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Case No.

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL
Civil Division
From Mr Justice Milmo**

Royal Courts of Justice
6th December 1967

B e f o r e :

**THE MASTER OF THE ROLLS
(Lord Denning)
LORD UPJOHN
and
LORD JUSTICE DIPLOCK**

BOYS

Plaintiff/Respondent

v

CHAPLIN

Defendant/Appellant

**(Transcript from the Shorthand Notes of the Association of Official Shorthandwriters Ltd.,
Room 392, Royal Courts of Justice, and 2, New Square, Lincoln's Inn, London, W.C.2.)**

**MR H. TUDOR EVANS, Q.C. and MR DEREK HYAMSON (instructed by Messrs Gascoin & Co.)
appeared as Counsel for the Appellant.**

**MR LEONARD CAPLIN, Q.C., MR JOHN COPE and MR V. KATHRIE (instructed by Messrs
Roche, Son & Neale, Agents for Messrs Buss, Cheale & Co., Tunbridge Wells)
appeared as Counsel for the Respondent.**

HTML VERSION OF JUDGMENT

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THE MASTER OF THE ROLLS: David Boys is a young Englishman whose home is at Surbiton. When he was 16 he joined up in the Royal Air Force on a twelve years' engagement. On the 6th October, 1963, when he was 22, he was stationed in Malta on his duties as a technician in the Royal Air Force. His friend, Charles Ducat, who was also stationed in Malta, gave him a ride on the pillion of his motor-cycle. They were run into by a motor car driven by Richard Chaplin. He was serving in the Royal Naval Air Squadron and was also stationed in Malta at the time. David Boys was badly injured. He had a fractured skull and was unconscious for three days. The right side of his face was crushed. He was taken to the Royal Naval Hospital in Malta. He was there for about six weeks. Then he was brought back to England on the 19th September, 1963, and taken to the Royal Air Force Hospital at Wroughton in Wiltshire. He was there for over six months, until the 7th April, 1964. Then he was an out-patient for two months. Eventually on the 5th June, 1964, owing to his injuries, he was discharged from the Royal Air Force. He is wholly and permanently deaf in one ear and his sense of balance has been substantially impaired. The right side of his face is partially paralysed and he suffers much from headaches. Nevertheless, he is able to do good work. Soon after his discharge he found employment as an electronics engineer at a good wage: and it is unlikely that he will suffer any loss of earnings in the future on account of this accident.

The driver of the car, Richard Chaplin, is also back in England. He is stationed at Culrose in Cornwall. In August 1965 David Boys was given legal aid to sue Richard Chaplin and he issued a writ claiming damages. At first Chaplin denied negligence, but later it was admitted. So the only question is: What damages should be awarded? We were told that both vehicles are fully insured against liability for damages, whatever sum is awarded, being both insured with the same Insurance Company, an English Company.

Now the question arises: What is the law to be applied in the assessment of damages? According to the law of England, David Boys should be compensated, not only for his expenses and money loss, but also for his pain and suffering and loss of amenities of life. The figure would be £2,303. But, according to the law of Malta (as found by the Judge), David Boys should only receive his expenses and his money loss, and nothing whatever for his pain and suffering and loss of amenities. The figure would be £55.

The Judge held that the damages should be assessed according to the law of England, and he awarded the plaintiff £2,303. The defendant appeals to this Court, claiming that the matter is governed by the law of Malta and that the plaintiff should recover only £53.

The case throws up one of the most vexed questions in the conflict of laws: When a wrong is committed abroad, and the injured party seeks redress in England, what is the law to be applied? The cases on the subject are legion. So are the writers. The trend of the authorities is to this effect: In England, in general and subject to certain conditions, the Courts apply the law of the place of trial (Lex fori). Canada does the same. In Scotland, and at one time in the United States of America, the Courts applied the law of the place where the wrong was committed (lex loci delicti). In recent cases in the United States, the Courts have applied the law of the place which has the most significant contacts with the matter in dispute (the proper law of the tort, lex propria delicti).

After considering the authorities, I am of opinion that we should apply the proper law of the tort, that is, the law of the country with which the parties and the act done have the most significant connection. And once we have decided which is the correct law to apply, I think that law should be applied, not only to ascertaining whether there is a cause of action, but also to ascertaining the heads of damage that are recoverable and also the measure of damages: for these are matters of substantive law. They are quite distinct from the mere quantification of damages, which is a matter of procedure for the lex fori.

I will show how the English authorities can be fitted in so as to achieve this result.

PHILLIPS V. EYRE

The leading case in England is Phillips v. Eyre (1870) 6 Queen's Bench, p.1, a decision of the Court of Exchequer Chamber consisting of seven Judges. It is of high authority. It must be read in the light of the facts. In 1865 there was an insurrection in Jamaica. The Governor, Edward Eyre, proclaimed martial law and called out the forces to suppress it. Phillips was arrested in his house, handcuffed, put on board a ship and taken away. After the insurrection was suppressed, the Legislative Council of Jamaica passed an Act of Indemnity saving Governor Eyre from any liability for what was done in repressing the revolt. Governor Eyre returned to England. Phillips also returned and brought an action in these Courts for assault and false imprisonment. Governor Eyre pleaded that the Act of Indemnity was an answer to the action, and his plea was held good. Much of the argument was taken up with a discussion as to whether the Act of Indemnity was valid. It was held to be valid. Next, the plaintiff said that, even if it was valid and a defence in Jamaica, it could not have extraterritorial effect and take away the right of action in England. This argument was rejected on the short and simple ground that validity was to be determined by the law of Jamaica: and as the conduct of Governor Eyre could not be questioned in Jamaica, it could not be questioned here. Mr Justice Willes at page 28 laid down the law in these words: "The civil liability arising out of a wrong derives its birth from the law of the place, and its character" (i.e. whether it is valid or not) "is determined by that law. Therefore, an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere". That principle was quite sufficient to determine Phillips v. Eyre. After stating it, Mr Justice Willes went on to formulate two conditions which he said must, as a general rule, be fulfilled in order to found a suit in England for a wrong committed abroad. "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".

Once those two conditions are fulfilled, the English Courts determine the actionability of the wrong according to the law of England, and determine also the heads of damages and the measure of them by English law. Those two conditions have long been treated as good law. Lord Macnaghten in the House of Lords accepted them as correct, see Carr v. Francis Times & Co., (1902) Appeal Cases at p.182. So have the Supreme Court of Canada, see Canadian National Railways v. Watson, (1939) Supreme Court Reports, pp.11, 13. Mellon v. Pettigrew, (1945) Supreme Court Reports, p.62. But those conditions are not of universal application. Mr Justice Willes was careful to say that "as a general rule" those two conditions must be fulfilled. Like every general rule, it is subject to exceptions. To some of these I now turn.

