

PHILLIPS V EYRE (1870)

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1. Introduction

The judgment of the Court of Exchequer Chamber in *Phillips v Eyre*¹ is widely known among conflicts lawyers as the origin of the double-actionability rule. For over a century, this rule was used in England and many other common law countries to deal with foreign torts, and it continues to be applied in England to historical wrongs and defamation claims. It is also widely known that *Phillips v Eyre* concerned a dispute between Alexander Phillips, a native Jamaican, and Edward John Eyre, a famous Australian explorer and former governor of Jamaica, concerning the arrest and torture of Phillips during the suppression of the 1865 Morant Bay uprising under martial law.

This suffices to regard *Phillips v Eyre* as a landmark case.² But there are other reasons for giving *Phillips v Eyre* this status. The Court of Exchequer Chamber's judgment ended the efforts of the co-called Jamaica Committee to use English law and courts to hold Eyre legally responsible for the ruthless suppression of the Morant Bay uprising, and particularly for the execution of George William Gordon, Governor Eyre's leading political opponent. In its core, therefore, *Phillips v Eyre* was a case about the nature and scope of martial law, executive power and civil liberties of British subjects in times of emergency, and the rule of law in a sprawling empire. Although the criminal prosecution and civil proceedings against Eyre were ultimately unsuccessful, Dicey, a supporter of the Jamaica Committee, cited *Phillips v Eyre* as authority for the proposition that 'In England the idea of legal equality, or of the universal subjection of all classes, to one law administered by the ordinary Courts, has been pushed to its utmost limit.'³ Many of the broader issues raised by the 'Governor Eyre Controversy' are of contemporary relevance, as shown by the recent litigation in England concerning historical wrongs in former colonies. The double actionability-rule continues to be applied in England to defamation claims, at least in part because it is claimed to protect the right of free speech necessary for the functioning of the UK as a modern democracy. The double-actionability rule is still applied to determine the law applicable to foreign torts in general in some common law countries.⁴

This chapter has two aims. First, it recounts the history and contemporary relevance of the double-actionability rule. It explores the origin and nature of the rule, problems surrounding its application, its almost complete abolition in the UK, its abolition in Australia and Canada, and its continuing application in England to historical wrongs and defamation claims. Second, this chapter

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¹ (1870-71) LR 6 QB 1.

² See also Peter Hantford, 'Edward John Eyre and the Conflict of Laws' (2008) 32 *Melbourne University Law Review* 822.

³ Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan and Co 1889) 181.

⁴ British Virgin Islands: *Livingston Properties Equities Inc v JSC MCC Eurochem* (Eastern Caribbean Supreme Court, 18 September 2018); Ghana: *Wachter v Harley* [1968] GLR 1069; Hong Kong: *Kwok Yu Keung v Yeung Pang Cheung* [2005] HKCFI 779; India: *Kotah Transport Ltd v The Jhalawar Transport Service Ltd* AIR 1960 Raj 224 (Rajasthan High Court); Kenya: *Rage Mohammed Ali v Abdullahim Maasai* [2005] eKLR (High Court, 28 October 2002); Nigeria: *Herb v Devimco International BV* [2001] 52 WRN 19 (Court of Appeal); Singapore: *Parno v SC Marine Pte Ltd* [1999] 4 SLR 579 (Court of Appeal). Also in Japan: Art 22 of the Act on General Rules for Application of Laws; Jun Yokoyama, *Private International Law in Japan* (2nd edn, Wolters Kluwer 2019) 84.

places *Phillips v Eyre* in a broader historical, political, and legal context. It outlines the history of the Governor Eyre Controversy and the constitutional issues which it raised, and notes the contemporary relevance in England of some of these issues.

This chapter is divided in six sections. Following this introduction, the second section describes the Governor Eyre Controversy and the place of *Phillips v Eyre* therein. The third section explores the origin of the rule in *Phillips v Eyre*. The fourth section traces the subsequent development of the rule, in particular problems surrounding its application, the large case law to which it led, its almost complete abolition in the UK, and its abolition in Australia and Canada. It also considers the very limited influence of the decision on the development of choice of law in tort in the US. The fifth section notes the contexts in which the rule in *Phillips v Eyre* has continuing contemporary relevance in England, before the sixth concludes.

2. Governor Eyre Controversy⁵

The story of Jamaica as a British colony began in 1655, when Oliver Cromwell's fleet drove the Spanish out of the island. Although acquired by conquest, Jamaica was treated as a settled, not as a conquered or ceded, colony.⁶ This is because Jamaica was acquired in what was, from the point of view of the restored monarchy, illegal warfare and because the Spanish fled the island, leaving no settlement or administrative structure behind.⁷ Consequently, English law applied in Jamaica and English settlers had all the rights and liberties of English subjects.⁸ This was confirmed by the royal proclamation of 1661, which declared that all children of natural born subjects of England to be born in Jamaica would be 'free denizens of England' with the same privileges as free born subjects of England. From the early days, however, the population of Jamaica also consisted of slaves who were brought to work on sugar plantations, and who had few rights. Following the establishment of a civilian government in Jamaica, the 1662 royal commission and instructions to the governor provided for the creation of 'representative' government. Among the early enactments of the Jamaican legislature were a 1664 statute declaring that the laws and statutes of England should be the law of Jamaica and, in 1681, the first of an unbroken chain of statutes permitting the governor and the council to declare martial law.

The conditions in Jamaica on the eve of the Morant Bay uprising were characterised by economic decline and political tension. Sugar had been the backbone of the Jamaican economy since the 16th century and had decisively influenced all aspects of life on the island. The loss of competitiveness of the Jamaican sugar industry led to economic decline that commenced at the end of the 18th and the beginning of the 19th century. The economic crisis was compounded by other factors. Slavery was generally abolished throughout the British Empire in 1838. Many former slaves withdrew their labour from sugar plantations and established freeholds or moved to towns. Free trade policies, which gradually led to the equalisation of the import duties on imperial and foreign

⁵ This section is based on Gad Heuman, *'The Killing Time': The Morant Bay Rebellion in Jamaica* (Macmillan 1994); Rande W Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (OUP 2008); Bernard Semmel, *The Governor Eyre Controversy* (MacGibbon & Kee 1962); Eric Williams, *From Columbus to Castro: The History of the Caribbean* (Vintage Books 1970). See also Geoffrey Dutton, *In Search of Edward John Eyre* (Macmillan 1982).

⁶ *Campbell v Hall* (1774) 1 Cowp 204, 212, 98 ER 1045, 1049 (per Lord Mansfield); Raphael Codlin, *Historical Foundations of Jamaican Law* (Canoe Press 2003) Ch 1.

⁷ Lloyd G Barnett, *The Constitutional Law of Jamaica* (OUP 1977) 1.

⁸ Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens 1966) 540-42.

sugar, were adopted in 1846. This removed a preferential treatment for Jamaican sugar in Britain, its main export market. This had a profound economic impact in Jamaica: the sugar market collapsed, unemployment rose, and the wages on plantations decreased. At the same time, planters obtained a concession from colonial and imperial governments in the form of encouragement of Asian immigration as a means of ensuring a steady supply of cheap labour. In the 1860s, natural disasters, including droughts, fires and epidemics, and the 1861-5 United States Civil War increased the scarcity and inflation of the prices of food and essential goods. Sugar had also decisively influenced Jamaican demographics. Following the establishment of the colony, the number of white planters, officials and labourers was quickly dwarfed by the number of slaves brought from Africa. According to the census of 1861, Jamaica had a population of 441,255, only 13,816 (3,13%) of whom were white. Only about 2000 people (0,004%), mainly whites, had the right to vote. This was fertile ground for political tension, which arose mainly over land access, labour issues, taxation, unfairness of the judicial system, suffrage, and Asian immigration. While key offices were held by the white population, there were some non-white officials and religious leaders who represented the interests of the black population. George William Gordon, a mixed-race merchant, landowner, planter, newspaper publisher, magistrate, member of the Jamaica Assembly and a lay Baptist preacher, led the political opposition to Governor Eyre. The demands that the black population made of the colonial and imperial governments fell on deaf ears. Previous Jamaican disturbances and events in other colonies, such as the 1791-1804 Haitian Revolution and the 1857 Indian Mutiny, kept the white population of Jamaica in constant fear of rebellion.

The uprising started on 11 October 1865, when a crowd of black men and women, led by the Baptist preacher Paul Bogle, attacked and burned the courthouse at the town of Morant Bay and killed 18 people, local officials and militiamen. Two days later, Governor Eyre and the council declared martial law in the county of Surrey, except for Kingston. The martial law lasted 30 days, although the uprising was put down within a week with virtually no resistance. Many black Jamaicans were tortured or killed, either after courts-martial or summarily, and many houses were burned. A key moment of the suppression was Gordon's arrest and execution. He was arrested in Kingston, an area under civilian law, and transferred to Morant Bay, an area under martial law. Following a flawed court-martial, he was convicted and sentenced to death. Since it was unclear whether the common law of martial law entailed comprehensive legal immunity for the exercise of the discretion of military commanders in the field, the Jamaican legislature, under the influence of Governor Eyre, enacted an indemnity law following the termination of martial law in November 1865. The Indemnity Act provided that 'all persons, whosoever in good faith and of loyal resolve have acted for the crushing of this rebellious outbreak, should be indemnified and kept harmless for such their acts of loyalty'. The validity of this statute ultimately depended on the British government, which had the prerogative power to disallow provisions of colonial statutes.

