles, he can limit himself to the allegation that the act complained of was an actionable tort according to English law, and it is then for the defendant, as the party hoping to gain from the application of foreign law, to plead that the act was not actionable according to the *lex loci delicti*.
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> There is, on the other hand, a dictum of du Parcq L.J. according to which the plaintiff must, in his statement of claim, allege that the act is wrongful according to the *lex loci delicti*. And the modern English practice is for the plaintiff to allege in his statement of claim that the act was wrongful by the *lex loci delicti*, because this has the effect of narrowing the issues and thus may save the expense of expert witnesses at the trial. But of course it is neither necessary nor customary for him to anticipate and meet any defence that the defendant may hope to derive from the *lex loci delicti*.

This statement of practice resulting from experience of *Phillips* v. *Eyre* seems to afford the best method of resolving the issues.

The presumption (although "presumption" may not be the correct word: *Dicey and Morris* make the point (p. 1133) that "it is better to abandon the terminology of presumption, and simply to say that where foreign law is not proved, the court applies English law") that foreign law is, in the absence of other evidence, presumed to be the same as English law, is based on the theory that a knowledge of foreign law is not to be imputed to an English judge. It is extraordinary, perhaps, but we do not expect our judges to be omniscient. *Cheshire* notes (Ninth ed., p. 128):

> Unless the foreign law with which a case may be connected is pleaded by the party relying thereon, then it is assumed that it is the same as English law. The onus of proving that it is different, and of proving what it is, lies upon the party who *pleads the difference* (italics mine). If there is no such plea, or if the difference is not satisfactorily proved, the court must give a decision according to English law, even though the case may be connected solely with some foreign country.

This, it seems, is at the basis of the practice referred to in *Dicey and Morris*. Even in the case of a country subject to the general rules of the civil law rather than the common law, the principle is, it seems, adopted. For example, in a major case in the Court of Appeal in Singapore, and one argued by brilliant counsel, Whyatt C.J. observed:[2]

> It, therefore, becomes necessary to examine in some detail the municipal law relating to the title to oil in Sumatra when it is existing in its natural state in reservoirs under the ground. The municipal law to be applied is, of course, the domestic law of the Netherlands Indies but since *Netherlands Indies Law is presumed to be the same as English law unless differences between the two are satisfactorily established* (italics mine again) it will be useful, in the first place, to consider whether under the law of England oil *in situ* is a res nullius.

Obviously, questions of personal law are different. Hindu law[3] and Jewish law,[4] for example, must be proved by experts; but where a question of municipal (or should one say, national) law is involved, the presumption would seem to apply, and there seems to be no reason to suppose that it has been displaced in any way by the Evidence Act: even in relation to a country under the influence not of the common, but the civil law.

So we can ask ourselves, therefore: is the rule of Malaysian law the same as that of English law, as explained by the Chief Justice in Singapore, in

[2] *H.V. De Bataafsche Petroleum Maatschappij and Ors. v. The War Damage Commission* (1956) 22 M.L.J., at p. 158.

[3] *Sivagami Achi v. P.R.M. Ramanathan Chettiar and Anor.* (1959) 25 M.L.J. 221.

[4] *In re the Estate of Jacob Manasseh Meyer deceased* (1938) 7 M.L.J. (S.S.R.) 190.

1956? Given the provisions of section 3 of the Civil Law Act 1956 (Act 67), applying the common law of England and the rules of equity as administered in England on 7 April 1956 (as far as West Malaysia is concerned), it does not seem unreasonable to follow the English practice: after all, if *Cheshire* is correct, the onus of proving the difference lies on the party pleading the difference. Some law must fill in and sustain the gaps: why not the common law?

It is a nebulous area, admittedly, and in a Malaysian or Singaporean context not so clear as it would be in an English one: but it is a presumption of assistance. After all, as *Dicey and Morris* state (ninth ed., p. 19) "all systems have at least one common denominator. They are expressed in terms of juridical concepts or categories and local place elements or connecting factors." We like to suppose that others are like ourselves, that our several systems of law are not only compatible, possibly similar, but perhaps identical. Few who have studied the trend of modern cases in common law jurisdictions would, I think, seriously contend the view that there is a kind of unspoken rule of public policy at work, designed to protect the local national or resident; the courts seldom come out into the open on this issue (as did Cotton L.J. in *Sottomayor* v. *de Barros* (HO.1) (1877), when he said that "(n)o country is bound to recognise the laws of a foreign state when they work injustice to its own subjects") but one feels it is there: as if, attaching to an individual citizen, were a kind of status created by nationality or residence, going with him wherever he goes, and falling for protection to such an extent as his own courts can contrive it. This may in the end be the true explanation of *Babcock* v. *Jackson*[5] and *Boys* v. *Chaplin*;[6] a kind of unspoken assumption of similarity (or rather, that there should be a similarity) founded in a belief that our own system is the worthiest product of human reason.