MACHADO V. FONTES

The actual decision in Machado v. Fontes, (1897) 2 Queen's Bench, p.231, was on a point of pleading. It would appear that the defendant Fontes published in Brazil a pamphlet that was libellous of the plaintiff Machado. One would think that the natural place for the plaintiff to sue for the libel was in Brazil, the place where the libel was published. But the plaintiff did not sue in Brazil. And for a very good reason. He could not recover any damages in Brazil. So he sued in England. I suppose that by this time the defendant Fontes was in England and was served here. At first the defendant Fontes only denied the libel. But afterwards he sought to amend his plea by saying that the publication was not actionable in civil proceedings in Brazil (though it might be made the subject of criminal proceedings), or, alternatively, that general damages were not recoverable in Brazil. The Court, consisting of Lord Justice Lopes and Lord Justice Rigby, held that the plea was absolutely bad and ought to be struck out. If the plea were allowed, it would mean that a commission would have to go to Brazil to inquire into Brazilian law. "That", said Lord Justice Lopes, "would be a great waste of time and money". So the case fell to be determined, both as to actionability and as to heads of damage, according to English law (the lex fori) and not by the law of Brazil (the lex loci delicti).

In coming to this conclusion, the Lords Justices took the two conditions stated by Mr Justice Willes in Phillips v. Eyre and held that they were fulfilled. The first condition was fulfilled because the libel was of such a character that it would have been actionable if committed in England. The second condition was fulfilled because it was not justified by the law of Brazil, seeing that it was not an innocent act there but might be made the subject of criminal proceedings.

I think the Court was in error in applying the two conditions so literally. They treated them as if they were contained in a statute. But if there was ever to be a case where an exception should be made to the "general rule", it was Machado v. Pontes. Those two gentlemen were, I suppose, Brazilian citizens. Their names suggest it. The libel was in Brazil and I suppose in Portuguese. It was an entirely Brazilian affair. If the plaintiff could not recover damages in Brazil, he ought not to be allowed to recover damages in England. It was a mere accident that Pontes happened to come here and thus be served with a writ here. Suppose that Pontes had not come to England but had gone to Portugal, to France, or anywhere else. Can it really be supposed that Machado could follow Pontes all over the world and choose the forum that suited him best? It cannot be. If the libel was not actionable in Brazil, it should not be actionable in England. If general damages could not be recovered in Brazil, they should not be recoverable in England. At any rate, the two points were so well arguable that leave should have been given to raise them.

IS MACHADO v. FONTES BINDING?

But is Machado v. Pontes binding on this Court? I do not think so. It was an interlocutory appeal, heard by two Lords Justices only, on the bare question whether there should be leave to amend or not. Such questions are dealt with expeditiously - I might almost say summarily - because they do not usually raise points of great moment. On the occasions when they do raise important points, arrangements are made to have them heard by three Judges. No such arrangements were made in Machado v. Pontes. It was regarded as a usual interlocutory appeal, to be disposed of in an hour or two, by two Lords Justices only.

I cannot regard such a decision as a binding precedent. There is no case in the books where a decision of two Lords Justices has been held to be binding when it is afterwards discovered to be wrong. On the contrary, there are three cases in which such a decision has been overruled by a Court of three or more. Thus the decision of the two Lords Justices in the old Court of Chancery in Tassell v. Smith, (1858) 2 De Gex & Jones, p.713, was overruled by three Lords Justices in the Court of Appeal in Mills v. Jennings (1880) 13 Chancery Division at p.648. The decision of two Lords Justices in an interlocutory matter in Daglish v. Barton (1900) 1 Queen's Bench, p.284, was overruled by the Master of the Rolls and five Lords Justices in the Court of Appeal in Wynne-Finch v. Chayter, (1903) 2 Chancery at p.485. The decision of two Lords Justices in an interlocutory matter in Gerard v. Worth of Paris Ltd. (1936) 2 All England, p.905, was overruled by the Master of the Rolls and two Lords Justices in Lancaster Motor Co. v. Bremith Ltd. (1941) 1 King's Bench, p.675. I do not think that Young v. Bristol Aeroplane Co., (1944) King's Bench, p.718, is any authority to the contrary. The Court there did not discuss interlocutory appeals heard by two Lords Justices: whereas I think it plain, to anyone who knows how this Court works, that they ought not to be regarded as binding when they are afterwards shown to be wrong. It is unnecessary to consider today the position of final decisions of this Court: though I foresee the time may come when we may have to reconsider the self-imposed limitations stated in Young's case, especially in view of the recent change in practice in the House of Lords.

In my opinion, therefore, Machado v. Pontes is not binding on this Court. Test it in this way: Suppose that in the present case the parties involved in the accident had been all Maltese citizens, ordinarily resident in Malta. The injured man would naturally seek his remedy in the Courts of Malta. The cause of action and the measure of damages would be governed by that law. Even if by some chance the injured man were able to bring an action in England - as he might do if the negligent driver came over to England on a visit and was served with a writ here - nevertheless, the rights of the parties would still be governed by the law of Malta. The English Courts would apply the law of Malta. The plaintiff would not get a new head of damages by the mere chance that the defendant had happened to come to England. In such a case the reason why English Courts apply the law of the place (lex loci delicti) is because it is the place with which the whole affair is most significantly connected. It is the proper law of the tort.

THE PROPER LAW OF THE TORT

This brings me to the crux of the case. These two young men were not Maltese citizens resident in Malta. They were two English Servicemen stationed in Malta on duty. Does this make any difference? I think it does. It goes far to show that English law is the proper law of the tort. These two drivers were

insured in England by an English Company. The injured man was brought back for treatment in England, his native land. Quite naturally, he seeks his remedy in the Courts of England: and he is enabled to bring his action here, not by any chance visit to England by the defendant: but as of right because the defendant is regularly here. It is the defendant's home too as well as the plaintiff's. Why should not the plaintiff bring his action here and have it determined by English law? I see no reason why he should not do so. He gets justice here in that he gets fair compensation. Whereas the law of Malta gives him less than fair compensation. The two conditions stated by Mr Justice Willes in Phillips v. Eyre are fulfilled. The first is fulfilled because the wrong done in Malta (negligent driving) was of such a character that it would have been actionable if committed in England. The second is fulfilled because the act was not justifiable by the law of Malta.

Seeing that the two conditions are fulfilled, why should we not apply the law of England to the whole case? We have to apply it so as to see whether the wrong was of such a character as to be actionable in England. We should also apply it so as to determine the measure of damage and heads of damage.