The ruthless suppression of the uprising, and in particular the execution of Governor Eyre's leading political opponent, sharply divided opinions in Britain. Many were shocked by the actions of soldiers and militiamen and wanted Eyre held legally responsible for his personal involvement in, and supervision of, the allegedly illegal use of force. Eyre's critics in Britain included a mix of Christian non-conformists and evangelicals, anti-slavery activists, social reformers advocating electoral reform and labour rights, and radical politicians. They coalesced as the Jamaica Committee on 19 December 1865. The principal aim of this committee was to persuade the British government to institute an investigation of the events in Jamaica, influence the investigation, and engage lawyers to prosecute Eyre and senior military officers in England. On the other hand, many regarded Eyre as a hero who kept the colony of Jamaica within the empire and saved its white population. Once it became obvious that the Jamaica Committee was serious about prosecuting Eyre, his supporters

formed the Eyre Committee on 30 August 1866. Both committees were run and supported by prominent people. For example, the Jamaica Committee was for most of the time chaired by John Stuart Mill; it was supported by John Bright, Charles Buxton, Charles Darwin, Albert Venn Dicey, Thomas Hughes, Thomas Huxley, Charles Lyell, and Herbert Spencer. The Eyre Committee was for a while chaired by Thomas Carlyle; it was supported by Charles Dickens, Joseph Hooker, Charles Kingsley, Roderick Murchison, John Ruskin, Alfred Tennyson, and John Tyndall. Although its immediate concern was the ruthless suppression of the Morant Bay uprising, the real issues in the Governor Eyre Controversy were much closer to home. The members and supporters of the Jamaica Committee were concerned with the protection of civil liberties under the British constitution and the accountability of military and civilian officers under British law, and were worried that Eyre's impunity could motivate the British government to use brutal force under martial law to suppress the movements for the extension of the suffrage and improvement of labour rights in Britain. The members and supporters of the Eyre Committee were motivated by the preservation of order and security in the empire and fear of Fenian violence.

Eyre's critics quickly won their first victory. In December 1865 the British government decided to suspend Governor Eyre from his duties and to send a royal commission of inquiry to Jamaica to undertake an investigation of the uprising and its suppression. The commission completed its report in April 1866. It concluded that the declaration of martial law was valid. But the implementation of martial law was problematic because the punishments inflicted were excessive and the martial law was unnecessarily long. The commission found that Crown forces killed 439 and tortured about 600 non-white Jamaicans and burned about 1000 houses, while no soldier or militiaman had been injured. The commission also indicated that Gordon's court-martial was defective. The commission recommended that Governor Eyre be relieved of duty. The British government acted on this advice, but refused to commence criminal proceedings against Eyre or senior military officers in England. The Crown assented to the Indemnity Act in June 1866. However, the British government did instruct Jamaican authorities to prosecute those who committed serious crimes when they fomented or suppressed the uprising. But Jamaican grand juries found there was insufficient evidence to justify trials of militia officers. Similarly, two soldiers tried by courts-martial in Jamaica were acquitted. The only legal avenues open to holding Eyre and senior military officers responsible was to commence private criminal prosecution or civil proceedings in England. Some of the most distinguished members of the Victorian Bar participated in these proceedings. The Jamaica Committee retained Sir James Fitzjames Stephen for the criminal prosecutions. Lead counsel in *Phillips v Eyre* was John Richard Quain, a fellow of University College in London. The Eyre Committee had its own heavyweights, the most prominent of which was Hardinge Giffard, later Earl of Halsbury.

The Jamaica Committee commenced two private criminal prosecutions in England for the alleged murder of Gordon and one private criminal prosecution for crimes under the Colonial Governors Act 1700. The first prosecution for murder was commenced in London on 6 February 1867 against the naval officer Abercrombie Nelson and the army officer Herbert Brand, who were instrumental in Gordon's court-martial and execution. Eyre was not prosecuted on this occasion because he had moved to Shropshire after his return to England and was thus outside the jurisdiction of the London court. The second prosecution for murder was commenced against Eyre in the Shropshire town of Market Drayton on 25 March 1867. Both prosecutions were unsuccessful. On 12 April 1867 the grand jury dismissed the indictment in the first prosecution. On 27 March 1867 the magistrates found that there was no contestable issue to put to a trial judge and jury in the second prosecution. The prosecution for crimes under the Colonial Governors Act was commenced against Eyre in London on 20 April 1868. This prosecution was also unsuccessful because the grand jury dismissed the indictment on 2 June 1868. The importance of these prosecutions lies in the

authoritative judicial pronouncements on the powers of the Crown and its agents in British colonies and on the British law of martial law by Lord Chief Justice Cockburn in the grand jury charge in *The Queen v Nelson and Brand* and by Justice Blackburn in a separate jury charge in *The Queen v Eyre*. The two judges disagreed on the nature and scope of martial law. Conflicts lawyers have so far ignored this material. But that is a mistake. As discussed in more detail below in section 3, the claim in *Phillips v Eyre* depended on the existence and extent of the Crown's prerogative to suspend the common law rights of British subjects in case of rebellion by declaring martial law. Cockburn CJ and Blackburn J offered two competing views on the existence and scope of the Crown's prerogative power. But they agreed that the general law, that is English common law, governed the existence and extent of this prerogative power in Jamaica. This, in turn, allows us to advance a novel explanation for the first limb of the rule in *Phillips v Eyre* in section 3 that is based on the constitutional background of this case.

According to Cockburn CJ,⁹ the power of a colonial governor to declare martial law could be derived from the commission he received from the Crown or from imperial or local legislation. Such legal authority ultimately depended on the terms of the commission, on whether the Crown had the prerogative to proclaim martial law, and on whether the colonial legislature acted within its jurisdiction. If a colonial governor did not have the power to declare martial law, the governor, as well as those taking part in it, could be exposed to criminal and civil responsibility. Since Jamaica was a settled colony, its inhabitants had all the rights and liberties of British subjects, including all the rights and liberties enjoyed against the prerogatives of the Crown in England. The 'great constitutional question' at the heart of the case was whether the Sovereign has, 'by virtue of the prerogative of the Crown, in the event of rebellion, the power of establishing and exercising martial law within the realm of England?'¹⁰ Whilst the Crown was entitled to use all necessary force to repel an armed invasion or rebellion, it had no prerogative to declare or enforce martial law against civilians. The Jamaican statute under which Governor Eyre declared martial law also did not and could not have given him and the military the power to arrest, try, and execute civilians outside the ordinary courts of law. 'Martial law' was nothing else than ordinary military law.

Blackburn J was of a different view.¹¹ Governor Eyre's legal duty and responsibility depended on the power he had 'either by the general law or by particular statutes referring to his particular case'.¹² The powers of a colonial governor were more extensive than those of a lord-lieutenant of an English county or a mayor of an English borough. Governor Eyre's powers were, therefore, governed by Jamaican law, which consisted of the general law (English common law as it stood at the time of Charles II) and imperial and local legislation. The Jamaican legislature could, within the limits of the Colonial Laws Validity Act 1865 and subject to the Crown's right to disallow colonial legislation, alter English law within the colony in the same way as the UK parliament could alter English law within the UK. In Jamaica, common law 'has been completely altered by the Jamaica Statutes ... and very greatly extended power is given to the Governor of Jamaica more than ever was possessed by the Crown in this country, or by the officers of the Crown in this country'.¹³ Under Jamaican statutes, governors had 'very arbitrary and great power' 'to supersede the ordinary process of law, the

⁹ Frederick Cockburn (ed), *Charge of the Lord Chief Justice of England to the Grand Jury at the Central Criminal Court in the Case of The Queen against Nelson and Brand* (William Ridgway 1867).

¹⁰ Ibid 20.

¹¹ William Francis Finlason (ed), *Report of the Case of the Queen v Eyre Containing the Charge of Mr Justice Blackburn* (Chapman and Hall and Stevens & Son 1868).

¹² Ibid 55.

¹³ Ibid 75.

ordinary common law, and to try all manner of things by this summary process' upon a declaration of martial law.¹⁴

Following the grand jury's dismissal of the indictment against Eyre, the only legal avenue still open to holding Eyre responsible was civil proceedings in England. Alexander Phillips, a black Jamaican, was a self-described 'gentleman' freeholder. He was a political opponent of Governor Eyre before the uprising. He was, like Gordon, arrested in an area under civilian law and transferred to Morant Bay, where he was detained for ten days without charge or trial, forced to witness the execution of 49 persons and was given 100 lashes with a cat-o'-nine tails. After the termination of martial law, Phillips was charged with conspiracy to commit treason, but eventually acquitted. Supporters of the Jamaica Committee subsequently paid for his travel to, and maintenance in, England, as well as legal costs. Phillips brought a civil claim against Eyre for damages for trespass to the person on 7 November 1867.

3. Origin of the Rule in *Phillips v Eyre*

English law gives everyone the right to be free of unjustifiable trespass to the person and to sue, even officials, for damages for the infringement of that right. The Governor Eyre Controversy pitted these rights against the need to preserve order and security in a sprawling empire, using brutal force if (thought) necessary. The civil proceedings in *Phillips v Eyre* were the last attempt to hold Eyre legally responsible for the ruthless suppression of the Morant Bay uprising, and thereby to procure a decision by an English court that martial law was unconstitutional, and that the common law protected the civil liberties of British subjects even in the face of a declaration of martial law. This section outlines the arguments advanced by the parties before the Court of Queen's Bench and the Court of Exchequer Chamber, presents the two courts' judgments on the conflict-of-laws issues that arose, and explores the origin of the rule in *Phillips v Eyre*.

