bad faith, the attention of the jury should be drawn to the fact that a refusal to settle by the insurer was not accompanied by an assumption of all the risks of such a decision even though the insurer had complete control over the management of the defense or settlement of the claim. Furthermore, it should be proper for a trial court to point out to the jury that the proximity of the settlement offer to the maximum coverage of the policy might influence the insurer's decision to contest, rather than to settle, a claim.[34]

HERBERT N. WOODWARD*

Conflict of Laws—Torts—Rules in Phillips v. Eyre—[Canada].—The plaintiff and the defendant were residents of Quebec. The plaintiff, in Quebec, accepted the defendant's invitation to make a trip to Ottawa as a gratuitous passenger in the defendant's automobile. In an accident, which happened in Ontario when the defendant, in rainy weather, was driving down a hill at great speed, the plaintiff was injured. An action for damages was brought in Quebec. An Ontario statute expressly exempts the driver of an automobile from liability to a passenger;[1] under another statutory provision of Ontario a person "who drives a motor vehicle on the highway without due care and attention" is guilty of an offense, and is punishable by fine or imprisonment.[2] Under Quebec law the negligent driver of an automobile is liable to a gratuitous passenger.[3] The Supreme Court of Quebec affirmed a judgment in favor of the plaintiff, and its decision was affirmed by the Supreme Court of Canada. *McLean* v. *Pettigrew*.[4]

The case illustrates the difference between the British and the American approach to tort cases involving problems of conflict of laws. An American court, applying the rule that problems of the law of torts are to be decided under the law of the place where the alleged wrong took place,[5] would almost certainly have applied to the case the law of Ontario, where the accident occurred. English courts have not found it necessary to decide tort cases brought before them under any foreign law. Rules of jurisdiction may preclude an action from being brought in England at all, for instance, when the defendant neither resides in England nor can be personally served there. If, however, the action can be brought in England, the court will decide it under its own law. If, under an

[34] Note 11, supra.

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[1] Highway Traffic Act, § 47(2). [2] Highway Traffic Act, § 27.

[3] In an extensive discussion of decisions of Quebec courts, French cases, and French textwriters, this liability was held to be based upon tort (quasi-délit) rather than upon a contract of gratuitous transportation (contract de bienfaisance); per Taschereau, J. [1945] 2 D.L.R. 65, at 66–76.

[4] [1945] 2 D.L.R. 65. [5] See Restatement of Torts, §§ 379 et seq.

analogous set of facts occurring exclusively in England, no liability exists under English law, the defendant is not liable, irrespective of any rule to the contrary prevailing in the domestic law of the place of the accident. If, on the other hand, English law predicates liability upon an analogous set of facts occurring in England, the defendant is liable. At this stage the law of the place of wrong will then be consulted, to see whether or not, at that place, the defendant's conduct was "justifiable." If so, English law grants him a valid defense.[6] The term "justifiable" means more than "not subjecting the defendant to liability for damages." The defendant's conduct is not justifiable when it constitutes an offense punishable at the place of wrong. In *Machado* v. *Fontes*[7] an action was brought in England for conduct carried on in Brazil. Under English law such conduct subjected the defendant to liability for slander. Under Brazilian law the defendant was not civilly liable, but subject to punishment. His conduct was held not to be justifiable in Brazil, and the defendant was held liable.

In the present case the situation was complicated by the fact that the defendant had been acquitted of the offense of negligent driving by a criminal court of Ontario. The Quebec courts held that this decision was not binding upon them, and that they were free to find that the defendant had violated the criminal law of Ontario. An American court would probably have regarded as conclusive the decision reached by the criminal court of the place of the accident. If that court would have been one of a sister-state, the result would almost certainly have been regarded as being required by the full faith and credit clause of the Constitution of the United States;[8] if the criminal court would have been that of a foreign country, its decision, although not regarded as binding under the Constitution, would most likely have been held conclusive nevertheless, as having been rendered by a court of competent jurisdiction.

The attitude of the English courts, which is generally applied by the courts throughout the British Commonewealth of Nations, has been criticized frequently and severely.[9] To anyone regarding as axiomatic the territorial theory of conflict of laws, the rule subjecting all cases of tort to the law of the place of

[6] Phillips v. Eyre, 6 Q.B. 1, at 28–29 (1870), per Willes, J.: "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."

[7] [1897] 2 Q.R. 231.

[8] Art. IV, § 1; the question of whether or not such conformity would really be required by the full faith and credit clause is not beyond doubt, however.

[9] See, esp. Goodrich, Conflict of Laws 221 (2d ed., 1938); Cheshire, Private International Law 303–5 (2d ed., 1938); Keith, The American Law Institute's Restatement of the Conflict of Laws, 1 U. of Toronto L. J. 233, 257 (1936); Hancock, A Problem in Damages for Tort in the Conflict of Laws, 22 Can. B. Rev. 843, 853 (1944). The rule is defended by Falconbridge, Annotation, [1945] 2 D.L.R. 82; see also the same author's note in 17 Can. B. Rev. 546, 549 (1939), and book review by Lorenzen in 52 Yale L. J. 680 (1943).

wrong appears as self-evident and the British rule as an unjustifiable heresy. Strangely enough, however, these criticisms have not been extended to divorce cases where it is regarded as equally axiomatic in both British and American courts that no law other than that of the forum will be consulted in determining the existence or nonexistence of a ground for divorce, irrespective of whether or not the conduct alleged to constitute such cause is so regarded at the place where it was carried on.[10] An inquiry into the motives impelling a court ever to decide a problem under any law other than that of its own jurisdiction reveals either blind belief in dogmas of allegedly logical conclusiveness, which do not stand up, however, under logical scrutiny,[11] or, as a motive of intelligible policy, the desire to protect the justified expectations of private parties or, in certain rare cases, to help a friendly foreign state in the enforcement of its policies. In tort cases these considerations do not require that attention be paid to any law other than that of the forum, beyond the elementary idea that nobody should be compelled to pay damages for the result of conduct which, at the time it was carried on, the actor was justified in regarding as innocent and permissible. This result can well be achieved under the British rule, which has the additional merit that under it the task of the courts is easier than under the American rule, which compels the courts to make lengthy and cumbersome inquiries into foreign law even where they are in no way required by justice. To make things worse, even definite injustice can result from the American rule, when "place of wrong" is understood as the place where the effects of allegedly tortious conduct have taken place, rather than as the place where the conduct itself has been carried on. The identification of the place of wrong with the place of the harm has been stated as American law in several pronouncements of high authority.[12] An effort to show that this identification has been produced by historical accident, rather than through considerations of deliberate policy, and that its mechanical application results in unjust decisions, i.e., decisions defeating the very policies for whose sake the whole field of conflict of laws has been invented, has been made in a recent publication.[13] While it is probably too late to hope that American courts will adopt the easy, practicable, and just approach of the British courts, they can still be expected to modify the mechanical application of the place-of-harm rule.

M. Rh.

[10] This rule is accepted without criticism even by so vigorous a proponent of the vested rights-territoriality theory as the late J. H. Beale; see his Treatise on the Conflict of Laws § 135(1).

[11] See esp. Cook, The Logical and Legal Bases of the Conflict of Laws (1943).

[12] Restatement of Conflict of Laws § 378; Beale, Treatise 378; Goodrich, Conflict of Laws § 90.

[13] Rheinstein, The Place of Wrong, 19 Tul. L. R. 4, 165 (1944).