I know that this means drawing a distinction between a collision in Malta between two Maltese and a collision between two English Servicemen. But I am prepared to draw the distinction. It has been drawn by others besides me. Take Scott v. Seymour (1862) 1 Hurlstone & Coltman, p.219, Lord Seymour struck Mr Scott in Naples and injured him severely. When they got home to England, Mr Scott sued Lord Seymour for damages. It was said that in Naples no-one could bring an action for damages for assault, and that only criminal proceedings lay. Mr Justice Wightman said (at p.235): "Whatever might be the case as between two Neapolitan subjects, or between a Neapolitan and an Englishman, I find no authority for holding that, even if Neapolitan law gives no remedy for an assault and battery, however violent and unprovoked, by recovery of damages, that therefore a British subject is deprived of his right to damages given by the English law against another British subject"; and Mr Justice Willes said: "I am far from saying that I differ from any part of the judgment of my brother Wightman".

These views are echoed in the latest edition of Dicey and Morris, p.916: "If an Englishman assaults another while both are on a holiday or a business trip in Italy, little can be urged in favour of the application of Italian law by an English Court called upon to decide the question of damages".

We were referred to several Scottish cases where the Scottish Judges, insistent as ever on principle, rigorously apply the law of the place (lex loci delicti) without exception. But I cannot help noting that this has led to injustice. So much so that I am not inclined to follow them.

I am of opinion that in these cases we should apply the law of the country with which the parties and the act done have the most significant connection. This has been called "the proper law of the tort". It has been done in many cases recently in the United States, in particular in Babcock v. Jackson (1963) 2 Lloyd's List Reports, p.286; and Griffith v. United Air Lines (1964) 203 Atlantic Reporter, 2nd Series, p.796. I would do the same here.

On the facts of this case, I think that England is the place with which the parties and the act done have the most significant connection. I think we should apply the law of England and award the plaintiff £2,303. I would dismiss this appeal.

(read by **THE MASTER OF THE ROLLS**)

LORD UPJOHN: The facts of this case can be very briefly stated. On the 6th October, 1963, the plaintiff (respondent to this appeal), riding pillion on a motor-scooter in Malta, met with an accident and suffered severe injuries when the defendant (appellant in this appeal), driving a motor car, collided with him. The plaintiff has sued the defendant in our Courts and the latter at the trial before Mr Justice Milmo admitted that he drove negligently and is, accordingly, liable in damages to him. The whole issue in this case is caused by the circumstance that while the plaintiff had a cause of action in Malta based on the defendant's negligence and could have successfully sued him there, yet having regard to paragraph 1088 of the Civil Code, he could only have recovered, putting it shortly, what we should describe as special damages plus certain (as distinct from problematical) future financial loss (which in this case has been assessed at £53) but nothing for general damages for pain and suffering or loss of amenity, nor for problematical future financial loss.

Mr Justice Milmo, however, came to the conclusion, following the decision of this Court in Machado v. Fontes, (1897) 2 Queen's Bench, p.231, that in an English action he was entitled to award general damages in accordance with our rules for the assessment of damages and he awarded him £2,250 in addition to the sum of £53 admittedly recoverable by the law of Malta. The whole question is whether he was right to do so.

Both plaintiff and defendant are English nationals domiciled and normally resident in this country and both were in Malta in the service of the Crown, though at the time of the accident neither was engaged on duty, so no question of any liability on the part of the Crown arises.

We were referred to the case of Scott v. Seymour, 1 Hurlstone & Coltman, p.219, where Mr Justice Wightman in the Court of Exchequer Chamber expressed the view that if one Englishman assaulted another Englishman while abroad, on their return here the sufferer could sue his assailant with out regard to foreign law; that view did not meet with the approval of all of his brethren and I propose to treat the matter as though the plaintiff was a resident domiciled Maltese who had pursued the defendant here.

Counsel for the appellant has argued that in a transitory tort such as negligence, all questions of substantive law must be determined by the lex loci delicti and questions of procedure by the lex fori. But he further argued that although the remedy to be granted is normally a question of procedure, yet it is not true that the remedy of damages is necessarily such a question. When considering what kind or head of damage is recoverable (e.g. general damages for pain and suffering), that is a question of principle and should be determined by the lex loci delicti, though quantification or assessment of damages he agrees is a matter for the lex fori. He relies by analogy on the case of D'Almeida v. Becker & Co. Ltd. (1953) 2 Queen's Bench, p.329, a case of contract, where Mr Justice Pilcher held that the question of remoteness of damages must be determined by the proper law of the contract, a case to which I shall return.

The foundation of the appellant's argument that all questions of substantive law must depend on the lex loci delicti rests upon the case of Phillips v. Eyre, Law Reports, 6 Queen's Bench, p.1, a decision of seven Judges sitting in the Exchequer Chamber, the judgment of the Court being delivered by Mr Justice Willes. Eyre was the Governor of Jamaica at the time of a rebellion there in 1865. He imprisoned Phillips without trial and later the Jamaican Legislature passed a retrospective Act indemnifying Eyre from his acts as Governor in suppression of the rebellion. Phillips sued him in this country and a number of points were debated; among them it was said that the Act of the Jamaican Legislature could have no extra-territorial effect to protect Eyre from an action in this country for wrongful imprisonment. This point was dealt with by the Court on page 28 of the report. After pointing out that the submission was based on a misconception, Mr Justice Willes said: "A right of action whether it arise, from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto. The terms of the contract or the character of the subject matter may shew that the parties intended their bargain to be governed by some other law; but, prima facie, it falls under the law of the place where it was made. And in like manner 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. Therefore, an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere....In this respect no sound distinction can be suggested between the civil liability in respect of a contract governed by the law of the place and a wrong".

All this was directed to shewing that the submission that the Indemnity Act could have no extra-territorial effect was without substance, for the Governor's acts took their colour from the law of the place where the alleged wrong was committed; the character of the civil liability must be determined by that law. So that extra-territoriality had nothing to do with it; the Governor's acts must be judged of in the light of the fact that he was immune by the law of Jamaica. But the learned Judge was very careful not to say that? that being so, the tortious act must be determined by the lex loci delicti. Had that been the view of the Court? it would have been a very short answer and would have been decisive of the issue. On the contrary? having? so to speak? got rid of the misconceived issue of extra-territoriality, Mr Justice Willes went on to consider a different point altogether, namely, what were the

necessary ingredients in an action in England in respect of a tort committed abroad. He dealt with it at the foot of page 26 and after stating that the English Courts were said to be more open to admit actions founded on foreign transactions than other countries? continued: "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". Though the Court expressed it to be "a general rule" and, therefore, I suppose capable of exception, I, for my part, can see nothing in the circumstances of this case which would justify a departure from that general rule; indeed, the facts seem to me to support its application in this case.