The procedural history of the civil proceedings in *Phillips v Eyre* is well-documented.¹⁵ A key feature of this case is that it was not decided on the merits, but following a preliminary hearing on Phillips' demurrer. Essentially, Phillips admitted the material facts alleged in Eyre's pleadings, but objected to the legal validity of Eyre's plea that the Indemnity Act of the Jamaican legislature provided him with a complete defence. Given the importance of the case, Cockburn CJ presided over a panel of three judges of the Court of Queen's Bench, Lush and Hayes JJ being the other two members. In his pleadings, Phillips set forth seven separate allegations of torts. His main arguments were that he acquired a vested right of action in England the moment the torts were committed, and that the Jamaican legislature had no power to divest him, a British subject, of that right. Phillips relied on an old precedent to support these arguments. In *Mostyn v Fabrigas*¹⁶ the Court of King's Bench ordered a former governor of a British colony to pay damages for torts committed in the colony under colour of his office. In his defence, Eyre relied on the principles of parliamentary sovereignty and devolved governmental power in the empire. He argued that imperial law gave the Jamaican legislature the power to discharge a right of action accrued within the colony, and that the English courts had to recognise an exercise of this power. Cockburn CJ, who gave the judgment of the court, accepted Eyre's defence.¹⁷ For present purposes, the most important aspect of Cockburn CJ's judgment was the way in which he supported his conclusion that the Jamaican legislature validly

¹⁴ Ibid 78.

¹⁵ Kostal (n ...) 'Epilogue'.

¹⁶ (1774) 1 Cowp 161, 98 ER 1021.

¹⁷ (1869) LR 4 QB 225.

discharged Phillip's right of action in England. Cockburn CJ applied the *lex loci delicti*. He justified the application of Jamaican law by invoking the ideas of comity and legitimate expectations of the parties,¹⁸ and relied on two precedents where the *lex loci delicti* was applied to provide a defence in proceedings in England.¹⁹ He also noted that *Scott v Lord Seymour*²⁰ left open the question whether, to found an action for damages in England, an act must be unlawful and actionable under both the *lex loci delicti* and English law.²¹

Phillips appealed against this judgment. His arguments on the constitutional issue became more refined. He argued that, since it was created by the Crown, not Parliament, the Jamaican legislature did not have the power to pass valid acts of indemnity. He also argued that the Indemnity Act was repugnant to English law and imperial statutes, that it could not deprive him of a vested right of action in England, and that comity did not extend to foreign *ex post facto* legislation rendering acts legal that were previously illegal. Eyre repeated the arguments advanced in the lower court. He further argued that the Privy Council opinion in *The Halley*²² required double-actionability for foreign torts, and that comity required recognition of the Indemnity Act. Willes J gave the judgment of the Court of Exchequer Chamber (Kelly CB, Martin, Channell, Pigott and Cleasby BB, Willes and Brett JJ) dismissing the appeal.²³ He clarified that the court was dealing only with the narrow question of the validity and effect of the Indemnity Act.²⁴ As is well known, Willes J set out the following rule in his judgment:

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.²⁵

Interestingly, less than five years earlier Willes J gave the judgment of the Court of Exchequer Chamber (Erle CJ, Pollock CB, Martin B, Willes and Keating JJ and Pigott B) in *Lloyd v Guibert*,²⁶ in which he adopted the sole application of the *lex contractus* as the law applicable to contracts. *Phillips v Eyre* thus created a curious rift in the English choice of law rules for obligations that lasted for over century. What led Willes J to adopt a fundamentally different choice of law rule for tort? To answer this question, we need to examine the origin and nature of the two limbs of the rule in *Phillips v Eyre*.

Willes J derived the first limb of the rule in *Phillips v Eyre* from the Privy Council's opinion in *The Halley*.²⁷ This case concerned a collision between a British and a foreign vessel in Belgium. The British vessel was under the control of a compulsory pilot. The British defendant would have been

¹⁸ Ibid 239, 241-2.

¹⁹ Ibid 240-1, referring to *R v Lesley* (1860) Bell CC 220, 169 ER 1236; *Dobree v Napier* (1836) 2 Bing NC 781, 132 ER 301.

²⁰ (1862) 1 Hurl & C 219, 158 ER 865.

²¹ (1869) LR 4 QB 225, 239-40, 242.

²² (1867-69) LR 2 PC 193.

²³ (n ...).

²⁴ Ibid 14.

²⁵ Ibid 28-9.

²⁶ (1865-66) LR 1 QB 115. The Privy Council held in *Peninsular and Oriental Steam Navigation Co v Shand* (1865) 3 Moo PC NS 272, 16 ER 103 that the *lex contractus* applied to a contract less than 6 months before the Court of Exchequer Chamber's judgment in *Lloyd v Guibert*. *Peninsular and Oriental Steam Navigation Co v Shand* was not cited in *Lloyd v Guibert*. Adrian Briggs discusses the two cases in his contribution to this collection.

²⁷ (n ...).

delictually liable under Belgian law. There was no liability under English law. Sir Robert Phillimore in the High Court of Admiralty classified the issue at hand as one of substance, applied Belgian law as the *lex loci delicti*, and held that the application of Belgian law was not contrary to English public policy.²⁸ The Privy Council allowed the appeal, holding that it was ‘contrary to principle and to authority to hold, that an English Court of Justice will enforce a Foreign Municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed.’²⁹ To find the origin of the first limb of the rule in *Phillips v Eyre*, one must, therefore, look at the reasons behind the Privy Council’s opinion in *The Halley*.

Four explanations have been advanced for the first limb of the rule in *Phillips v Eyre* in conflicts scholarship. One explanation, whose main proponent is Yntema, is that the first limb of the rule in *Phillips v Eyre* referred to the jurisdictional requirements that had to be met before an English court could hear a claim for a foreign tort under the *lex loci delicti*.³⁰ This explanation is based on the fact that Willes J derived the term ‘actionable’ from a passage in *The Halley* in which the Privy Council cited the note to *Mostyn v Fabrigas* in *Smith’s Leading Cases*³¹ as key authority for the proposition that ‘there seems to be no reason why aliens should not sue in England for personal injuries done to them by other aliens abroad, when such injuries are actionable both by the law of England and also by that of the country where they are committed’.³² According to Yntema, Willes J used the term ‘actionable’ ‘in its natural sense as “cognisable” or “triable,” not as referring to substantive “liability”’.³³ Yntema found support for this argument in the fact that Willes J, who was a co-editor of *Smith’s Leading Cases* at the time of the *Phillips v Eyre* litigation, assisted the editors of two subsequent editions of *Smith’s Leading Cases* in which the note to *Phillips v Eyre* asserted that ‘a “right of action”, whether for contract or for wrong, and the corresponding “civil liability”, is “the creature of the law of the place”, while the two rules latterly supposed to contain the quintessence of English conflicts law respecting torts are not mentioned!’³⁴ Although the ‘jurisdictional’ approach to the rule in *Phillips v Eyre* was later accepted by some courts in England, Australia and Canada, it was eventually firmly rejected by the House of Lords in *Boys v Chaplin*.³⁵

The other explanations for the first limb of the rule in *Phillips v Eyre* that have been advanced in conflicts scholarship regard all aspects of the rule in *Phillips v Eyre* as choice of law rules. One explanation is that, in the early period of English private international law, the English courts could not assume jurisdiction over a transitory action concerning an act abroad unless the claimant pleaded by way of fiction that the act had taken place in England. ‘Having thus naturalized the

²⁸ (1867-69) LR 2 A & E 3.

²⁹ (n ...) 204. But see earlier cases in which the English courts imposed liability which would not have existed if English municipal law had applied: *Nostra Signora de Los Dolores* (1813) 1 Dods 290, 165 ER; *Madrazo v Willes* (1820) 3 B & Ald 353, 106 ER 692; *The Zollverein* (1856) Sw 96, 166 ER 1038.

³⁰ Hessel E Yntema, ‘Review of Falconbridge’s *Essays on the Conflict of Laws*’ (1949) 27 *Canadian Bar Review* 116, 117-20; ‘Dicey: An American Commentary’ (1951) 4 ICLQ 1, 7-9. See also P Gerber, ‘Tort Liability in the Conflict of Laws’ (1966) 40 *Australian Law Journal* 44, 49-50; Donald B Spence, ‘Conflict of Laws in Automobile Negligence Cases’ (1949) 27 *Canadian Bar Review* 661.

³¹ Henry S Keating and James S Willes, *Smith’s Selection of Leading Cases on Various Branches of the Law: With Notes*, vol 1 (T&J W Johnson 1852) 656.

³² (n ...) 203-4. However, both parties in *Mostyn v Fabrigas* were British subjects.

³³ Yntema, ‘Dicey: An American Commentary’ (n ...) 8.

³⁴ Yntema, ‘Review of Falconbridge’s *Essays on the Conflict of Laws*’ (n ...) 119.

³⁵ [1971] AC 356, 385 (Lord Wilberforce). See further section 4 below.

foreign act, it seems that English law applied as a matter of course.³⁶ Another explanation is that English law was applied in *The Halley* for reasons of public policy.³⁷ This explanation is based on the idea that tort law is a private system of deterrence, punishment and moral condemnation and thus an expression of important public policies. Foreign tort laws imposing liability for behaviour that English law considered innocent was an unacceptable intrusion of foreign public policies which English courts would not enforce. A third explanation is that the Privy Council in *The Halley* was influenced by the ideas of Savigny and Wächter.³⁸ Even though the Privy Council did not refer to these authors in its opinion, it was aware of Savigny's ideas because the defendant had cited Savigny in argument³⁹ and the High Court of Admiralty had discussed Savigny's ideas in its judgment.⁴⁰ Savigny, in turn, was influenced by Wächter.⁴¹ The two scholars regarded tort law as performing primarily a public function of deterring and punishing the commission of wrongdoing, considered laws relating to delicts as analogous to penal laws, and thus thought that delicts should be governed by the *lex fori*.⁴²

There is, however, one more explanation for the first limb of the rule in *Phillips v Eyre*, which lies in the constitutional background of this case and the 18th century case of *Mostyn v Fabrigas*.⁴³ As mentioned above, in *Phillips v Eyre* the Court of Exchequer's Chamber was decisively influenced by the Privy Council opinion in *The Halley*, and the Privy Council in this case was decisively influenced by the note to *Mostyn v Fabrigas* in *Smith's Leading Cases*. The facts of *Mostyn v Fabrigas* were strikingly similar to those of *Phillips v Eyre*. The governor of Minorca, a British colony at the time, was sued for damages for trespass to the person allegedly committed in the colony in purported exercise of his powers. The powers of a colonial governor were derived from three sources: royal commission and instructions, imperial legislation, and local law. The Crown could only confer on a colonial governor the powers that it itself possessed. A governor acting within his powers could not be liable in tort.⁴⁴ In cases like *Phillips v Eyre* and *Mostyn v Fabrigas*, therefore, the tortious liability of a governor for purporting to exercise his powers depended on the scope of the Crown's

³⁶ Kurt Lipstein, 'Phillips v. Eyre, A Re-Interpretation' in Ernst von Caemmerer, Soia Mentschikoff and Konrad Zweigert (eds), *Ius Privatum Gentium*, vol 1 (JCB Mohr (Paul Siebeck) 1969) 411, 413. See also Hantford (n ...) 853-4; Christopher GJ Morse, *Torts in Private International Law* (North-Holland Publishing Company, 1978) 9-10.