Be that as it may, we can see that the question of proof is a nice one, on which there is at least logic and precedent on the side of the presumption of similarity referred to. Yet in spite of all this, the learned judge concluded, in allowing the appeal "with costs here and below," that although there was no doubt that the wrong done to the respondent was actionable in Malaysia, there was not going to be a retrial. "In my opinion," he said, "the respondent has failed to prove his case, he cannot be allowed to have a second bite at the cherry."

That failure, if failure it was, was of a technical nature; a second bite at a cherry whose existence has only just been established is not unreasonable; and the decision of the court leaves at least one reader with a sense of

[5] (1963) 2 Lloyd's Rep. 286.
[6] (1971) A.C. 356.

injustice. It is to be hoped that when the principles of the case fall for review by the Federal Court, it may permit itself a closer look at the reasons behind this particular judgment and contrive a better solution – one, dare I suggest it, founded in the practice referred to by *Dicey and Morris?* In this context, comments by T.A.G. Beazley in the *Malaya Law Review* (1977) 19 Mal.L.R. 391) and Harbajan Singh in the *Malayan Law Journal* [1977] 2 M.L.J. lxvii) will be of value.

For the Federal Court has now cast a major doubt in a critical area of evidence. Let us assume, what can be assumed without stretching the imagination too vigorously, an action in the High Court in Johor Bahru, in which the plaintiff has been run down by a Johore resident, in Singapore. Is it now the law that evidence must be led, by an expert on the law of Singapore, that the tort complained of was actionable by the law of Singapore? I can foresee some entertaining arguments at the taxation of a bill of costs, when the expenses of such an expert are reviewed.

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CUSTODY OF MUSLIM INFANTS

In an article on "Custody of Muslim Infants" (1977) J.M.C.L. 19 reference was made to two cases decided in Kelantan on the subject. In this note it is proposed to refer to a Kedah decision[1] and some decisions of the Saudi Arabian courts on the same subject.

In the Kedah case of *Rosna binte Ismail* v. *Mohamed Nor bin Hashim*[2] the plaintiff, the mother of the child, Duratul Ambiyak binte Abdul Hamid, claimed custody under S.41(3) of the Kedah Administration of Muslim Law Enactment, 1962. It seemed that the father of the child died on the 6th of March 1974 and after his death, his grandmother Cik binte Akib and his brother, Mohamed Nor bin Hashim came to his house and took away the child. The child was looked after by the grandmother and the defendant, Mohamed Nor, claimed that his brother had said before he died that the child should be looked after by him. The Kathi after hearing the plaintiff and the defendant and two witnesses called by the defendant, held that the mother was entitled to the custody of the child; He relied on a statement in a book by Mohamed Amin Alkuwai to the effect that when there are male and female claimants, priority is to be given to the mother, then to the mother's mother and so on how high soever who are entitled to become heirs. The matter was taken up on appeal[3] but the appeal was dismissed.

In the Saudi Arabian case of *Abdul Qadir* v. *Suhan*[4] Suhan, being the maternal grandmother was the legal custodian of Maryam, as her mother had remarried after the death of Maryam's father. As Suhan intended to move to Madina, where her daughter, the child's mother was living, Abdul Qadir, the paternal uncle of Maryam applied to the court claiming the right of custody over Maryam as he was the *'asaba* and therefore legal representative of his brother in matters of custody. According to the classical Hanbali doctrine, if one of the separated parents or his legal representative in his absence, intends to change residence to a place over

[1] I am indebted to Encik Ishak bin Ahmad B.A. (Hons.) University Kebangsaan Malaysia from whose thesis the case is obtained.

[2] Alor Star Kes Mal No. 22 of 1974. See Appendix 1.

[3] Alor Star Kes Rayuan No. 1 of 1974. See Appendix 2.

[4] High Court of Mecca, Case No. 53 Vol. 46 (1376 A.H. 1956 A.D.). See Ibrahim Ahmad Ali and Abdul Wahab Abu Sulaiman, Recent Judicial Developments in Saudi Arabia, (1969) 3 Journal of Islamic and Comparative Law, p. 13.