In the interlocutory appeal of Machado v. Fontes (supra), so much debated before us? Lord Justice Lopes and Lord Justice Rigby held that this test clearly distinguished between actionability in this country for the tort had it been committed here and unjustifiability in the place where the alleged wrong was committed, for the Court held that an action for defamation in respect of an alleged libel published in Brazil (plainly actionable if published here) was actionable here though not actionable in Brazil by way of civil proceedings but only the subject of criminal proceedings. So they held that actionability in a civil sense by the lex loci delicti was not necessary and struck out two pleas in bar by the defendant - (1) that in Brazil the plaintiff could not maintain legal proceedings against the defendant in which damages could be recovered; (2) alternatively? that in Brazil it could not be a ground of legal proceedings in which the plaintiff could recover general damages for injury to his credit, character or feelings. Lord Justice Lopes said: "It then follows, directly the right of action is established in this country, that the ordinary incidents of that action and the appropriate remedies ensue".

However, that decision, as Professor Cheshire has pointed out in the 7th Edition of his work on Private International Law at page 603? "has been commended, reprobated, reconciled with, doctrine explained, doubted, followed by some Courts, repudiated by others", though all the criticisms have been directed to the first plea in bar.

But the decision in Phillips v. Eyre was accepted as settling the law in The M. Moxham, 1 Probate Division, p.107, by a strong Court (Lords Justices James, Mellish and Baggallay) and (after Machado v. Fontes) approved in terms by Lord Macnaghten in Carr v. Francis Times & Co., 1902 Appeal Cases, p.176 at p.182.

For my part I can see no reason for departing from the perfectly clear test laid down in Phillips v. Eyre. It is said that the words of Mr Justice Willes have been treated as though they were contained in a statute. I cannot understand this argument. The Court was laying down the practical test for actionability in England for a tort committed abroad; tests for actionability or per contra liability are laid down every day in Judge-made law. The test is either right or wrong, and, as I have already said, I think only the Rouse of Lords can say that test is wrong; this Court cannot usefully criticise the test by saying it has been treated (especially in Machado v. Pontes) as though it was contained in a statute where (as I think) it cannot be argued that this case is an exception to the general rule. If this Court thought that Machado v. Fontes was wrongly decided, it could probably review that case because it was an interlocutory appeal heard by two Judges, though this Court undoubtedly remains bound by the principles of Young v. Bristol Aeroplane Co. Ltd., (1944) 1 King's Bench, p.718, notwithstanding some recent relaxation from the binding effect of precedent in the House of Lords, a relaxation which applies only to that House. That, however, is not the real point; that only goes to the question whether this Court in that case misinterpreted what was said in Phillips v. Eyre. As a matter of plain English language, I should have thought it was clear that Mr Justice Willes, while recognising that the lex loci delicti provided a fundamental condition to be satisfied, was being very careful to say that the tort did not have to be actionable by the lex loci delicti. As I have already pointed out, it would have been so simple to have said, had the Court so intended, that foreign torts were, by the law of England, in an action in this country to be judged by the lex loci delicti and not by the law of England. If we are to say that the major proposition in Machado v. Fontes, namely, that the tort need only be justifiable but not necessarily actionable by the lex loci delicti, was wrong, we must in my judgment overrule the test laid down in Phillips v. Eyre which we have not been invited to do and only the House of Lords can.

If, therefore, the test is to be read in its ordinary sense, I for my part cannot see how the lex loci delicti can be applicable, for if the only test of actionability is actionability as if the tort were committed in this country, then the rules of English law must surely follow not only in relation to procedure but also in respect of all substantive law, once non-justifiability by the place of the delict is established; I can see no other principle of law that can be applicable. That, I think, is what Lord Justice Lopes was saying in Machado v. Fontes in the passage I have quoted.

But this aspect of the matter was not canvassed at length before the Court, and I must deal, though shortly, with the cogent arguments developed upon the footing that in matters of substance the lex loci delicti governed, for in fact there is no issue upon that point because having suffered damage, there is no dispute that the plaintiff could have sued for damages for the tort in Malta. So we are really only concerned with the second proposition in Machado v. Fontes. That is directly in point here, for the Court negated any idea that a mere kind or head of damage could be excluded because it was not recoverable by the lex loci delicti. That part of the judgment has never been criticised in any English decision and only by the text writers after Mr Justice Pilcher's decision in D'Almeida. Mr Justice Lynskey in Kohnke v. Karner (1951) 2 King's Bench, p.670, applied English principles of damages in preference to French principles to a motor car accident in France.

Some of the text writers (see Dicey, 8th edition, p.848, Cheshire, 7th edition, p.603) have referred to a very old case decided in 1717, Ekins v. East India Company, 1 Peere Williams, p.395, as establishing that even in tort, the lex loci delicti may be applied to damages. That was a case in trover where a ship was tortiously sold by the defendants' servants in India and damages were assessed by reference to the law of India. The defendant was ordered to pay damages based on the rate of interest obtaining in India, not in obedience to any rule of private international law depending upon the locus delicti but because the defendant had employed the proceeds of the tortious sale in India and it was right that he should account accordingly, for money earned a higher rate of interest in India than in this country. That case has nothing whatever to do with the question before this Court.

In deciding D'Almeida, Mr Justice Pilcher applied the proper law of the contract (Portugal) to a question of remoteness of damage and awarded damages to the plaintiff which would have been too remote by our law of contract. But he agreed that assessment remained a matter for the English Courts, a distinction which Mr Justice McNair in N.V.Handel, M.Y.J. Smits Import Export v. English Exporters Ltd. (1955) 2 Lloyd's List Reports, p.69, had some difficulty in appreciating. I have some sympathy with Mr Justice McNair, and I think D'Almeida may one day require reconsideration. But we are not concerned with contract here and we do not recognise any principle of the "proper law of the tort", though such a principle has recently been adopted in certain States of the U.S.A. in place of the former rule which (in contrast, as I think, to this country) undoubtedly obtained there of applying the lex loci delicti. (See generally Babcock v. Jackson (1963) 2 Lloyd's List Reports, p.286 (State of New York); Griffith v. United Air Lines, 203 Atlantic Reporter, 2nd series, p.796 (State of Pennsylvania); Tramontaine v. Empresa 350 Federal Reporter, 2nd series, p.468 (District of Columbia)). It has not been suggested in argument that our Courts should adopt any such principle which, however convenient in a vast country like the U.S.A. which has fifty States with no system of law of torts common to all and an enormous network of internal airlines, would, I think, in this country give rise to much practical difficulty and, that bugbear of the law, enormous uncertainty in its application. I would reject any idea that such a principle should be introduced in this country. There is no relevant analogy between the proper law of the contract and a similar concept in tort, for while contracting parties can choose the law by which their relationship shall be governed, the victim of a tort cannot; damages too are assessed upon entirely different principles (see Koufos v. Czarndnikow (1967) 3 All England Reports, p.686).

Then some reliance was placed upon the Scottish cases based on "solatium". But those cases make it clear that a claim based on solatium is a new, substantial and entirely separate cause of action which may be vested in a spouse or relation of the injured party quite independently of the latter's rights and it cannot be described as a mere head or kind of damage (see Naftalin v. L.M.S. (1933) Session Cases, p.259; M'Elroy v. M'Alistair (1949) Session Cases, p.110. Though these cases dissent from the first plea in Machado v. Fontes, they throw no doubt on the second.