³⁷ David J Bederman, 'Compulsory Pilotage, Public Policy, and the Early Private International Law of Torts' (1990) 64 *Tulane Law Review* 1033; Dicey (n ...) 32, 35-6, 661; Moffatt Hancock, 'Torts in the Conflict of Laws - The First Rule in Phillips v. Eyre' (1940) 3 *University of Toronto Law Journal* 400, 405; *Torts in the Conflict of Laws* (The University of Michigan Press 1942) 11, 14; 'Torts Problems in the Conflict of Laws Resolved by Statutory Construction: The *Halley* and Other Older Cases Revisited' (1968) 18 *University of Toronto Law Journal* 331, 341-47; Otto Kahn-Freund, 'Reflections on Public Policy in the English Conflict of Laws' (1953) 39 *Transactions of the Grotius Society* 39, 45-6, 48-53. See also *The Halley* (HCA n ...) 13-7; (PC n ...) 203.

³⁸ Otto Kahn-Freund, 'Delictual Liability and the Conflict of Laws' (1968-II) 124 *Recueil des Cours* 1, 12-4; Kahn-Freund (n ...) 51-53; Sagi Peari, *The Foundation of Choice of Law: Choice and Equality* (OUP 2018) 266-8; Hessel E Yntema, 'The Historic Bases of Private International Law' (1953) 2 *AJCL* 297, 311.

³⁹ (n ...) 195.

⁴⁰ (n ...) 17-8.

⁴¹ Friedrich C von Savigny, *Private International Law: A Treatise on the Conflict of Laws* (William Guthrie trans, Stevens & Sons 1869) 203, fn (x).

⁴² *Ibid* 203, 205-7; Carl G von Wächter, *Über die Collision der Privatrechtsgesetze verschiedener Staaten* (Vico 1841) 425.

⁴³ (n ...).

⁴⁴ *Musgrave v Pulido* (1879) 5 App Cas 102 (PC), 111. See also *Cameron v Kyte* (1835) 3 Kn 332, 12 ER 678; *Hill v Bigge* (1841) 3 Moo PC 465, 13 ER 189; opinion of De Grey CJ in *Fabrigas v Mostyn*, when that case was before the Common Pleas (1774) 1 Cowp 161, 169, 98 ER 1021, 1026.

prerogative and the terms of his commission and instructions. And these, in turn, were governed by the general law, that is English common law.

In *Mostyn v Fabrigas* Lord Mansfield, after deciding that the court had jurisdiction, stated that 'the governor must be tried in England, to see whether he has exercised the authority delegated to him by the letters patent legally and properly; or whether he has abused it in violation of the *laws of England*, and the trust so reposed in him'.⁴⁵ This was derived from the principle of colonial law that those born in the king's overseas dominions were British subjects, with all the rights and liberties which that status entailed.⁴⁶

The case for the application of English law in *Phillips v Eyre* was even stronger. Jamaica was treated as a settled colony in which English law applied. Cockburn CJ and Blackburn J had agreed, in their grand jury charges in *The Queen v Nelson and Brand* and *The Queen v Eyre*, that English common law governed the existence and extent of the Crown's prerogative to suspend the common law rights of British subjects in case of rebellion by declaring martial law. Cockburn CJ and Blackburn J, however, disagreed on whether a declaration of martial law had any effect at common law and, if so, whether the actions of a colonial governor done for the purpose of suppressing a rebellion under martial law were shielded from tortious liability at common law. Since the actions of Governor Eyre were justified under the Indemnity Act, the court did not have to decide on the extent of the rights and liberties of British subjects in a colony and on the powers of a colonial governor at common law. But if it had been necessary to decide these issues, they could have been decided only by reference to common law. The Court of Exchequer Chamber recognised this in the last paragraph of its judgment:

We have thus discussed the validity of the defence upon the only question argued by counsel, touching the effect of the colonial Act, but *we are not to be understood as thereby intimating any opinion that the plea might not be sustained upon more general grounds as shewing that the acts complained of were incident to the enforcement of martial law*. It is, however, unnecessary to discuss this further question, because we are of opinion with the Court below that the colonial Act of Indemnity, even upon the assumption that the acts complained of were originally actionable, furnishes an answer to the action.⁴⁷

The justifications for the first limb of the rule in *Phillips v Eyre* may, therefore, be found not only in private international law precedent, principle or theory, but also in the particular colonial context which was before the court, which raised questions of great consequence for the legal constitution of the British Empire. It may not always have been sufficiently appreciated, by subsequent judges and scholars alike, that this was not merely a case about a tort committed by a private citizen in a foreign country, but about the sources of authority of a colonial governor appointed as a public representative of the Crown.

The second limb of the rule in *Phillips v Eyre*, namely that 'the act must not have been justifiable by the law of the place where it was done',⁴⁸ was founded upon two ideas. The first was that private rights had a territorial origin, which meant that the *lex loci delicti* governed the issue of basis of liability. A civil or legal obligation and the corresponding accessory right of action that arose out of a wrong were said to be 'the creature[s] of the law of the place and subordinate thereto'; 'the

⁴⁵ (1774) 1 Cowp 161, 173, 98 ER 1021, 1028 (emphasis added).

⁴⁶ Bruce H McPherson, *The Reception of English Law Abroad* (Supreme Court of Queensland Library 2007) 13-4, 86-7, ch 6.

⁴⁷ (n ...) 31 (emphasis added).

⁴⁸ *Ibid* 29.

civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law'.⁴⁹ This is not surprising. The territorial origin of English private international law is well known.⁵⁰ In the Middle Ages, when jury members were still witnesses, a trial of a cause of action in tort could only be held in the *locus delicti*.⁵¹ When the needs of international commerce and intercourse in the 17th century forced the common law courts to assert jurisdiction over transitory actions and develop choice of law rules, they 'managed to combine their own territorial tradition with a respect for similar territorial claims on the part of neighbouring legal systems'.⁵² With respect to torts, the old territorial rules on venue became the rule that the *lex loci delicti* could provide justification to a foreign tort.⁵³ The second idea on which the second limb of the rule in *Phillips v Eyre* was founded was comity.⁵⁴ This also explains Willes J's reliance on cases on what is now called the foreign act of state doctrine.⁵⁵ The comity doctrine, developed by Ulrich Huber, had a considerable influence on English private international law.⁵⁶ Huber's conception of comity was built on a territorialist theory of state sovereignty: respect for a foreign state meant giving territorial effect to its laws. Huber's ideas appealed to English conflicts lawyers because they provided a rational basis for the English choice of law principles and rules, which the English courts had developed autonomously by adopting the idea of territoriality.⁵⁷ This also served as a basis for the adoption of the vested rights theory by Dicey.⁵⁸ It, therefore, comes as no surprise that Willes J stated in *Phillips v Eyre* that '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'.⁵⁹

4. The Common Law Legacy of *Phillips v Eyre*

This section examines the legacy of the rule in *Phillips v Eyre*, considering its subsequent interpretation and reform in the United Kingdom (including by the Privy Council), Australia, and Canada, and its influence (or rather lack of influence) in the US. Although *Phillips v Eyre* has had a significant and enduring impact, this legacy does not, on the whole, reflect very favourably on the decision, for three reasons. First, because of the variety of interpretations of the rule which have been adopted in subsequent case law, reflecting a significant uncertainty regarding the precise

⁴⁹ Ibid 28.

⁵⁰ Peter E Nygh, 'The Territorial Origin of English Private International Law' (1964-1967) 2 *University of Tasmania Law Review* 28; Alexander N Sack, 'Conflicts of Laws in the History of the English Law' in *Law: A Century of Progress 1835 – 1935*, vol 3 (New York University Press 1937) 342

⁵¹ Nygh (n ...) 29.

⁵² Ibid 28.

⁵³ *Blad v Bamfield* (1673) 3 Swans 603, 604, 36 ER 991, 992; *Dutton v Howell* (1693) Show Parl Cas 24, 30-1, 1 ER 17, 21; *Wey v Rally* (1704) 6 Mod 195; 87 ER 948; *Mostyn v Fabrigas* (1774) 1 Cowp 161, 175, 98 ER 1021, 1029; *Rafael v Verelst* (1776) 2 Wm Bl 1055, 1058, 96 ER 621, 622-3; *Collett v Lord Keith* (1802) 2 East 260, 102 ER 368.

⁵⁴ (n ...) 30-1.

⁵⁵ *Blad v Bamfield* (n ...); (1674) 3 Swans 604, 36 ER 992; *Dobree v Napier* (n ...); *R v Lesley* (n ...). At the time, the foreign act of state doctrine was regarded as being derived from the doctrine of comity: *Hatch v Baez* (1876) 7 Hun 596, 599.

⁵⁶ Alexander E Anton, 'The Introduction into English Practice of Continental Theories on the Conflict of Laws' (1956) 5 ICLQ 534; DJ Llewelyn Davies, 'The Influence of Huber's *De Conflictu Legum* on English Private International Law' (1937) 18 BYBIL 49.

⁵⁷ Ernest G Lorenzen, 'Huber's *De Conflictu Legum*' (1918-1919) 13 *Illinois Law Review* 375, 394; Nygh (n ...) 39-40.

⁵⁸ Albert V Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens & Sons – Sweet & Maxwell 1896).

⁵⁹ (n ...) 28.

requirements of the rule and its motivation. Second, because the rule was subject to significant modification by the courts, due to concerns that it could lead to inappropriate or unjust outcomes. Third, because the rule has largely been rejected through statutory or judicial reform in each of the states examined, aside from the US where the rule was never adopted. It is true that the rule, as subsequently modified, retains some influence as part of English law, in the context of historical wrongs and defamation claims, as discussed in section 5 below. The common law legacy of *Phillips v Eyre* is largely, however, a story of courts struggling to interpret and apply the decision in a way which sits comfortably with their evolving understanding of the policy objectives which should be achieved by choice of law rules in tort.

4.1 United Kingdom

An early occasion for considering the rule in *Phillips v Eyre* arose only a few years later, in *The M Moxham*.⁶⁰ Suit was brought by the English owners of a Spanish pier against the English owners of a ship which had collided with it. By English law the shipowner might be liable, but by Spanish law, which the shipowner argued to be applicable, it would not. Although *Phillips v Eyre* was raised in argument, at first instance Sir Robert Phillimore considered the issue to be ‘whether the law of Spain or the law of England is to be applied to the circumstances of the case’, rejecting the relevance of *Phillips v Eyre* as ‘in great measure dependent upon peculiar circumstances and upon the powers of a colonial legislature as recognised by the law of the empire’.⁶¹ English law was held to be applicable, at least to the key issue of whether the owner of an English registered ship would be responsible for the acts of its master. On appeal, the court drew on *Phillips v Eyre* as authority, but held that liability would be excluded because the case would be governed by Spanish law.⁶² Although there was some recognition of the rule in *Phillips v Eyre*, one judge expressly held that ‘by applying the principles enunciated in *Phillips v Eyre*, we are able to arrive at the conclusion, in the present case, that the law of Spain, and not the law of England, applies’.⁶³ This reasoning is very difficult to square with *Phillips v Eyre*, but to the extent that it can be reconciled *The M Moxham* appears to be authority for the idea that the rule in *Phillips v Eyre* requires at least applying the law of the place of the tort.

A decade later, a distinctive set of facts arose for consideration in *Machado v Fontes*,⁶⁴ leading to a different but equally questionable interpretation and application of *Phillips v Eyre*. The claimant brought proceedings for an alleged libel arising from a pamphlet alleged to have been published in Brazil. The evidence presented was that Brazilian law would not allow civil recovery of damages for libel, although libel could potentially be subject to criminal prosecution. The Court of Appeal considered *Phillips v Eyre* to have established, and *The M Moxham* to have confirmed, that an action could lie in England, implicitly under English law, as long as the conduct concerned was ‘wrongful’ or not ‘innocent’, ‘authorized’, or ‘excusable’, under the law of the place of the act.⁶⁵ Once again, this decision is very difficult to reconcile with *Phillips v Eyre*, or indeed *The M Moxham*. One of the reasons given for giving effect to the law of the place of the tort in *Phillips v Eyre* was that ‘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’,⁶⁶ but in *Machado v Fontes* there was no such civil liability at all. Where *The*

⁶⁰ (1875) 1 PD 43.

⁶¹ Ibid 50.

⁶² (1876) 1 PD 107, 111, 114-5.

⁶³ Ibid 115.

⁶⁴ [1897] 2 QB 231.

⁶⁵ Ibid 233-4, 236.

⁶⁶ (n ...) 28.

M Moxham suggested that the applicable law was the law of the place of the tort, perhaps even solely the law of that place, *Machado v Fontes* applied exclusively the law of the forum and considered actionability under the civil law of the place of the tort unnecessary so long as the relevant conduct was criminalised.⁶⁷ The combination of these two decisions arguably left the rule in *Phillips v Eyre* even less clear than it was when adopted.

It is not claimed that the confusion thereby created made the rule in *Phillips v Eyre* difficult to apply in every case. In the 1901 case of *Carr v Francis Times & Co*,⁶⁸ for example, property was seized in the territory of Muscat, with the authority of the Sultan, the sovereign ruler. Although it was not disputed that the act would have been wrongful under English law if carried out in England, the House of Lords held that no action could lie because the act was lawful under the law of the place of the tort. In 1923 two Privy Council decisions on appeal from the Canadian courts similarly refused to allow claims in tort on the basis that no damages were recoverable under the law of the place of injury.⁶⁹ Nevertheless, the difficulties experienced by other courts in applying *Phillips v Eyre*, particularly those in Australia (discussed below), were also reflected in recurring academic criticism, which addressed not merely the interpretation of the rule but also its policy basis.⁷⁰ On the one hand, the rule appears too strict, in precluding liability under foreign law merely because English law is different – essentially making all rules of English tort law rules of public policy with which foreign law must be compatible. On the other hand, the rule appears too broad, in allowing for liability even if the conduct giving rise to the claim in tort was not civilly actionable under the law of the place where the person acted – suggesting, it seems, either that English law imposed liability without any jurisdictional justification, or that the defendant’s subsequent arrival in England retrospectively gave rise to liability. The decision of the Scottish Court of Session in *McElroy v McAllister*,⁷¹ dealing with a fatal accident involving Scottish parties in England, raised a further concern. Although the facts were complex, essentially English law and Scots law might each provide a cause of action for a widow in such circumstances, but on different grounds and subject to different limitations. The effect of the rule in *Phillips v Eyre* was however that no claim was available unless actionable in both systems, and thus substantive liability was generally excluded (with the exception of a small amount that could be recovered in both systems for funeral costs). The decision illustrates the danger that a strict application of the rule in *Phillips v Eyre* risks undermining the policies of both legal systems, and it prompted prominent calls for greater flexibility in choice of law in tort.⁷²

Despite this widespread dissatisfaction, the House of Lords did not have occasion to revisit the rule until the late 1960s. In *Boys v Chaplin*,⁷³ the court heard a claim arising out of a car accident in Malta between two English parties. Under Maltese law, damages would not be available for pain and suffering or loss of amenities, whereas under English law these could be claimed and would indeed form the bulk of the recoverable loss. The case raised two uncertainties regarding the operation of the rule in *Phillips v Eyre*. First, whether the rule applied in relation to causes of action

⁶⁷ This also gives rise to an incidental concern as to whether the English courts would, contrary to the usual prohibition, be indirectly enforcing rules of foreign criminal law in these circumstances.

⁶⁸ [1902] AC 176.

⁶⁹ *Walpole v Canadian Northern Railway Co* [1923] AC 113; *McMillan v Canadian Northern Railway Co* [1923] AC 120.

⁷⁰ For early criticism see, eg, Ernest G Lorenzen, ‘Tort Liability and the Conflict of Laws’ (1931) 47 LQR 483; JG Foster, ‘Some Defects in the English Rules of Conflict of Laws’ (1935) 16 BYBIL 84; AH Robertson, ‘The Choice of Law for Tort Liability in the Conflict of Laws’ (1940) 4 MLR 27.

⁷¹ [1949] SC 110.

⁷² See particularly John HC Morris, ‘Torts in the Conflict of Laws’ (1949) 12 MLR 228; ‘The Proper Law of a Tort’ (1951) 64 HLR 881.

⁷³ (n ...).

or categories of damage – that is, whether it was only necessary to show double-actionability for the cause of action, or double-recoverability for each type of damage claimed. Second, whether the rule might allow for an exception to be adopted in favour of the exclusive application of the law of the forum. Before the case reached the House of Lords, however, the Court of Appeal⁷⁴ had multiplied the existing uncertainties, as the three judges variously held that the rule in *Phillips v Eyre* was either a rule of jurisdiction, a rule of public policy, or a complex choice of law rule, and that the claim should consequently be governed by either the law of the forum,⁷⁵ the law of the place of the tort,⁷⁶ or the ‘proper law of the tort’⁷⁷ (adjudged to be English law).

In the House of Lords, Lord Wilberforce observed of *Phillips v Eyre* that ‘Like many judgments given at a time when the relevant part of the law was in course of formation, it is not without its ambiguities, or, as a century of experience perhaps permits us to say, its contradictions.’⁷⁸ The judgment of the House of Lords in *Boys v Chaplin*, however, was not without its own ambiguities or contradictions. Although not strictly arising on the facts, the Lords (by clear majority) did take the opportunity to set aside the decision in *Machado v Fontes*, finding that only civil actionability (and not criminality) under the law of the place of the tort would be a relevant consideration. The characterisation of the rule in *Phillips v Eyre* as a jurisdictional rule (as apparently contemplated by the Court of Appeal) was also firmly rejected.⁷⁹ Beyond this, the Lords concluded that English law should apply, but for various reasons. One theory was that double-actionability required only the claim to be actionable under the law of the place of the tort, leaving the types (and quantification) of damages for English law.⁸⁰ Another was that double-actionability generally required that the type of damages be recoverable under both the law of the place of the tort and the law of the forum, but that the rule should be subject to a flexible exception which would allow for the exclusive application of English law. This was justified either because of ‘the identity and circumstances of the parties ... [as] British subjects temporarily serving in Malta’,⁸¹ or more broadly because of the need for ‘flexibility in the interest of individual justice’,⁸² taking into account the interests of the affected states,⁸³ or by identifying the law with ‘the most significant relationship to the occurrence and the parties’.⁸⁴ The Privy Council was later to observe that the reasons given in *Boys v Chaplin* ‘varied to such an extent that both academic writers and judges in other cases have expressed doubt as to whether there can be extracted from the speeches one binding ratio decidendi’.⁸⁵ However, subsequent decisions have generally preferred to follow (certain aspects of) the judgment of Lord Wilberforce, applying English law to any claim in tort in the English courts (as if the relevant events had taken place in England), subject to the condition that the claim is civilly

⁷⁴ [1968] 2 QB 1.