In my view the ordinary rule must apply, namely, that even if, contrary to my opinion, the lex loci delicti applies to questions of substantive law, all questions of the remedy, both as to its nature and kinds or heads of assessment of pecuniary damage, must be determined in an English action entirely by English principles. The contrary would not have been argued at all thirty years ago and in my view it cannot be so argued successfully today.

In Baschet v. London Illustrated Standard Co. (1900) 1 Chancery, p.73, Mr Justice Kekewich pointed out the great difficulty in applying the rules of some other country when dealing with the nature of the remedy.

The rule that the lex fori must be applied to all questions of the remedy is clear and simple and gives rise to no difficulty in its application; it does no injustice, for I cannot see any injustice in claiming damages here of a kind or head which, by some local rule of the locus delicti, is denied to the plaintiff.

The difficulties of trying to apply some foreign rule about damages would be immense. First, the practical difficulty (pace Mr Justice McNair (supra)) of distinguishing between the head or kind of damage on the one hand and mere assessment on the other. Then if the foreign rule is to be applied, where does it stop? In this case, for example, the learned Judge has found as a fact that the plaintiff by the law of Malta can only claim his present pecuniary ascertained loss, but if later on as the result of the injury he suffers further incapacity, he can make further application for more damages. We have no machinery for that purpose and it is, in my judgment, no answer to say that under our system we reach the same result by giving at once damages for prospective or possible loss in the future; the quantitative result is plainly quite different.

The truth is that the two countries concerned may estimate (to use a neutral word) their damages in a different way and upon different principles and with different modes and manners of assessment, so that if you start to apply the foreign law of damages, I cannot see where you can logically stop. This would in some cases give rise to much difficulty. I would stick to the rule that damages must be awarded in accordance with the lex fori. That has the practical advantage that counsel experienced in these matters can give their expert opinion, so helpful and sometimes economical to their clients, and so useful in the speedy administration of justice, on matters of payment into Court; if the Court was bound to administer some different method of awarding damages? this might be very difficult and nearly impossible.

For these reasons I would dismiss this appeal.

LORD JUSTICE DIPLOCK: The plaintiff was injured in a motor accident in Malta when a motor scooter on which he was a passenger came into collision with a motor car which was being driven without reasonable care by the defendant.

As a result the plaintiff suffered serious physical injuries and sustained pecuniary loss in the amount of £53. Whether that loss would have been greater had he received medical treatment as a civilian in Malta, there is no evidence to show. But there is a clear finding of fact by the learned Judge that had he sued the defendant in Malta, he could have recovered only the £53, for under Maltese law there is no civil liability for physical injuries suffered as a result of the negligent act of another person. If he had sustained no pecuniary loss, he would not have had a right of action against the defendant at all. Whether the defendant was criminally liable for his driving under Maltese law, we do not know.

Both plaintiff and defendant are of British nationality and domiciled in England, and the plaintiff chose to sue the defendant not in Malta but in England. Mr Justice Milmo awarded him damages, not only for his pecuniary loss of £53, but also for his physical injuries. The total amount awarded was £2,250 under the latter head.

The question in this case is whether, by choosing England as his forum instead of Malta, where the defendant's act was committed and the plaintiff's injuries sustained, he can recover the additional £2,250.

Mr Justice Milmo decided this case upon the principles to be extracted from an interlocutory judgment of the Court of Appeal in Machado v. Fontes (1897) 2 Queen's Bench, p.231. I think that his analysis of

the decision in Machado v. Fontes was correct and that that judgment was one which was binding upon him sitting as he was at first instance.

Although the headnotes and the argument as recorded in the three reports of Machado v. Fontes refer to one proposition only as being the subject of the decision of the Court, I think that the learned Judge was right in saying that the judgments lay down two propositions, neither of which was obiter, viz:

(1) That an act done outside the territorial jurisdiction of the English Courts is nevertheless actionable in an English Court if such act (a) would have been actionable if it had been committed in England, and (b) could have been the subject of criminal proceedings against the defendant in the country where the act was committed, although it did not give rise to any civil liability on the part of the defendant under the law of that country;

(2) That where such an act is actionable under proposition (1), the damages recoverable in an action in an English Court are to be assessed upon the same basis as if the act had been committed in England.

It is the second proposition in Machado v. Fontes which is immediately involved in the present case. But for my part, for reasons which will appear later, I think that if the first proposition is right, the second must follow. That may be why the law reporters in 1897 did not think it necessary to single it out for mention in the headnotes or the argument.

The first question in this appeal is accordingly whether this Court is bound to accept the propositions laid down in Machado v. Fontes as correct. Unless we are entitled to reexamine them, there is an end of the appeal.

The House of Lords in an extra-judicial pronouncement has expressed its intention of loosening its self-imposed fetters of stare decisis; but this was expressly stated not to apply to any other Courts. Indeed? it is difficult to see how a pronouncement by the House of Lords which did not form part of the reasons for judgment in any appeal before it could have any binding effect upon any other Court. In the Court of Appeal we are bound by judicial decisions of the House of Lords, but so far as concerns the binding effect upon the Court of Appeal of its own decisions? our fetters too are self-imposed. Their extent was discussed in Young v. Bristol Aeroplane Co. Ltd. (1944) 1 King's Bench, p.718, and I concede that the decision in Machado v. Fontes does not fall within any of the three exceptions to the binding effect of decisions of the Court of Appeal upon a subsequent Court of Appeal of co-ordinate jurisdiction which are set out in Young's case. But in Young's case it was only final judgments of the Court of Appeal which were under consideration. Machado v. Fontes was an appeal from an interlocutory order of a Judge in chambers, and the order made by the Court of Appeal was an interlocutory, not a final, judgment. In interlocutory appeals the Court of Appeal does not usually have the benefit of a reasoned judgment by the Judge against whose order the appeal is brought. The statute constituting the Court of Appeal treats interlocutory appeals as being in a lower category than final appeals; the appeal may be heard by two Lords Justices, as Machado v. Fontes was, instead of by three. In practice lengthy and detailed argument in interlocutory appeals is discouraged. Machado v. Fontes, which raised a question of fundamental importance in the then almost untilled field of conflict of laws, was argued and disposed of by extempore judgments within a single day. In practice too appeals to the House of Lords from interlocutory orders of the Court of Appeal are discouraged and leave to pursue them is seldom obtained. These differences in practice in interlocutory and final appeals to the Court of Appeal detract from the weight to be attached to the reasons given for an interlocutory order of the Court of Appeal. Young's case, which I loyally, if regretfully, accept as binding upon me, does not, as I think, preclude this Court from declining to follow the ratio decidendi of a previous interlocutory order of the Court of Appeal if this Court thinks that the ratio decidendi was wrong. In the present state of juristic opinion, I would not extend the doctrine of stare decisis any further.