⁷⁵ Upjohn LJ.

⁷⁶ Diplock LJ.

⁷⁷ Denning MR.

⁷⁸ (n ...) 384.

⁷⁹ Ibid 385 (Lord Wilberforce).

⁸⁰ This appears the best explanation for the judgments of Lord Guest, Lord Donovan and Lord Pearson.

⁸¹ (n ...) 380 (Lord Hodson).

⁸² Ibid 389 (Lord Wilberforce).

⁸³ Ibid 392 (Lord Wilberforce).

⁸⁴ Ibid 391 (Lord Wilberforce).

⁸⁵ *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190, 198.

actionable under the law of the place of the tort, and subject to a further flexible exception which allows the general rule to be departed from in the interests of justice.⁸⁶

A further issue was addressed in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc.*⁸⁷ The complex facts of this case may, for present purposes, be summarised as involving a cross-border tort where certain acts were carried out in New York and others in England, with damage also suffered in England. The Court of Appeal clarified the application of the double-actionability rule in the context of cross-border torts ('double locality cases'), an issue which had not arisen in *Phillips v Eyre* or *Boys v Chaplin*. The relevant test, borrowed from the jurisdictional context, was where 'as a matter of substance' the torts were committed. On the facts, this was held to be in England, and in such a case no question of double-actionability arose – the claim was exclusively governed by English law.

The final stage in the development of the common law rule came in the decision of *Red Sea Insurance Co Ltd v Bouygues SA*.⁸⁸ The Privy Council held that a claim in tort brought before the courts of Hong Kong (against a company incorporated in Hong Kong, but with its head office in Saudi Arabia) arising out of problems with construction work in Saudi Arabia could be governed exclusively by the law of Saudi Arabia. In so doing, the court clarified the scope of the flexible exception to the double-actionability rule. In previous cases (including *Boys v Chaplin*) the exception had led to the application of the law of the forum, and so could be interpreted as allowing the court to disapply the requirement of actionability under the law of the place of the tort (actionability under the law of the place of the tort could thus be understood as a – dispensable – condition for an action to proceed, but not as forming part of the applicable law). Here, the court disapplied the double-actionability rule (so understood) in its entirety, replacing it with the exclusive application of the law of the place of the tort – the *lex loci delicti* became the applicable law, not just relevant in a determination of an 'actionability' condition.⁸⁹ In addition, the court clarified that the exception could operate to a claim in its entirety, and not just in relation to certain issues – *Boys v Chaplin* had allowed the exception to apply selectively, but had not thereby excluded a more wholesale application. However, some further uncertainty was perhaps introduced in the explanation offered as to how the exception should operate. The court suggested at certain points that it should be based on whether the law of the place of the tort had the 'most significant relationship' with the claim.⁹⁰ Although the justification for this rule was meeting the 'interests of justice', this account of the rule appears to require evaluation of objective connecting factors rather than the more flexible justice-based test which had been proposed in *Boys v Chaplin*.

Less than four months after the decision in *Red Sea Insurance Co Ltd v Bouygues SA*, the rule in *Phillips v Eyre* was substantially rejected through the adoption of the Private International Law

⁸⁶ See eg *Church of Scientology of California v Commissioner of Police of the Metropolis* (1976) 120 SJ 690; *Coupland v Arabian Gulf Oil Co* [1983] 1 WLR 1136; *Johnson v Coventry Churchill International Ltd* [1992] 3 All ER 14 (applying the exception in favour of English law).

⁸⁷ [1990] 1 QB 391.

⁸⁸ (n ...).

⁸⁹ The exception was also applied in favour of the law of the place of the tort in *Pearce v Ove Arup Partnership Ltd* [2000] Ch 403, although arguably unnecessarily, as the court appeared to ask itself whether the acts complained of were actionable in England (they were not, because English copyright law did not apply extraterritorially), rather than whether the claim would have been actionable under English law *had the relevant acts taken place in England* (the correct test from earlier cases).

⁹⁰ (n ...) 206.

(Miscellaneous Provisions) Act 1995 (1995 Act).⁹¹ The legislation was not, however, a reaction to the decision in *Red Sea Insurance*, but rather the result of a Law Commission reform proposal which was initiated in 1979 as a response to (abandoned) proposals for European regulation in the field,⁹² and which led to a Report proposing reform in 1990.⁹³ The Report noted that ‘The exceptional role given to the substantive domestic law of the forum in the law of tort, apart from being almost unknown in the private international law of any other country, is parochial in appearance’, and also contrary to the general principle that ‘the introduction of a foreign element may make it just to apply a foreign law to determine a dispute, even though the substantive provisions of that foreign law might be different from our own’.⁹⁴ The Act essentially established a two stage test for determining the law applicable to a tort. Section 11(1) established the general rule, ‘that the applicable law is the law of the country in which the events constituting the tort or delict in question occur’, offering further guidance in section 11(2) on how that law should be determined where ‘elements of those events occur in different countries’. Essentially, the basic rule adopted here was a *lex loci delicti* rule – the law of the place of the tort. The second stage of the test, set out in section 12, provided for a flexible exception, under which a different law may be applied if this appears substantially more appropriate on the basis of a comparison of the connecting factors between the tort and different countries. The Act thereby abandoned the mandatory role for the law of the forum which had been adopted in *Phillips v Eyre* (although later subject to a flexible exception), except through a general recognition of the ubiquitous public policy safety net⁹⁵ – it thereby brought choice of law in tort in line with the general principles underlying other choice of law rules. Importantly, however, the Act excluded defamation claims from its scope, preserving the double-actionability rule in that field, as discussed in section 5 below.

The rules governing choice of law in tort in the UK were further developed through the EU’s adoption of the Rome II Regulation on the law applicable to non-contractual obligations,⁹⁶ which was enacted in 2007 and came into force in 2009. Defamation was, however, excluded from the scope of the Rome II Regulation, under Article 1(2)(g), alongside violations of privacy.⁹⁷ The general rule for torts in the Rome II Regulation, like that in the 1995 Act, includes a basic rule in favour of the law of the place of the tort⁹⁸ and a flexible exception where another law is manifestly more closely connected.⁹⁹ It departs from the 1995 Act in some important respects, however, including through the adoption of specialised choice of law rules for particular torts,¹⁰⁰ the adoption of the law of the common habitual residence of the parties as an alternative general rule (overriding the law of the

⁹¹ In New Zealand, the rule in *Phillips v Eyre* was similarly applied until the Private International Law (Choice of Law in Tort) Act 2017 was adopted (see eg *The Seven Pioneer* [2001] 2 Lloyd’s Rep 57). The Act is closely modelled on the UK Act, although with some significant points of difference – including the fact that the NZ legislation does not exclude defamation from its scope, as discussed in section 5 below.

⁹² The initial proposal for EU choice of law rules in respect of contractual and non-contractual obligations was narrowed to deal exclusively with contractual obligations, in the 1980 Rome Convention on the law applicable to contractual obligations [1998] OJ C 27 (consolidated version).

⁹³ Joint Report of the Law Commission (No 193) and the Scottish Law Commission (No 129) on ‘Private International Law: Choice of Law in Tort and Delict’ (1990).

⁹⁴ *Ibid* [2.7].

⁹⁵ S 14(3)(a)(i).

⁹⁶ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199.

⁹⁷ Claims in ‘privacy’ are not excluded from the 1995 Act, and thus remain subject to that Act.

⁹⁸ Art 4(1).

⁹⁹ Art 4(3).

¹⁰⁰ Arts 5-9, see also Arts 10-13 dealing with other non-contractual claims.

place of the tort),¹⁰¹ the identification of the place of the tort as the place of the direct damage (in cases of cross-border torts),¹⁰² and in providing a limited direct role for party autonomy in choice of law in tort.¹⁰³ Despite these innovations, it may generally be viewed as consistent with the ethos of the 1995 Act, in rejecting the special role of the law of the forum which was characteristic of the rule in *Phillips v Eyre*. Notwithstanding Brexit, the Rome II Regulation has been retained as part of UK law¹⁰⁴ and thus for most torts now provides the relevant choice of law rules – exceptions are discussed in section 5 below.

4.2 Australia and Canada

The common law in Australia and Canada inherited the decision in *Phillips v Eyre*, and the double-actionability rule formed the applicable choice of law rule in tort for most of the 20th century. As in the UK, however, significant uncertainties arose in relation to its application. In *Koop v Bebb* (1951),¹⁰⁵ for example, the High Court of Australia questioned¹⁰⁶ the authority of *Machado v Fontes*, anticipating the later rejection of that rule by the House of Lords in *Boys v Chaplin*. On the other hand, however, the court expressly rejected a vested rights approach (which had appeared to be part of the reasoning in *Phillips v Eyre*, and inconsistent with *Machado v Fontes*), and therefore rejected the idea that the cause of action was based on the law of the place of the tort.¹⁰⁷ Instead, the court appeared to suggest (although not clearly) that it was the law of the forum which exclusively applied, subject to the condition of civil actionability under the law of the place of the tort.¹⁰⁸

The High Court of Australia returned to these questions in *Anderson v Eric Anderson Radio & TV Pty Ltd*,¹⁰⁹ in a case which further complicated the analysis as it involved both Australian federal and state jurisdiction, and also raised a question of whether a claim for which a complete defence was available (because of contributory negligence) was nevertheless still ‘actionable’. For present purposes, it is enough to note that some judges of the court grappled directly with the ambiguities in the earlier Australian and English authorities. Kitto J, for example, although acknowledging criticism of *Phillips v Eyre* and suggesting that ‘The whole subject may perhaps need to be re-examined some day’¹¹⁰ nevertheless felt constrained to apply the double-actionability rule, defeating a claim for which there was a complete defence under the law of the forum (New South Wales) but only a partial defence under the law of the place of the tort (the Australian Capital Territory, a federal territory). Windeyer J, more controversially, considered the double-actionability rule as a rule ‘concerning the jurisdiction of English courts in cases concerning foreign torts’,¹¹¹ asking ‘But when the two conditions are fulfilled - when the act is wrongful by the law of the forum and in the place where it occurred - what then?’ He concluded that the law of the forum ought to apply exclusively.

¹⁰¹ Art 4(2).

¹⁰² Art 4(1); Recitals 16-17.

¹⁰³ Art 14.

¹⁰⁴ Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/834).

¹⁰⁵ [1951] HCA 77.

¹⁰⁶ *Ibid* [11].

¹⁰⁷ *Ibid* [11] (citing *Phillips v Eyre*), but see the separate opinion of McTiernan J suggesting to the contrary that the law of the place of the tort governed (also citing *Phillips v Eyre*).

¹⁰⁸ *Ibid* [12].

¹⁰⁹ [1965] HCA 61.

¹¹⁰ *Ibid* [4].

¹¹¹ *Ibid* [1].

This 'jurisdictional' approach to the rule in *Phillips v Eyre*, which anticipated the approach of at least one Court of Appeal judge in *Boys v Chaplin*, was applied by some Australian courts – for example, the Supreme Court of the ACT in *Hartley v Venn*.¹¹² It was also applied in some Canadian decisions, such as *Gagnon v Lecavalier*.¹¹³ In other Australian courts, however, such as the NSW Court of Appeal in *Kolsky v Mayne Nickless Ltd*,¹¹⁴ decided shortly after the House of Lords decision in *Boys v Chaplin*, the court expressly rejected the idea that the double-actionability rule involved a question of jurisdiction at all, describing it as a doctrine of 'substantive law'.¹¹⁵ Nevertheless, the court only applied the law of the forum – it was irrelevant that the law of the place of the tort (but not the law of the forum) would provide a partial defence, because forum law applied once it was established that the claim was actionable under both laws.¹¹⁶

It is notable that all of these disputes involved tort claims across the borders of Australian states or Canadian provinces, rather than international claims, and in many of these cases the courts grappled with the question of whether analysis of the choice of law issues should be affected by the relevant federal system.

The idea that the Australian constitution or federal structure might provide a basis on which to reject the rule in *Phillips v Eyre* was explored by the High Court in *Breavington v Godleman*,¹¹⁷ although without a clear majority. Wilson and Gaudron JJ argued that the constitution created territorial limits on the sovereignty of each of the states,¹¹⁸ and that this limited the choice of law rules each state could adopt. Mason J rejected a specific role for the constitution in developing private international law, but held with Wilson and Gaudron JJ that the federal context had an effect on choice of law rules, concluding that it required the application of a *lex loci delicti* rule in inter-state torts. Deane J argued that the territorial limitation of each state sovereign and the fundamentally unitary system of law established by the constitution meant that the common law rules of private international law were inapplicable. Instead, he argued, a new federal standard 'sufficient relevant nexus' test ought to be applied.¹¹⁹ Although four out of the seven judges rejected the existing common law approach, they thus did so in three separate judgments for a variety of different reasons, which limited the impact of their decisions. The idea of a constitutional limit on inter-state choice of law rules was indeed subsequently rejected in *McKain v RW Miller & Co (SA) Pty Ltd*¹²⁰ and *Stevens v Head*,¹²¹ which held that the choice of law rules formulated by Brennan J in *Breavington v Godleman*, a restatement of the *Phillips v Eyre* test, continued to apply (unless modified by state legislation).

However, the Canadian Supreme Court took up the baton with the decision of *Tolofson v Jensen*.¹²² Although the case concerned an inter-provincial tort, the court addressed the choice of

¹¹² (1967) 10 FLR 151.

¹¹³ [1967] 63 DLR (2d) 12.

¹¹⁴ (1970) 72 SR (NSW) 437. See also eg *Kemp v Piper* [1971] SASR 25.

¹¹⁵ (n ...) 444.

¹¹⁶ The flexibility added to English law by the House of Lords in *Boys v Chaplin* was acknowledged, but not adopted by the court, in part because of uncertainty as to how this flexibility ought to operate: *ibid* 448. It was, however, applied by other Australian courts: see eg *Warren v Warren* [1972] Qd R 386; *Corcoran v Corcoran* [1974] VR 164.

¹¹⁷ (1988) 169 CLR 41.

¹¹⁸ *Ibid* [42]; see also Deane J at [15], [25] (*inter alia*).

¹¹⁹ *Ibid* [27].

¹²⁰ (1992) 174 CLR 1.

¹²¹ (1993) 176 CLR 433.

¹²² [1994] 3 SCR 1022.

law rules to be applied in both internal and international disputes. In respect of inter-provincial torts, the court drew on the idea that the sovereign power of the Canadian provinces is subject to territorial limitation. As a result, and drawing on the reasoning of some members of the Australian High Court in *Breavington v Godleman*,¹²³ the court held that the character of the constitutional system mandated the application of a *lex loci delicti* rule for inter-provincial torts. In respect of international torts, the court reasoned that 'it is to the underlying reality of the international legal order ... that we must turn if we are to structure a rational and workable system of private international law',¹²⁴ and that 'on the international plane, the relevant underlying reality is the territorial limits of law under the international legal order'.¹²⁵ Thus, the *lex loci delicti* rule was held to be equally applicable in international tort disputes, although (for international cases only) subject to a discretion to apply the law of the forum.

In turn, under the influence of *Tolofson v Jensen*,¹²⁶ the Australian High Court finally accepted a constitutional effect on choice of law rules in *John Pfeiffer Pty Ltd v Rogerson*.¹²⁷ The Court held that the constitutional idea of a unitary federal system with territorially limited state sovereigns implied a *lex loci delicti* rule for choice of law in Australian inter-state tort disputes, with no equivalent to the flexible exception under the traditional common law approach. Only a mechanical territorial choice of law rule, it was held, would satisfy the constitutional requirement for a clear territorial division of the sovereign competencies of the states. Kirby J perhaps went furthest, rejecting the legacy of *Phillips v Eyre* under the headings 'An inappropriate borrowing from English law' and 'A confusion of related but different concepts' (particularly the confusion of jurisdictional and choice of law requirements), and noting the statutory rejection of *Phillips v Eyre* in the UK.

In *Regie National des Usines Renault SA v Zhang*¹²⁸ the *lex loci delicti* rule was extended to international torts. Given that the constitutional arguments from *John Pfeiffer Pty Ltd v Rogerson* were inapplicable to international torts, this required new justification. The extension of the new approach beyond the inter-state context was largely based on a general preference for the predictability and territoriality of the *lex loci delicti* rule, and the pragmatic basis that it is better to have a consistent single approach for both internal and international choice of law disputes.¹²⁹ Unlike the approach adopted in Canada,¹³⁰ the Australian High Court extended the inflexibility of the *lex loci delicti* rule to the international sphere, rejecting the idea that in the international context the court should reserve the right to apply the *lex fori* or another more closely connected law.¹³¹

4.3 United States

The decision in *Phillips v Eyre* had a curious influence (or perhaps absence of influence) in the US. In *Leonard v Columbia Steam Navigation Co*,¹³² the New York Court of Appeals developed its own

¹²³ Ibid 1063. The court suggested (at 1052) that Australia had established a *lex loci delicti* rule, which was actually not the case at the time, given its rejection in *McKain v Miller* (n ...) and *Stevens v Head* (n ...).

¹²⁴ (n ...) 1047-8.

¹²⁵ Ibid 1047.

¹²⁶ See eg *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 [87], [111ff] (per Kirby J).

¹²⁷ Ibid.

¹²⁸ (2002) 210 CLR 491.

¹²⁹ Ibid [125ff] (per Kirby J).

¹³⁰ *Tolofson v Jensen* [1994] 3 SCR 1022.

¹³¹ For the difficulties thereby created, see *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54, discussed in Alex Mills, 'Renvoi and the Proof of Foreign Law in Australia' [2006] CLJ 37.

¹³² 84 NY 48 (1881).

doctrine, under which claims in tort were to be governed by the law of the place of the tort, subject to the condition that the law of the place of the tort was 'similar' to the law of the forum. The following month this decision was endorsed by the US Supreme Court, in *Dennick v Railroad Co*,¹³³ and the doctrine was formally adopted by the Supreme Court in *Texas & Pacific Railway Co v Cox*.¹³⁴ Although expressed in terms which perhaps suggest something like double-actionability, it was clear that the rule thus adopted was nothing more than the application of the *lex loci delicti*, subject to a public policy exception where the law of the forum was too dissimilar to foreign law.¹³⁵ Indeed, in the official report of *Dennick v Railroad Co*, the decision in *Phillips v Eyre* was cited for the proposition that under 'the principle of comity, the foreign law, if not contrary to the public policy of the country where the suit is brought, nor to abstract justice or pure morals, will be recognized and enforced'.¹³⁶ In *Huntington v Attrill*,¹³⁷ the decision in *Phillips v Eyre* was (more accurately) cited as authority for the double-actionability rule under English law, but only in the context of observing that 'such is not the law of this court'.¹³⁸ Although based on somewhat dubious authority, this approach was also supported by the development of the vested rights or obligation theory, which supported the territorial approach to choice of law which dominated thinking in the US in the late 19th and early 20th century. This was exemplified in the First Restatement on Conflict of Laws, which adopted the *lex loci delicti* as the choice of law rule in tort,¹³⁹ and in judgments like *Slater v Mexican National R Co*,¹⁴⁰ in which the US Supreme Court famously held that:

The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligatio, which, like other obligations, follows the person, and may be enforced wherever the person may be found. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, but equally determines its extent.¹⁴¹

This theory would, of course, be later challenged by the US conflict of laws 'revolution', in which choice of law in tort was particularly contested – but those developments were a rejection of a more straightforward territorial choice of law rule, not of the double-actionability rule, which never played a part in US law.