I think, therefore, that we are entitled to re-examine the two propositions laid down by Lords Justices Lopes and Rigby in Machado v. Fontes and to form our own view as to whether they are correct. The actual question for decision was whether in an action for damages for the publication in Brazil of a statement defamatory of the plaintiff, the defendant should be allowed to add to his defence a plea which the Court construed as averring that the publication did not constitute grounds for a civil action on the part of the plaintiff against the defendant under Brazilian law, or, alternatively, that if it did, the plaintiff could not recover under Brazilian law general damages for any injury to his credit, character

or feelings. But the actual decision appears to be based upon a concession made by counsel for the defendant in the course of the hearing that the publication could be the subject matter of criminal proceedings in Brazil. Both Lords Justices purported to apply to that legal situation under the law of Brazil, where the act of publication took place, the proposition laid down by Mr Justice Willes delivering the judgment of a seven-judge Court of Exchequer Chamber in Phillips v. Eyre, Law Reports, 6 Queen's Bench, p.1, in the second passage from his judgment which Lord Upjohn has cited: "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".

It seems to have been the fate of Mr Justice Willes to have passages in his judgment taken out of their context and construed as if they were Acts of Parliament (cf. Indermaur v. Dames (1866) Law Reports, 1 Common Pleas, p.274. At any rate, Lords Justices Lopes and Rigby, concentrating on an assumed contrast in that passage between the word "actionable" in the first condition and the word "justifiable" in the second, reached the conclusion that Mr Justice Willes had meant that the second condition was satisfied if the act complained of could give rise to any liability, whether civil or criminal, on the part of the defendant under the law of the country where the act was committed. They overlooked the contrast between the use of the word "wrong" in the first condition and the word "act" in the second, and having regard to the subject matter of the decision and the reasoning upon which the "general rule" so stated was based, this is a much more significant contrast.

In Phillips v. Eyre, which was decided on demurrer, the acts of the defendant in respect of which the action was brought were done in Jamaica, a self-governing colony whose Legislature had no power to make laws having extra-territorial effect. The acts complained of ex concessi constituted a "tort" under the law of Jamaica at the time they were done. An actionable wrong had been committed in Jamaica. The only defence which was relevant on the demurrer was that it was justified ex post facto by an Act of Indemnity passed subsequently in the legislature of Jamaica. It was argued that this Act, even though effective to deprive the plaintiff of any right of action in Jamaica, could not have the extra-territorial effect of destroying the right of action already vested in the plaintiff in England. This argument involved the proposition which was supported by the dicta of Mr Justice Wightman in Scott v. Seymour, 1 Hurlstone & Coltman, p.219, that an act done abroad could at common law give rise to a right of action in England distinct from any civil liability incurred by the doer under the law of the country where the act was done.

This proposition, which is one of substantive law, not of conflict of laws, was rejected by the Court of Exchequer Chamber in the paragraph preceding that which I have already cited. "A right of action", said Mr Justice Willes (at p.28), "whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto.....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".

He thus rejects the contention of substantive law that the civil liability which is enforced by the English Courts is anything other than the civil liability arising under the law of the place where the act was committed. It is to be noted that in this passage and throughout the judgment "wrong" as a noun is used in the sense of an act giving rise to civil liability in the place where it is committed.

He then goes on to discuss the limitations upon the jurisdiction of the English Courts to entertain what he calls "foreign causes of action" which, in the context of what has gone before, clearly refers to actions brought to enforce the civil liability arising under the law of a foreign place from an act done in that place. This in my view is what he meant by "a suit in England for a wrong alleged to have been committed abroad" in the passage which was cited in Machado v. Fontes and has been reproduced in Lord Upjohn's judgment in this appeal. This is borne out by the terms in which the first condition is expressed: "the wrong must be of such a character that it would have been actionable if committed in England", not, it is to be noted, the "act" or the "foreign transaction". This qualification restricts the English Court's jurisdiction to entertain actions to enforce a civil liability arising under the law of a foreign place from an act done in that place; it does not assert the existence of a separate English cause of action arising from an act done in a foreign place which would have been a tort if done in England

but does not give rise to any civil liability under the law of the place where it was done; for such an assertion was that which he had rejected in the immediately preceding paragraph.

This first condition states what is strictly a rule of jurisdiction comparable to that whereby English Courts decline jurisdiction over actions relating to foreign land to which Mr Justice Willes also refers in the sane passage. It is a rule of public policy that our Courts do not hear and determine liability for acts of a kind which are not regarded as giving rise to liability in tort in England, notwithstanding that such acts give rise to civil liability under a foreign system of law and could be the subject of a foreign judgment which would be recognised here.

The second condition is of a rather different character. It does not express what today would be called a rule of "jurisdiction"; but a rule about choice of law* It had been decided in the cases cited in support of it that an act done abroad which did not give rise to any civil liability under the law of the place where it was done (i.e. was not a "wrong" there) did not give rise to any liability in England. In Phillips v. Eyre itself, however, the acts complained of had been actionable under the law of Jamaica at the time when they were committed but had ceased to be actionable under that law at the time when the action was brought in England by reason of the Jamaican Act of Indemnity. Hence the use of the word "act" instead of "wrong" was appropriate to cover the cases cited and the use of the phrase "must not have been justifiable" instead of "must have been actionable" was appropriate to cover the ex post facto extinction of a civil liability which had at one time existed. The ratio decidendi of the rule as respects extinguishment under foreign law of a civil liability incurred under that law is later expressed in the following terms: "...if the foreign law extinguishes the right, it is a bar in this country equally as if the extinguishment had been by a release of the party or an act of our own legislature".

In my view Phillips v. Eyre did lay down the law as Lord Esher, then Lord Justice Brett, formulated it in Chartered Mercantile Bank v. Netherlands etc. Co. (1882) 10 Queen's Bench Division, p.521 at p.526, viz: "For any tort committed in a foreign country within its own exclusive jurisdiction an action of tort cannot be maintained in this country unless the cause of action would be a cause of action in that country and would also be a cause of action in this country", and the first proposition in Machado v. Fontes is wrong in so far as it decided that an act committed abroad was actionable in England if it gave rise to criminal, although not to civil, liability under the law of the country where it was committed.

But this is not sufficient to dispose of the present appeal. The act committed by the defendant in Malta did give rise to some civil liability on his part to the plaintiff under Maltese law. It is contended that even though the "actionability" of that act (i.e. the question whether or no there is any right of action in England) is to be determined by the lex loci delicti, recovery of damages is merely the remedy granted by the Court for the wrong, and accordingly all questions of assessment of damages are governed by the lex fori, i.e. by English law.

"Actionability" in English law may arise in two different kinds of circumstances. It may arise as a result of the doing of a particular kind of act by the defendant, irrespective of the consequences of that act to the plaintiff. Breach of contract and trespass are examples. On the other hand, it may arise as a result of the particular consequences to the plaintiff of the doing by the defendant of a particular kind of act. Unless the act has those consequences, it is not actionable. Negligence and all other actions for tort derived from trespass on the case are examples. In France under the Code Civile and in most European countries, including Malta, nearly all actionable wrongs are in the latter category. It is to this category of civil liability to which our attention in the present appeal can be confined.

The consequences to the plaintiff which make the act of the defendant actionable are generally some loss or injury to the plaintiff or his property of a particular kind or kinds. For instance, in English law the erection of a neighbouring building may be actionable if it has the consequence that it injures the plaintiff's right to light to windows on his property. It is not actionable if its only consequence is to injure the plaintiff's view from his windows. For the consequence of injury to light, the remedy is monetary compensation. The assessment of the monetary equivalent of a loss not directly sustained in money must necessarily be made by the Court before which the remedy is sought and is in this sense decided by the lex fori. But for the consequences of injury to view, no question of remedy arises, for injury to view is not a wrong. And if the erection of the building injures both light and view,

compensation cannot be awarded for the injury to view. To include a sum of money for this in the assessment of damages would be to give a remedy for, and thus to treat as "actionable", a consequence of the defendant's act which does not give rise to any right of action.

Turning to negligence, in English law an act done in England without reasonable care by a defendant which causes the death of a third party is actionable in a suit brought on behalf of a dependant of the deceased if its consequence is pecuniary loss to the dependant. It is not actionable if its consequence is only injury to the health or happiness of a survivor of the deceased. Where the consequence of such an act to a dependant of the deceased is both pecuniary loss and also injury to health or happiness, it is clear law that the Court cannot, in its assessment of damages, award any compensation for these latter kinds of injuries. The "heads of damage", as distinct from the "quantification of damages" sustained under each head, pre matters of substantive law upon which the decider of fact, whether jury or Judge, has no discretion to give effect to an idiosyncratic opinion.

For what is compendiously called "assessment of damages" involves two distinct inquiries. The first is to ascertain what loss or injury of the particular kind or kinds which make the defendant's act "actionable" were in fact sustained by the plaintiff as a consequence of the defendant's act. It would be too irrational, even for English law, if this inquiry were conducted by applying any different criteria than those which determine whether the act of the defendant is actionable at all. The second inquiry is to estimate what is the appropriate monetary equivalent of the loss or injury so ascertained. In this inquiry the Court cannot do otherwise than form its own idiosyncratic estimate.

Where, because the act of the defendant has been committed abroad, the law to be applied in determining whether the act was actionable at all is the lex loci delicti, the first inquiry involved in the assessment of damages is, in my opinion, to be conducted by applying the criteria as to "heads of damage" provided by the lex loci delicti. "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". The words are those of Mr Justice Willes; the italics are mine.

This rule as respects damages recoverable for an act committed abroad has been applied in Scotland in a number of cases in which it is only necessary to cite Naftalin v. L.M.S. (1933) Session Cases, p.259. I find this case indistinguishable from the present case and its reasoning convincing, save in one passage in Lord Murray's judgment (at p.274) in which he accepts the first proposition in Machado v. Fontes as correct, but considers that the second proposition does not follow from the first. For my part, if I were able to accept the camel that English law requires an English Court to award damages in respect of an act committed abroad upon the same principles as if it had been committed in England when no damages at all could be recovered under the lex loci delicti, I could not strain at the gnat that English Courts should apply the same principles when some damages could be recovered under the lex loci delicti. To accept the first but to reject the second proposition in Machado v. Fontes would mean that in the present case, if the plaintiff had sustained no pecuniary loss as a result of the accident in Malta, he could have recovered in England full damages for his bodily injuries, whereas if he had also sustained the slightest pecuniary loss, he could not recover in England a single penny of damages for his bodily injuries, which is absurd.

So far as English cases are concerned, there is none reported in which either of the decisions in Machado v. Fontes have been applied, although it is equally true to say that there is no subsequent reported case which conflicts with them. In Konhke v. Karger (1954) 2 King's Bench, p.670, Mr Justice Lynskey applied English law in assessing the damages recoverable in an action for damages caused by the negligent driving by the defendant of a motor car in France. The issue in that case was whether a satisfied judgment for damages sustained by the plaintiff in the same accident against a third party who was not sued in the English proceedings was a bar to a further action in England against the defendant. It was not disputed that the "heads of damage", for which the defendant incurred civil liability under French law, were the same as those for which he would have incurred liability in English law had the accident occurred in England. Damage to the plaintiff's property, although recoverable under French law in an ordinary civil action in France, were not recoverable in the type of proceedings which the plaintiff had in fact taken, viz. as partie civile in a criminal prosecution of the third party. There was no satisfied judgment against the third party in respect of the plaintiff's cause of action in French law for compensation for this head of damage. Damages for physical injury were also recoverable under

French law, but under French procedure damages under this head are not awarded once and for all. A plaintiff may re-open the proceedings and apply for a further award if there should be any subsequent deterioration of his physical condition. A further difference between the practice of the English and the French Courts in assessing damages for physical injury was accepted by Mr Justice Lynskey upon the evidence before him to be that the French Courts avowedly took into consideration the social rank of the plaintiff. The effect of the first difference was that the French judgment against the third party did not exhaust the plaintiff's rights under French law to recover compensation for the physical injuries sustained by him in the accident, with the consequence that there was no satisfied final judgment for the whole of her cause of action in France for compensation for this head of damage. That any balance of compensation would not have been recovered in France until her physical condition had actually deteriorated, whereas in England it would be recoverable in anticipation of the physical deterioration, is a mere difference of procedure governed by the lex fori. The second difference is merely one of "quantification of damages". Neither is a difference between English and French law as to the "actionability" of the consequences of the defendant's negligent act in causing physical injuries to the plaintiff. This decision does not conflict with the rule that "actionability", including the "heads of damage" as distinct from the "quantification of damages" sustained under those heads, is governed by the lex loci delicti.