5. The Contemporary Relevance of the Double-Actionability Rule in England

¹³³ 103 US 11 (1881).

¹³⁴ 145 US 593 (1892).

¹³⁵ Ibid 605.

¹³⁶ (n ...) 14.

¹³⁷ 146 US 657 (1892).

¹³⁸ Ibid 670. The doctrine was, nevertheless, occasionally applied – see eg *The Brantford City* 29 F 373 (1886); *The Lamington* 87 F 752 (1898) (each citing approvingly to *Phillips v Eyre* as authority for the double-actionability rule).

¹³⁹ S 382.

¹⁴⁰ 194 US 120 (1908).

¹⁴¹ Ibid 126 (citations omitted). See similarly *Loucks v Standard Oil Co of New York* 120 NE 198 (1918) (rejecting *Phillips v Eyre*, and also rejecting the similarity doctrine, in favour of a simple application of the law of the place of the tort).

As explained above, the double-actionability rule has largely been rejected, including in the UK through the 1995 Act, later in turn largely replaced by the Rome II Regulation. It is, however, more than of just historical interest, as it remains a part of the law in two important respects.

The first is that, exceptionally, a claim in tort may arise from events prior to the date of entry into force of the 1995 Act, and therefore outside its temporal scope. This arose in *Sophocleous v Secretary of State for Foreign and Commonwealth Affairs*,¹⁴² a case concerning torts allegedly committed in Cyprus in the 1950s by the UK and its colonial agents. In order to determine the applicable law, including the relevant limitation periods, the Court of Appeal applied the double-actionability rule (citing to *Phillips v Eyre*). In so doing, the court rejected the decision at first instance that a flexible exception should be adopted in favour of the exclusive application of English law. The double-actionability rule thus continues to be applicable to the kinds of cases in which it originated, namely to claims arising from atrocities committed during the suppression of independence movements in former colonies.

The second context for continued application of the rule in *Phillips v Eyre* is in disputes which fall outside the subject matter scope of the 1995 Act, in particular claims for defamation. The Law Commission report which led to the adoption of the 1995 Act considered that defamation raised particular concerns ‘given the public interest in free speech and in the proper functioning of public institutions’, arguing that ‘it is not desirable that those who make statements in this country should have their freedom of expression circumscribed by the application of foreign law’,¹⁴³ although did not propose the exclusion of defamation but rather its regulation by a specialised rule. This suggestion was not adopted, but the public interest considerations led to the exclusion of defamation from the 1995 Act altogether.¹⁴⁴ Defamation was equally excluded from the scope of the Rome II Regulation, under Article 1(2)(g), alongside violations of privacy.¹⁴⁵ This exclusion is intended to be temporary, although despite prompting from the European Parliament¹⁴⁶ the European Commission has not yet taken any further steps in the matter. The continued application of the double-actionability rule to defamation claims is therefore not so much a matter of policy design, but rather a failure to adopt reforms. However, one of the reasons why general choice of law rules in tort have not been considered suitable for defamation is that treating defamation purely as a matter of private law does not seem entirely satisfactory, because of the important public interests involved in free speech protection in a democracy. Although the double-actionability rule is not consistent with the general principles underlying choice of law rules, it certainly does recognise an English public interest in regulating free speech, in the particular role it gives to the law of the forum – English media organisations sued in England, for example, at least ordinarily benefit from any defences to defamation claims under English law, regardless of where in the world their publications are received and read. It is no coincidence that the media were, indeed, vocal in supporting the exclusion of defamation claims from these modern attempts to reform choice of law in tort.¹⁴⁷ In parliamentary debates on what became the 1995 Act, Lord Lester of Herne Hill (a former barrister) had similarly observed:

¹⁴² [2018] EWCA Civ 2167.

¹⁴³ (n ...) [3.31].

¹⁴⁴ Although it is of interest that the Private International Law (Choice of Law in Tort) Act 2017 in New Zealand, which is in very similar terms to the 1995 Act, does not exclude defamation from its scope.

¹⁴⁵ Claims in ‘privacy’ are not excluded from the 1995 Act, and thus remain subject to that Act.

¹⁴⁶ See eg www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2013-002703&language=EN.

¹⁴⁷ The role of media representatives in formulating the Bill was noted by Lord Wilberforce in Hansard, HL Vol 563, col 1362 (2 May 1995).

I believe that there is an important point of principle here. Freedom of expression and freedom of the press are vital civil rights and liberties which ... are restricted under English law only where necessary in a democratic society in accordance with the common law and Article 10 of the European Convention on Human Rights. Surely, in this age of global communications, it would be quite wrong for the freedom of the press in this country and elsewhere to be chilled or restricted by applying in English courts the laws of foreign countries which are far more repressive of freedom of expression.¹⁴⁸

It may, however, certainly be questioned whether this insistence on English free speech protections regardless of the location or targeting of the relevant communication is always appropriate – the effect of *Phillips v Eyre* in this context is arguably to give mandatory effect to English tort law in a way which might not always seem consistent with general principle. Nevertheless, it is undoubtedly difficult to design a rule which balances the competing interests involved, particularly in a cross-border context engaging more than one state’s conception of the appropriate balance between the protection of free speech and reputation.

This difficulty is indeed amply demonstrated by experience subsequent to the passage of the 1995 Act. Although the continued application of the double-actionability rule in the context of defamation was at least partly motivated by the idea that English defamation law would protect English free speech against the lower standards of foreign law, a quite different and more significant practical concern has arisen as a consequence of two factors. First, technological developments mean that communications very readily cross borders, and thus material produced by a foreign publisher may frequently be considered to be published in England (as well as numerous other locations) for jurisdictional and choice of law purposes.¹⁴⁹ Second, English law is in fact *less* protective of free speech than some foreign systems, particularly US law. In combination, these factors have allowed and encouraged defamation claimants to bring claims against foreign (particularly US) defendants in the English courts, raising concerns that private international law assists in suppressing rather than protecting free speech in this context, only partially addressed by statutory reform.¹⁵⁰ These issues are not unique to England,¹⁵¹ and are not a product of the double-actionability rule itself but rather the rule that torts located in England are governed exclusively by English law (and establish a basis of jurisdiction for the English courts), as well as the chilling effect of the expense (particularly in England) of defending defamation proceedings. They nevertheless further illustrate the complexity of the modern interaction between private international law and defamation law which has thus far led to defamation claims being excluded from reforms and remaining subject to otherwise outmoded choice of law rules.

6. Conclusion

¹⁴⁸ Hansard, HL Vol 559, col 839 (6 December 1994).

¹⁴⁹ See generally Alex Mills, ‘The Law Applicable to Cross-border Defamation on Social Media: Whose Law Governs Free Speech in “Facebookistan”?’ (2015) 7 *Journal of Media Law* 1; Trevor Hartley, ‘“Libel Tourism” and Conflict of Laws’ (2010) 59 *ICLQ* 25.

¹⁵⁰ The Defamation Act 2013 was an initial response; the UK Ministry of Justice is presently considering responses to a further public consultation on Strategic Lawsuits Against Public Participation (SLAPPs) (submissions closed 19 May 2022).

¹⁵¹ The European Commission has also proposed a Directive to address SLAPPs – see Commission Proposal COM(2022) 177 (27 April 2022).

In certain respects, the decision in *Phillips v Eyre*, although undoubtedly a landmark, gives the impression of belonging to a pre-modern era. It does not reflect the principles or values of modern private international law, but rather seems a product of its colonial context, and/or of outmoded thinking regarding tort law's public function. Since the decision was made it has been misinterpreted, misapplied, criticised, qualified, and even ignored by other courts, and ultimately rejected either by statutory or judicial reform in many common law countries. In many respects, its lasting influence is not as a ruling, but as a provocation – a challenge ultimately taken up by courts and legislators, to think more deeply about choice of law in tort, and to bring the principles of private international law to bear in designing a choice of law rule in tort which better reflects the range of competing policy interests involved. But *Phillips v Eyre* is more than a fossil – it is rather what biologists refer to as a living fossil, a species which exists in both fossil record and alive in the modern world, because of its continuing role in England in relation to defamation claims. Encountering *Phillips v Eyre* is also a bit like catching a coelacanth, or stumbling over a Wollemi Pine – discovering that the choice of law rule in defamation in England, including even for defamation claims on the internet, derives from a case excusing a 19th century colonial atrocity. The deficiencies of the double-actionability rule are well recognised, but in England the provocation of *Phillips v Eyre* remains unanswered as no rule has been found to replace it in the context of defamation, a tort imbued with public interest and not just private right. The story of *Phillips v Eyre* therefore has an ending almost as curious as its beginning – it endures not as a reflection of any inherent wisdom in its decision, but as the legacy of a colonial wrong which is now relied on (rightly or wrongly) to protect the rights of free speech necessary for the functioning of a modern democracy.