The decision in Machado v. Fontes has been much criticised by writers on private international law. It has, as I have already noted, been rejected in Scotland. It has been coldly received and doubted by the Privy Council in Canadian Pacific Railway v. Parent, (1917) Appeal Cases, p.195, and rejected by the High Court of Australia (Koop v. Bebb, 84 Commonwealth Law Reports, p.629), although it has been applied in the Supreme Court of Canada (Melleau v. Pettigrew (1945) Dominion Law Reports, p.392; Morris v. Angel (1956) Dominion Law Reports, p.30) so as to evade the consequences in other Provinces of an Ontario Statute which deprived a passenger in a vehicle of any cause of action in negligence against the driver. It has never been accepted in the United States where until the last few years the lex loci delicti has been applied (Slater v. Mexican National Railroad (1904) 194 United States Reports, p.120). In a number of States recently the Courts have departed from the lex loci delicti in favour of some other law, generally that of their own State, under a still embryonic and much debated doctrine of "the proper law of the tort". See Babcock v. Jackson, 12 New York 2nd, p.473, and Griffith v. United Airlines Inc. (1964) 203 Atlantic Reporter, 2nd Series, p.796, which contains an interesting summary of other cases. But this United States tendency to stray from the lex loci delicti is not ostensibly, at any rate, in the direction of the lex fori. In all the American cases to which our attention has been drawn, the Court where it has applied the law of its own State to a tort committed outside the State has always managed to find some other reason based upon sociological considerations for doing so. In this connection it is significant that in the American Restatement (Second) Conflict of Laws (Tentative Draft No.9) 1964, the important factors to be taken into consideration in determining the proper law of the tort are listed as: (a) the place where the injury occurred, (b) the place where the conduct occurred, (c) the domicile, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centred. The place where suit is brought is not included in the list. In theory, at any rate, the proper law of any tort would be the same in whichever State the plaintiff chose to sue.

In most cases, as in the present case, the injury and the conduct occur in the same place, and factors (a) and (b) point to the lex loci delicti. The novelty of the doctrine lies in the possible displacement of the lex loci delicti by factors (c) and (d). These factors are, in my view, irrelevant under the existing English rules of conflict of laws. Apart from the chauvinistic dicta of Mr Justice Wightman in Scott v. Seymour, cited by the Master of the Rolls, which Mr Justice Blackburn expressly disapproved, it has never been suggested that a British subject when he goes abroad carries with him as an extra-territorial aura the English - though not apparently the Scottish - law of tort; and any development of our rules of conflict of laws in the direction of making civil liability for wrongs dependent upon the nationality or, as I suppose Mr Justice Wightman would have said, had Scotland crossed his mind, the domicile of the wrongdoer or the victim would seem to me to be a retrograde step in the latter half of the twentieth century. Where there exists a special relationship between the doer of the act and the person injured by it, such as carrier and passenger or driver and guest, there may be a plausible argument in favour of applying the law of the place where that relationship was created, in order to determine the extent of the mutual rights and obligations of the parties to it. But no such relationship existed between the plaintiff and the defendant in the present case. The only relationship between them which gave rise to a

duty of care owed by the plaintiff to the defendant was that of temporary physical propinquity upon a Maltese road. That relationship arose in Malta. Factor (d) as well as (a) and (b) pointed to the lex loci delicti in the present case.

My sympathies are naturally with the plaintiff. He suffered serious physical injuries for which I should like to award him compensation at the defendant's Insurance Company's expense. But, with great respect, I cannot find in the special circumstances relied upon by the Master of the Rolls any justification in law for doing so. Nor do I know of any American case which jettisons the lex loci delicti upon such tenuous grounds. That the defendant was stationed in Malta as a member of the Royal (i.e. British, not English) Navy, of which a Maltese citizen might be a member, and not as a visitor, does not seem to me to impose upon him any higher duty or greater liability than a visitor to other users of the Maltese roads; nor does the fact that the plaintiff was a member of the Royal (i.e. British, not English) Air Force, of which a Maltese citizen might also be a member, appear to me to give him any greater rights than other persons as a user of the Maltese roads. Whether the plaintiff was insured at all must surely be irrelevant, and I can see no grounds upon which the fact that he has entered into a policy of insurance against civil liability in Malta with an English insurer instead of a Scottish, American or Maltese one can alter the rights against the defendant of a stranger to the contract of insurance. Finally, I cannot accept that his coming to England for treatment after the event which gave rise to the defendant's liability can, ex post facto alter the legal nature of a wrong which was already complete. I am sorry that we have been unable to agree on the relevant conflicts rule. Lex propria delicti, lex fori, lex loci delicti: quot judices tot cententiae.

It is found as a fact upon the evidence in the present case that under Maltese law physical injuries sustained by the plaintiff as a result of the defendant's act in Malta do not give rise to any civil liability. In my view the damages of £2,250 awarded under this head are not recoverable but only the £53 for which the defendant incurred civil liability under the law of Malta. If it rested with me, I would allow this appeal accordingly.

THE MASTER OF THE ROLLS: By a majority the appeal is dismissed.

MR COPE: My client, the plaintiff, is legally aided. My application would be consistent with his status, that the costs be allowed on a common fund basis.

THE MASTER OF THE ROLLS: Do not we usually say appeal dismissed with costs and then you recover your costs.

MR COPE: I am obliged.

MR HYAMSON: Of course, I cannot resist that application. For my part I ask your Lordships for leave to appeal to the House of Lords on two grounds. First, it is a difficult question of law

THE MASTER OF THE ROLLS: Lord Justice Diplock said three.

MR HYAMSON: Yes, my Lord. I ask for leave to appeal to the House of Lords. If your Lordships grant that leave, there is in fact the whole of the money in Court. I ask that that money should stay there and there should be a general stay.

THE MASTER OF THE ROLLS: We spoke to Lord Upjohn about it and we all agree that there should be leave to appeal to the House of Lords, but I am not sure about a stay. It is most unusual for this Court ever to grant a stay.

MR HYAMSON: The difficulty is this. If the money is paid out to the plaintiff and if we were successful in the House of Lords, of course the money might have gone and we should secure a Pyrrhic victory if we won.

THE MASTER OF THE ROLLS: What do you say about a question of a stay, Mr Cope?

MR COPE: I quite appreciate my friend's proposition but my client has been deprived of his compensation for some considerable time now.

THE MASTER OF THE ROLLS: If Lord Justice Diplock is right, as he may be, he would get nothing.

LORD JUSTICE DIPLOCK: It is all or nothing.

MR COPE: I appreciate that. May I suggest that part of the general damages which are in Court be paid to this young man.

THE MASTER OF THE ROLLS: We are inclined to think he might have £500. Have you any objection to that, Mr Hyamson?

MR HYAMSON: It is I suppose in a sense the judgment of Solomon.

The position is that if the House of Lords decided that Lord Justice Diplock's view is the correct one, my client would be out of pocket £500.

LORD JUSTICE DIPLOCK: You are more likely to get back £500 than £2,250. That is the ratio decidendi of this problem.

MR HYAMSON: There is no suggestion that this man needs the money: there is no suggestion of that at all. I would ask your Lordships to say that the proper course would be to allow the whole matter to stand over pending an appeal in this matter to the House of Lords.

THE MASTER OF THE ROLLS: In this case we grant a stay as to all out £500. You will have to pursue the appeal and carry it on expeditiously. Subject to that there will be a stay as to all but £500.